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

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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

WP 7 Civil Rights

Deliverable Case Study 7.4: Freedom of expression in the context of the media

Report on Belgium

CONTRIBUTOR: UA

APRROACH TO THE RIGHT OF THE FREEDOM OF EXPRESSION IN BELGIUM – CONTEXTUALISATION

For a good understanding of the (potential) barriers faced by individual persons when engaging in citizen journalism in Belgium, it is necessary to first provide a brief contextualization of the regulation of the right of freedom of expression in this country.

As known, the freedom of expression was set down at the end of the 18th century already, in article 11 of the Declaration of the Rights of Man and of the Citizen.[1] It much later found its modern corollary in article 10 of the European Convention of Human Rights, to which Belgium has been a contracting party since its inception.[2] Both provisions share the same idea, i.e. the protection of the freedom of thought and opinion of the citizen. As stated in these articles, every citizen must be free to speak, write and publish. However, there exists a limit to this freedom of expression, *viz.* the abuse of the right in certain cases determined by the law.

Even when several different objectives of the freedom of expression can be identified in the light of article 10 ECHR, for the purposes of the present study, the most important one is considered to pertain to the progress of society and how that is influenced by the concept of the freedom of expression. Or, as one author has put it, 'society develops through the self-expression and self-development of its members, thought communication and tolerance, through public participation of many and control over the actions of those who lead it'.[3]

As a second point, it is necessary not to mix up the concept of freedom of expression with the concept of freedom of press. In this regard, in many sources of Belgian positive law, the freedom of the press has been the subject of special consecration beyond the general recognition of the freedom of expression.[4]

Third, if the freedom of the press is the corollary of the freedom of expression, any person exercising a journalistic activity or expressing him/herself through written media can benefit from the principles regarding that freedom. However, the freedom of expression specifically benefitting journalists goes further than that, and persons engaged in a journalistic activity or expressing thoughts through written media enjoy certain privileges that 'ordinary' citizens utilising the freedom of expression do not have. Furthermore, the freedom of the press is

[1] Dating back to 26 August 1789.
[2] Signed in Rome on 4 November 1950.
[3] D. CUCEREAUNU, *Aspects of Regulating Freedom of Expression on the Internet*, Antwerp/Cambridge: Intersentia 2008, p. 12.
[4] Q. VAN ENIS, *La Liberté de la presse à l'ère numérique*, Bruxelles: Larcier 2015, p. 21.

generally more narrow than the freedom of expression, and imposes a greater responsibility on journalists (professionals) due to the application of and their subjection to particular ethical rules and codes.[5]

At the same time, dissociating between the freedom of the press and the freedom of expression will not always be an easy task, especially since these two freedoms can coincide in one and the same case. Thus, a journalist may benefit from the freedom of expression as a citizen as well as from the freedom of the press in his professional capacity.[6]

At the national level, both the freedom of expression and the freedom of press are protected in the Title II of the Belgian Constitution[7] concerning 'The Belgians and their rights', in articles 19 and 25 respectively. Article 19 of the Constitution states that: 'La liberté des cultes, celle de leur exercice public, ainsi que la liberté de manifester ses opinions en toute matière, sont garanties, sauf la répression des délits commis à l'occasion de l'usage de ces libertés.' Thus, the freedom to express one's opinion is protected and guaranteed, unless the expression of offences are committed in the exercise of such freedom. The freedom of the press is secured by article 25 of the Constitution which states: 'La presse est libre; la censure ne pourra jamais être établie; il ne peut être exigé de cautionnement des écrivains, éditeurs ou imprimeurs. Lorsque l'auteur est connu et domicilié en Belgique, l'éditeur, l'imprimeur ou le distributeur ne peut être poursuivi.' The literal text of this provision suggests that Belgium is quite permissive and that the press enjoys great freedom, as censorship can never be established. Further still, in its second paragraph, it is indicated that if the author is known and domiciled in Belgium, the editor, the distributor and the pressman may not be prosecuted. As is to be expected however and will be further clarified below, some particular limitations can be imposed nevertheless when circumstances so warrant.

Nowadays, the freedom of expression is no longer a right only exercised in traditional ways, i.e. in physical print or comparable media. It has in fact morphed into a right which used in ever more interactive fashion, in an online context. In Belgium as elsewhere, the age of the internet has definitely brought with it some major challenges. From now on every citizen, regardless whether (s)he a professional journalist or not, can express freely and in an effective way his/her opinions concerning all topics. This has been hailed as the advent of

[5] On which further M. ISGOUR, 'La presse, sa liberté et ses responsabilités', in X., *Médias et droit*, Louvain-la-Neuve: Anthemis 2008, pp. 75-122, especially pp. 84-85.
[6] Ibid., p. 85.
[7] La Constitution coordonné du 17 fevrier 1994 / De gecoördineerde Grondwet, *Moniteur Belge / Belgisch Staatsblad* 27 July 2004. The full text can be consulted from <www.ejustice.just.fgov.be> .

'open journalism'.[8] Apart from abolishing the core difference between tradional written and audiovisual media, the internet has also diluted the differences between the citizen and the journalist, writer or pamphleteer.[9] At present, it is sufficient for every citizen to be in possession of a computer and a connection to internet, to be able to purely and freely disseminate his/her view on any subject and in any form, i.e. to hold a public opinion.[10] This has had a considerable impact in Belgium, considering the high ICT penetration and 'digital literacy' in this country.

1. BLOGGERS AND BLOG EDITORS

In Belgium, no specific regulatory framework has yet been set down for blogs and bloggers. Consequently, the rules applicable to them may be assimilated to those pertaining to the professional journalist if some conditions are met. Otherwise, they are just to be considered as citizens voicing an opinion, expressing him/herself. In the paragraphs below, this will be discussed in greater detail. However, as further explained in point 8, Belgium is currently in the process of offering greater assistance to citizens that act more and more as journalists. Within this increasing wave of 'citizen journalists' or 'participatory journalism', bloggers, and indeed their weblogs, have a leading role.

In order to start a blog, it is not required under Belgian legislation to register beforehand or obtain a license for it. However, it is necessary to possess a domain name so as to be identified. On Belgian territory, many blog services providers offer bloggers the possibility to choose a free sub-domain name,[11] but the latter can always register a full domain name as well and link it to his/her blog. Nonetheless, within this process, it is obviously important not to infringe the registered trademark of others, e.g. by incorporating an existing brand name in the domain.[12]

It is not easy however to provide a definition of blog, and the definition will change depending on different aspects, as there are many different domains (topics) they may focus

[8] With the concept of free journalism, references to 'citizen journalists' are made in the same vein as done by the European Audiovisual Observatory of the Council of Europe; see further <http://www.obs.coe.int/-/pr-open-journalism>.
[9] The abolition of the difference between a professional journalist and ordinary citizens expressing their opinions has also been sanctioned in some case law of the ECtHR and CJEU.
[10] J. ENGLEBERT, *La pocédure garante de la liberté de l'information*, Louvain-la-Neuve: Anthemis 2014, pp. 207-208.
[11] For example, <http://uwbedrijfsnaam.blogspot.com>.
[12] See <http://www.seodvize.be/juridische-aspecten-van-bloggen/>.

on. In any event, the *raison d'être* of blogs, and thus of bloggers, is to express an opinion or a thought. A blog offers the opportunity to write down in a very simple way the personal thoughts and ideas to share with a large audience: the internet user, thus the general public.[13] In this light, the protection of the freedom of expression of blogs and bloggers in Belgium falls under the scope of application of articles 19, 25 and 150 of the Belgian Constitution. The application of article 19 is clear, as the activity squarely falls within its ambit upon first consultation of the text. It guarantees and protects the freedom to express opinions on all matters, save for offences committed in the exercise of that freedom. Unclear might be the application of article 25 to 'citizen journalists'. At first blush, it could seem that the scope of application *ratione personae* of article 25 only encompasses the professional journalist. It has however been recognised in Belgian jurisprudence, detailed below, that anyone pursuing the exercise of a journalistic activity or expressing his / herself through written media can benefit from the principles of the freedom of press. This means that a blogger acting as a journalist will benefit from the guarantees and freedoms granted to the professional press. These benefits will on the other hand not be given to an ordinary citizen expressing his/her opinion.

From the above, it may thus be derived that the key point in order to assimilate a blog/blogger with the (activities of a) professional journalist will depend on the actual (contents of the) activity of the blogger. A blogger will be considered to act as a journalist when (s)he publish his/her blog on a regular basis, when the aim of his/her publications is to reach the general public, and (s)he publishes about what is happening in the society. These are the main prerequisites required by the general associations of professional journalists in Belgium,[14] as also adhered to by Belgian courts, in order to consider a normal citizen to be acting as a journalist. In this regard, the Belgian Court of Cassation has indicated in several judgments that it is not required to hold a special qualification, such as that of a professional journalist, to fully enjoy the freedom of press, as this freedom is granted to all citizens.[15] An additional landmark constitutes decision 91/2006 of the Belgian Constitutional Court of 7 of June 2006.[16] Upon the request of a selection of bloggers who believed the scope of application of the Law of 7 of April 2005 on the protection of journalistic sources to be too

[13] See <http://www.seodvize.be/juridische-aspecten-van-bloggen/>.
[14] In the Flemish speaking Community this is the *Raad voor Journalistiek*; more information about this institution can be found on <http://www.rvdj.be/>. For the French-speaking Community, this is the Association des Journalistes professionnels; more information about this institution can be found on < http://www.ajp.be/>.
[15] Q. VAN ENIS, op. cit. (n. 4), pp. 67-68.
[16] Q. VAN ENIS, *Développements récents relatifs à la protection des sources journalistiques en Belgique. Pierre angulaire ou pierre d'achoppement?, Journal des Tribunaux* N.º 6392, 24 April 2010, p. 262.

narrow and discriminatory,[17] the Court of Arbitration[18] ruled that the right to secrecy of journalistic sources should be guaranteed to allow the press to play its watchdog role, and inform to the public on questions of general interest. The Court also stated that this right should not only protect the interests of journalists as a professional group of persons, but should also be recognised to accrue to persons engaged in a journalistic activity. Thus, the first category of beneficiaries of the protection of sources will be any persons who directly contribute to the gathering, writing, production or dissemination of information through media, for the enjoyment of the public in general. This broad definition undoubtedly allows an extending of the guarantees of the law regarding the protection of journalistic sources to bloggers, as long as the issues treated by them are relevant to the public in general. As underscored by VAN ENIS,[19] regarding the clarification of the nature of the concept of journalistic activities, in principle nothing precludes the dissemination of information on a social network or by a video posted on a content sharing site to be considered as journalistic activity, worthy of protection under the law of 7 April 2005. Consequently, based on this pronouncement and provided the abovementioned conditions are met, a citizen, and thus a blogger, may hold a similar legal status as a professional journalist. Failing that, when a blogger only offers his/her opinion about personal subjects, (s)he will be treated as a normal citizen utilising the freedom of expression.

A second parallel between bloggers acting as journalists and professional journalists pertains to the respect for moral rules. In recent recommendations, the delegates of the Organization for Security and Cooperation in Europe tasked to scrutinise media freedom have considered that the journalistic codes of ethics and media regulatory bodies controlling and supervising journalists must adapt to the new online reality. From the OSCE's point of view, everyone involved in the production of relevant information for the public (including bloggers, news portals, etc.) must be allowed and encouraged to participate in self-regulatory mechanisms.[20]

In particular in the French-speaking Community of Belgium, the Deontological Council of Journalists also seems to have taken a broad view of its jurisdiction. It considers

[17] Loi du 7 avril 2005 Loi relative à la protection des sources journalistes / Wet tot bescherming van de journalistieke bronnen, *Moniteur Belge / Belgisch Staatsblad* 27 April 2005. This law came into force on 7 May 2005. The full text can be accessed via <www.ejustice.just.fgov.be>.
[18] The current Constitutional Court.
[19] Q. VAN ENIS, op. cit. (n. 16), op. cit., p. 262.
[20] Q. VAN ENIS, op. cit. (n. 4), p. 450.

that it is not the status of a professional journalist[21] that requires a specific ethical conduct, but rather the activity of disseminating journalistic information to the general public.[22] In the Flemish speaking Community, the Deontological Council of Journalists and the association of professional journalists (*Raad voor Journalistiek*) has also pronounced itself in the same vein when applying deontological and ethical rules, focusing more on the act of informing the general public than on whether the person responsible for the dissemination of the information is a professional journalist or not.[23] An illustration of this broader scope of application have been the repeated claims against bloggers, handled by this two institutions. The reason to accept these claims and exercise their 'jurisdiction' as regards bloggers, deeming them to fall within the purview of the associations of professional journalists, is that the activity they were performing was a factual journalistic activity. The 'sanctions' or recommendations these bodies provide on these occasions is just to erase the controversial information, or insert a new post apologising and/or rectifying the previous one. It should be pointed out that the advice provided by these bodies is not legally binding, so if the blogger declines to perform a correction of the disputed information, a judicial procedure may ensue.

The freedom of expression is in any case not an absolute fundamental right, and thus, it comes with some limitations, and also for bloggers. The main limitation that bloggers may encounter is related to the prohibition of committing offences, such as defamation, slander or libel. To post any racist or xenophobic comments is also considered to go beyond the freedom of expression, and is prohibited by law.[24] These limitations are applicable to blogs and bloggers linked to physical persons. In certain circumstances, it has been recognised in case law that bloggers can commit press offences, but the latter have so far not been conceptualised in Belgian legislation. The three main components are: the offensive act is committed through the press; it involves the manifestation of a thought that constitutes an abuse of the freedom of expression; this information is widely disseminated, i.e. is available for the general public, regardless the mechanism/channel resorted to.[25] In this vein, an oft-cited judgement of the Court of First Instance of Brussels of 20 June 2011 indicates that:

[21] i.e. Being a member of the professional association.
[22] Q. VAN ENIS, op. cit. (n. 4), p. 450.
[23] Most of the information and insights originate from interviews with representatives of the respective organs conducted in October and November 2015.
[24] They are forbidden by the Belgian Law of 7 May 2007 regarding the fight against certain forms of discrimination.
[25] M. ISGOUR, op. cit. (n. 5), p. 88.

The articles that are not published in a print media but which appear only on a blog on the internet can therefore also constitute a press offence. The current media, which ensure that these articles are more widely diffused in other versions than on paper, has to be also considered. Through internet forums, everyone has very simple access to the public, whereby the opinion can always be disseminated more easily. In this case, the journalist or any person must receive assurances that his / her freedom of expression is guaranteed, though it must be consistent with his rights and responsibilities referred to in article 10.2 the European Convention on Human Rights. A balance of interests must take place between the freedom of expression and the law violated of which it is invoked the right to protection of reputation.

The fault can be attributed on the basis of the responsibility of a journalist or anyone who is responsible for the dissemination of the disputed information. It may consist of an offence or just a simple illegal act, as a result of the violation of a legal provision or obligation based on a normal prudence and diligence of a journalist. The civil fault committed does not require an evidence of a specific intent to cause damage.[26]

Similarly, the Court of First Instance of Ghent in its judgment rendered on the 14 June 2011 indicated that:

Just like a newspaper article can be broadcast through a printed form, on paper and ink, the same press article can be broadcast by digital means. These help it to evolve it digitally worldwide, through technical processes that enable it to be found, reproduced, copied and forwarded.

The author of articles expressing an opinion on the internet must, in one way or in another, indicate the sources on which (s)he bases his/her opinion. The fact that his opinion is not readable through a printed paper and ink does not prevent that opinion, if it can be found, reproduced, copied and broadcast on the internet, to be considered a writing protected under the meaning of article 25 of the Constitution.

Any opinions, even simple outrages, can be regarded to possess the constituent elements of the press offence. The prerequisite that the opinion should be of particular importance for the whole society to be considered as a press offence does not match with the requirements of article 150 of the Constitution. Thus, articles posted on

[26] English translation of the summary accessible at <www.jura.be> .

internet blogs that contain criminally reprehensible opinions and that can be made available to the public via the media must be considered as a press offence.[27]

As a result, bloggers abusing their freedom of expression can be held responsible for civil and penal offences. Most of the penal offences committed by a blogger entail civil responsibilities. As there are so many different kind of blogs, there are many different crimes that can be committed by a blogger abusing his/her right of freedom of expression. Thus, the penalties and fines differ from the crimes committed, ranging from ordinary criminal misconduct to a serious crime that may lead to imprisonment. For example, by blogging about work-related aspects, one risks to disclose confidential corporate information. Here, an obvious link with labour law is present, and in this case, an employee is expected to be loyal to his / her employer and fulfil his/her duties in good faith. Employees are also expected to observe the duty of confidentiality that may apply to all information obtained in the course of his/her activities. This follows from article 17.3 of the Belgian Law on employment contracts, which reads: 'The employee is required both during the duration of his/her contract and after its termination, to refrain from publishing trade secrets, business secrets or secrets associated with personal or confidential matters, which he in the course of his professional work takes note of'. An obvious infringement of this rule would be that an employee writes down such secrets on his/her personal blog or another blog. The penalty for such infringement can be a prison sentence of up to 6 months. If the infringement consists of the disclosure of a trade secret, the sanction can be increased to 3 years, and on some occasion may be joined with a fine ranging from EUR 100 to EUR 11.000, as established by article 458 of the Belgian Penal Code. Another noted example, which falls under the scope of article 443 to 452 to the Belgian Penal Code, is to write a blog article in which a competitor is accused to have committed fraud, but whereby the legal proof of this accusation is not clear or officially established. Even when the blogger is telling the truth, (s)he may be committing the offence of libel. As blogs exists on almost any topic, a final example of a crime committed by a blogger may be found to lie in the infringement of article 1 of the Law on anti-racism, in conjunction with article 444 of the Belgian Penal Code. Through an evolutionary interpretation of these articles, these can be applied to images and texts published online, and equally lead to criminal convictions.

The civil offences that bloggers are liable to commit are basically the abovementioned ones, i.e. defamation, slander, libel, or any racist or xenophobic expressions of his/her

[27] English translation of the summary accessible at <www.jura.be> .

thoughts. The civil procedures concerned will in a vast majority of cases be based on articles 1382 and 1383 of the Belgian Civil Code. The sanctions they could trigger are mainly monetary ones and measures to repair the moral damage of the victim (including the publication of information rectifying the statements of the litigious previous post).

In accordance with the classic conception of responsibility, the author, i.e. the blogger in this case, is solely responsible for what (s)he writes or posts on a blog. In case of misinformation or provision of information that is unreliable, based on unconfirmed sources, causing damage to anybody, bloggers can be held responsible under civil law for his/her action.[28] On the other hand, as regards the responsibility of the editor, in application of article 25.2 of the Belgian Constitution, when the author is known and resident in Belgium, the publisher, printer or distributor may not be prosecuted. This 'cascading' responsibility has been extended to the modern information channels and new ways of communication. The approach flowing from the Constitution is indeed to presume a successive, isolated accountability which excludes criminal proceedings against the publisher, the printer or the distributor when the author is known and resident in Belgium.[29] Nonetheless, even though the cascading liability system prevails in Belgium, it does not mean that in case the author is not established there, the injured party can invoke the responsibility of all alternates. In this case, it will be the editor the one who will primarily considered responsible.[30] This constitutional system of cascading liability however does not derogate from the rules of responsibility establish in the Civil Code. The publisher, the printer or the distributor may equally be held liable on the bases of the common civil liability law if they have helped and give voice to an unknown author or to an author non-resident in Belgium whose remarks have been insufficiently scrutinised.[31]

On the whole then, Belgium is a very liberal country with regard the protection of freedom of expression. As is indicated in article 19 of the Belgian Constitution, the freedom of expression is guaranteed and protected unless an offence is committed. As far as could be traced, so far no blogs have been forcibly closed on the latter basis. It cannot be ruled that such a measures are taken in the near future if serious offences are committed, by request of the victim, or by way of preventive measures. When the present report was concluded though,

[28] S. DAMAS, *Les Blogs: relations avec les médias traditionnels et enjeux juridiques*, Thèse Université Libre de Bruxelles, <http://www.droit-technologie.org/upload/dossier/doc/154-1.pdf>.
[29] Q. VAN ENIS, op. cit. (n. 4), p. 349.
[30] Ibid., pp. 363-364.
[31] Ibid., pp. 363-364.

shortly after the Paris attacks of November 2015 and the subsequent clampdown on suspects of terrorism in the Brussels-Molenbeek municipality, the tide seemed to be changing, with the different governments being pressed to adopt a 'zero tolerance' approach on hate speech.

2. SOCIAL MEDIA USERS

As for blogs and bloggers, Belgium does not yet possess of a specific regulatory framework for social media users. However, the particular context of digital networks is not impervious to the implementation of limitations on freedom of expression. In this context, the freedom of expression of social media users will be primarily articulated through its traditional conceptualisation, i.e. in application of article 19 of the Belgian Constitution. In this regard, it must be repeated that the freedom to express an opinion is protected and guaranteed, unless the expression of offences are committed in the exercise of such freedom.

The revolution that the internet has brought in the form of personal communication cannot be negated either. Above, it has been mentioned how in this context the idea of open journalism has emerged. Due to the advent of social media (Twitter, Facebook, etc.), also personal opinions expressed are nowadays more accessible than ever to the general public.[32]

In Belgium, both case law and legal doctrine favour applying the same rules to online speech as to other ways of expression. This follows from the idea that in Belgium, the freedom of expression is one of the most important rights that empower a democratic state. Consequently, online speech is not subjected to any special legal regime differing from the one granted to the freedom of expression. In this regard, as will be elaborated more fully in point 8 below, the Belgian Constitution envisages that anyone can make public his/her opinion without fetters. In other words, it did not reserve the special protection granted to the press or professional journalist, but extended a general freedom to every citizen expressing him/her in any way. This has also been taken into consideration by the Belgian Court of Cassation, which has considered several times that the latter is an attribute available to all citizens, and that the words 'freedom of the press' must be understood in the sense assigned to them by the combined provisions contained in articles 19 and 25 of the Constitution.[33]

At the same time, the fact that social media constitute, in a vast majority of the cases, private settings has not necessarily diminished their exposure to the laws pertaining to

[32] J. ENGLEBERT, op. cit. (n. 10), p. 208.
[33] See, with further references, Q. VAN ENIS, op. cit. (n. 4), pp. 67-68.

particular types of illegal speech. The main legal problem currently arising in this regard pertains to illegal speeches posted on Facebook, whereby the difficulty lies in proving the defamation. Thus, by way of example, in the Judgement N.º 2010/AB/00014 of 4 March 2010 rendered by the Labor Court of Brussels, the conclusion was reached that:

> *The publication of dishonest messages, not respectful and aggressive towards certain colleagues, posted on internet through a discussion group created on Facebook, and at first only available to a group of staff members, is not of such nature of definitely and immediately make impossible any professional collaboration, because the employee was not aware of being in a discussion forum open to all. The Court considers that it issued no insult or injury, or any menace, the perpetrator did not act surreptitiously, and he immediately expressed regret when he realized the gravity of his act. The publication has not created considerable damage to the employer, from where the messages were barely comprehensible to the general public.*[34]

At first blush however, the operation of social media groups does not pose serious problems for the protection of the freedom of expression for their users. In this regard, in a Judgement of the Commercial Court of Brussels rendered on 24 December 2013, in a case linked with the freedom of expression, relating to xenophobic qualifications and reputation damages ensuing from posts submitted by a forecaster of RTL Belgium on his profile on Facebook, it was reassuringly indicated that:

> *Under Belgian law can be admitted as restrictions of the freedom of expression offences such as slander, defamation and insult and, more generally, the misconduct as defined in the articles 1382 and 1383 of the Civil Code.*
> *The Belgian Court of Cassation stated that certain restrictions to the exercise of freedom of expression are necessary in a democratic society, to answer to a general social need of the proportionality that must be observed between the meaning of what it is expressed and the objective of this expression. This restriction is justified by relevant and sufficient reasons.*[35]

A restriction on the freedom of expression must, however, meet the following conditions:

[34] English summary of the text accessible through <www.stradalex.com>.
[35] English summary of the text accessible through <www.stradalex.com>.

- be provided for in law (in the broadest sense);
- respond to a pressing social need;
- respect the proportionality between the means used and the objective pursued;
- be justified by pertinent and sufficient reasons.

The press may thus be limited in fulfilling its mission of information if it cannot be justified or is insufficiently considerate to other rights protected, notably the right to respect for private life and the rights related to one's honour and good reputation. A reasonable balance must be found between the freedom and other rights. The foregoing principles apply to any individual spreading information or opinions as well.

A related, topical and thorny issue is who can be held responsible for unlawful expressions (e.g. hate speech) on social media. This has more generally proved a controversial subject in the exercise of the freedom of expression in an online environment. In Belgium, the main rule applicable to this matter is the general one by analogy, *viz.* that the author of the speech will be responsible for what (s)he posts on social media. With regard to the potential (joint or several) responsibility of the social networks involved, a difficulty resides first of all in determining whether the social network functions as an online intermediary or not. Here, it is important to accurately define the concept of 'hosting service provider', since a conditional exemption is recognised in this regard by the Belgian Code of Economic Law of 28 February 2013[36] transposing Directive 2000/31/EC on electronic commerce.[37] Article XII 19.1 of the Code makes clear what should be understood as a hosting activity. This provision states that the activity of the hosting services provider must be understood as storing information provided by a service recipient. In order to be included in the exemption of article XII 19.1, it is necessary that the hosting services provider concerned does not have an effective knowledge of the illegality of the activity or of the information contained, on the one hand. On the other hand, it is also required that the hosting services provider removes the illegal information once it is made aware of it, or ensures that the access to the illegal information becomes impossible. The activity of the hosting services provider, in this case, thus merely entails the storing of information.[38]

In the context of a 'web 2.0 environment', the quality of hosting is not restricted to the operator of a technical storage website, but can also pertain to the holder of an internet site

[36] Code de droit économique / Wetboek van economisch recht, *Moniteur Belge / Belgisch Staatsblad* 29 March 2013. This law came into force on 12 December 2013. The full text is available via <www.ejustice.just.fgov.be>.
[37] Q. VAN ENIS, op. cit. (n. 4), p. 378.
[38] Ibid., p. 378.

that opens up a space for users to express their opinion, and thereby stores, on the request of the recipients of the service, the information provided by them.[39] However a judgment rendered by the Brussels Court of Appeal on 25 November 2009[40] has maintained a restrictive definition of providing hosting services. In this case, a student website was charged with tolerating that internet users, under the guise of anonymity, write messages of a defamatory character, and allowing the free distribution thereof, failing to employ immediate moderators. The Court flatly rejected the argument that the website was exempted from liability on the ground that the host could not be recognised as the manager of the discussion forum, once the technical storage site as a whole was provided by a third party who was the only one who could benefit from this quality.

Under Article XII.19 of the Belgian Economic Code, the exemption from liability benefits the host in criminal matters provided he has remained unaware of the presence of illicit information, and in civil matters, if he has remained unaware of circumstances that reveal such a presence, and that he acts promptly, as soon as he has obtained such knowledge, to remove the contested information, or makes access to it impossible and immediately notifies the public prosecutor. The exemption from liability moreover does not apply to the recipient (e.g. when a newspaper company uses its own server to store content produced by its journalists). To date, the case law is scarce on the conditions of lack of knowledge and prompt response of the host.[41]

So far, no activities are known to be significantly hampered by the existing legal framework or its application to social media. However, there are several examples of certain social networks being requested and obliged to disclose information to public authorities. This could be regarded as impeding the freedom of expression as well as the data protection rights of users and non-users. Conversely, we may point to an announcement of 9 November 2015 in which Facebook has declared that it would appeal to a court in order to stop tracking online activities of non-Facebook users in Belgium who visit Facebook pages. The Belgian Data Protection Authority took Facebook to court last June, accusing it of trampling on EU privacy law by tracking people without a Facebook account without their consent. This tracking of data is allowed when the ‘datr’ cookie install in the browser of the persons who visits facebook.com. The Brussels Court ordered Facebook to stop tracking non-Facebook user in

[39] Ibid., p. 379.
[40] Ibid.
[41] Ibid., pp. 381-382.

Belgium within 48 hours, or pay a daily fine of EUR 250.000. Facebook is not allowed to follow people on the internet who are not members of Facebook, as they cannot have given permission to follow them.[42]

The organisers of discussion forum sites are not covered by Directive 2000/31/EC on electronic commerce nor any other Belgian law, yet their position has been further explored in case law. Thus, the Brussels Court of Appeal in its judgment of 23 January 2009 noted that a lack of knowledge on the part of such defendants of litigious messages and entailed the infringement could not be imputed to them. In the same vein, the Court of First Instance of Antwerp in its judgment of 3 December 2009 indicated that it was a sufficiently prompt reaction of a forum manager to render access to the information impossible, one day after receiving the precise identification of the disputed messages. Moreover, maintaining messages in the cache of a search engine and various websites that host links to those posts does not mean these contributions are still freely accessible. Similarly, the Court of First Instance of Brussels, in a judgment rendered on 25 November 2009,[43] considered appropriate the reaction of the manager of a discussion in a forum who had acted within ten days to remove certain messages, which was held to constitute a not unreasonable period.

As far as could be traced, in this particular regard, no Belgian cases with a cross-border relevance have emerged.

3. ONLINE COMMENTS

Belgium has not yet adopted a specific regulatory framework for online comments. However, as has already been highlighted, this particular context impacts significantly on the implementation of limitations on freedom of expression. From a legal perspective, here the freedom of expression of the citizen posting comments on forums will be articulated in its traditional conceptualisation, i.e., application of article 19 of the Belgian Constitution. This entails that the freedom to express personal opinions is protected and guaranteed, unless offences are committed in its exercise. The limits to this 'digital' type of freedom of expression encompass the following requirements: they must be allowed by law in the

[42] J. FIORETTI, 'Facebook to appeal Belgian ruling ordering it to stop tracking non-users', 9 November 2015, <http://www.reuters.com/article/2015/11/09/us-facebook-belgium-idUSKCN0SY27220151109#rfuiReC6FqbIypi1.99>.
[43] Ibid.

broadest sense, respond to a pressing social need, respect proportionality between the means used and the objective pursued, and must be justified by a pertinent and sufficient reason.[44] Thus, depending on the comments and the forum(s) the comments are posted, the author can be held liable for civil or penal offences. Such offences range from defamation against the honour of a person (moral or physical), libel, slander, xenophobic or racists comments, etc. Due to the liberal context in which the freedom of expression is articulated in Belgium, the vast majority of procedures against comments posted online will be initiated under civil law jurisdictions. Yet, criminal responsibility of the author can certainly not be discarded.

According to article 10 of the ECHR, in conjunction with article 19 of the Belgian Constitution, the freedom of expression in print or online can be limited in order to protect the right of other parties. To judge whether a limitation imposed is proportional or not, a distinction should be made between comments stated as facts on the one hand, and comments expressed as personal opinions on the other. This entails that persons who communicates something as a fact can be expected to possess and furnish proof of this fact; if not, (s)he will not be protected by the freedom of expression. This strict criterion is not applicable to personal opinions. Nonetheless, it remains necessary that there are certain (demonstrable) factual bases for opinions as well. As a result, print or online sources which state incorrect facts cannot claim protection. If however the piece can be qualified as an opinion, it is possible that the freedom of speech can be applied to this case. According to Belgian case law, commercial organisations need to accept that they may be subjected to public criticisms.[45] In addition, the Court of Appeal of Liège in a judgment rendered on 22 October 2009 noted that negative online comments can still be adequately compensated for by reviews of others.[46]

An example of the different types of responsibilities is the following. If someone places anonymous comments with regard to an item or service on e.g. a booking site or on Facebook, the owners of the reviewed item or service will need to identify the reviewer in order to seek any damages recovered. This raises the question whether the operator of the booking site or Facebook can be obliged by authorities to reveal the identity of the reviewer.

[44] As it is indicates in the Judgment of the Commercial Court of Brussels of 24 December 2013, the full text of the judgment can be found in <www.stradalex.com>.
[45] 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, pp. 158-159.
[46] Ibid., p. 159.

In Belgium, in general the answer is no. The intermediary is only obliged to provide the authorities information which might assist the tracking and demonstrate breaches committed by himself. Yet, the right of the internet user is not unlimited, and in certain cases the disclosure of the identity of the reviewer will not be deemed in violation of the right of freedom of expression and the right to respecting for one's private life.[47]

As it may thus be difficult for the affected party to identity the reviewer, (s)he has the possibility to initiate a claim against the review site. To investigate whether or not a review site can be protected by a liability exemption for hosting providers, one needs to turn to the definition in the e-commerce Directive and the Belgian Economic Code. For such an exemption to apply, the case law of Belgian trade courts requires that a hosting provider plays a passive role.[48] In this vein, if a review site can indeed be qualified as a hosting provider, certain additional criteria need to be met in order to have the liability of the hosting service provider exonerated. The most important one here is that the hosting provider does not possess any knowledge of the incorrect information. In case it does or can reasonably be expected to so, it is required to delete or render inaccessible the contested source. According to the Belgian Code of Commerce, such action is only necessary if the information is considered manifestly illegal, and most of the time, review sites are themselves to determine whether or not the information is illegal or not. However, this raises the risk that in case of doubt, the site will proceed to delete the information considering the risk that it will be held liable – yet in this way, the freedom of expression is obviously impeded or pre-empted.[49]

As indicated by the Court of First Instance of Antwerp in a judgment rendered on 3 December 2009,[50] a notice placed on a website that expressly provides for content posted by third parties on the forum may exonerate site managers, if it makes clear that litigious messages are not subjected to surveillance, selection or adaptation before being published. In this light, the benefit of the exemption for the hosting activity depends on whether the role played by that provider is sufficiently 'neutral', i.e. the components are merely technical, automatic and passive, producing no (immediate) knowledge of or control over the data stored.[51] Of course, such a binary approach encourages managers of forums and blogs to

[47] Ibid., pp. 182-183.
[48] Ibid., p. 183.
[49] Ibid.,. 182-183.
[50] The abstract of the judgment is taken from Q. VAN ENIS, op. cit. (n. 4), pp. 379-380.
[51] Ibid. 379-380.

refrain from any *a priori* restraint, unless other grounds compel them.[52] This restraint is equally advised by the Councils on Journalistic Deontology of the different language Communities. They add that where it is not possible to moderate all comments *a priori*, reaction spaces must be present with adequate *subsequent* possibilities for intervention.[53] It has been proposed however to replace the abovementioned approach by a more refined analysis that takes into account genuine editorial selection work, beyond the existence of a simplified control to remove manifestly unlawful or irrelevant comments. More precisely, it is argued that the fact that comments remain visible after a simple technical control cannot automatically be considered proof of editorial judgments made.[54]

Conversely, it is not certain one may benefit from the exemption granted to the host in any case as long as the publishing of comments with *a posteriori* moderation is guaranteed.[55] In this regard, it must be pointed out that the judgement rendered by the European Court of Justice in *Delfi v. Estonia* has not a great impact in Belgian legal system, as it was already established that the actor who provides information over which it exercises editorial control cannot automatically benefit from the exemption granted to the host, when merely being able to control the contents of the online comments *a posterior*.[56]

On the whole, Belgium is not so different to other Member States in these regards, since the most important media outlets feature comment platforms (e.g. tripadvisor, booking.com, major newspaper sites) on which individuals can leave their comments and reviews. To this extent, the status of people posting comments online compared to those sending comments in print to the media do not differ so much. Obviously, the main difference lies in the fact that online comments are faster, will nowadays reach a much greater audience, and invite greater follow-up reactions than the published version in the printed newspaper.

At this juncture, the interesting possibility of introducing a right to reply on the internet may be mentioned as a potential specific emanation of a rule preventing abuse of the freedom of expression.[57] This right of reply can be defined as the right of a person involved in a publication to require, without any cost, the insertion of a response to any comments, regardless of the other responsibilities of the media. Mooted by one influential author, it were

[52] Ibid., p. 380.
[53] Ibid., footnote 1441.
[54] Ibid.
[55] Ibid.
[56] Ibid.
[57] This right should not be confused with other very similar media right, particularly the right to rectification.

to constitute an alternative remedy in case of attacks through the (online or printed) press.[58] The *ratio legis* is stated as ensuring an equal visibility of the person implicated.[59] Obviously, the internet allows for many opportunities to connect the original article and any further responses from the person it involved, by the use of hyperlinks. The establishment of a right of reply on the internet would not replace the right of reply on traditional media, which will be broadcasted in the same way as the original platform/carrier. The beneficiary of this right would be any person affected by incorrect information. The residence or nationality of the person concerned should not have any impact on the enjoyment of this right. To exercise the right of reply, the person referred is to submit his request to the editor, or where the (non-professional) editor remains anonymous, to the host that will forward it to the director of the publication. The role of intermediary in charge, if any, would thus be to contact the applicant and the responsible editor. The publication of the reply should, in any event, remain the responsibility of the publisher.[60]

4. WIKI

Belgium has not adopted a specific regulatory framework for wiki contributors. However, as occurred with the development of social media in general, wiki contributors have had an impact on the implementation of limitations on freedom of expression. In this context also, the freedom of expression of the person contributing in a wiki web will be articulated in its traditional conceptualisation, i.e. in application of article 19 of the Belgian Constitution. Thus, again, the freedom to express personal opinions is protected and guaranteed unless the offences are committed in the exercise of the freedom. The limits of this kind of freedom of expression of posting online encompass the following requirements: they must be allowed by law in the broadest sense, respond to a pressing social need, respect proportionality between the means used and the objective pursued, and must be justified by a pertinent and sufficient reason.[61] Thus, depending on the comments and the forum(s) the comments are posted, the author can be held liable for civil or penal offences. Such offences range from defamation against the honour of a person (moral or physical), libel, slander, xenophobic or racists comments, etc. Due to the liberal context in which the freedom of expression is articulated in

[58] Q. VAN ENIS, op. cit. (n. 4), pp. 410-411.
[59] Ibid., p. 419.
[60] Ibid., p. 429.
[61] As it is indicates in the Judgment of the Comercial Court of Brussels of 24 December 2013, the full text of the judgment can be found in <www.stradalex.com>.

Belgium, the vast majority of procedures against posting wiki contributions will be initiated under civil law jurisdictions. However, criminal responsibility of the author cannot be discarded. Depending on the type of crime committed, from minor offences to serious crimes, penalties can range from simple financial ones to prison sentences.

The fact that the author will be held responsible for what (s)he post does not means that the hosting service providers do not bear any responsibility. The problem in this case will be, as discussed before, whether or not there exists a hosting service provider or not. If so, it might be held liable or benefit from the exoneration of the responsibility. In application of the definition of host set down in article XII.19.1 of the Belgian Economic Code, a wiki page can indeed be considered as a host services provider. Equally, under Article XII.19 of the Belgian Economic Code, the exemption from liability may benefit the host provided that, in criminal matters, it is not aware of the presence of illicit information and, in civil matters, if it is not aware of circumstances that may reveal such a presence, and that he acts promptly, as soon as it has obtained such knowledge, to remove any information or make access to them impossible, and provided it immediately notifies the public prosecutor. Moreover, the exemption from liability does not apply when the provider is also the recipient, e.g. when a newspaper company uses its own server to store content produced by its journalists. To date, case law is sparse on the conditions of lack of knowledge and prompt response of the host.[62] There has been, moreover, no visible litigation involving the freedom of expression of wiki contributors.

5. OTHER TYPES OF 'CITIZEN-JOURNALISM'

In Belgium, there is no other type of 'citizen journalism' than the ones developed and exposed in the present report.

6. INSTITUTIONAL CONTEXT OF CITIZEN JOURNALISM

Due to the lack of official regulation of the 'citizen journalist' in Belgium, we cannot talk about a specific institutional context. However, with the broader scope of application of article 25 of the Belgian Constitution that covers not only professional journalists but

[62] Q. VAN ENIS, op. cit. (n. 4), pp. 381-382.

everyone exercising a journalistic activity, the assimilation of professional journalists and 'citizen journalists' may be clear.

In this regard, while there is freedom of the press and journalism is considered a principally self-regulated area, there exists a media authority on the Community level, i.e. one in Wallonia and one in Flanders (Deontological Councils of Journalists).[63] These media authorities are wholly independent and serve as the self-regulatory bodies of journalistic ethics. They are composed of representatives of publishers, journalists, various editors, and other members of civil society. They have three functions: to inform, mediate and regulate.

Citizen journalists are overall quite well protected, and covered not only by these bodies but also by courts, as already demonstrated above. Furthermore, as mentioned censorship is as such not allowed in Belgium. Consequently, the freedom of expression is well respected and enjoys a broad scope, so that citizens acting as journalists cannot be seen to suffer any particular (undue) pressures. The role of Belgian courts in Belgium, due to the lack of specific regulation, has mainly been to offer solutions to the challenges that activities on the new technologies and media have posed when pitted against the freedom of expression.

As already amply illustrated above, nowadays the freedom of expression is no longer a right merely exercised in traditional ways, through printed words or comparable media. It is in fact a right which is increasingly being used in an interactive form and in an online context. Definitively, as elsewhere, in Belgium the internet has proved a revolutionary project that has created major challenges for public authorities. At present, every citizen (regardless whether (s)he is a professional journalist or not) can freely and in an effective way express his/her opinions on all topics. As mentioned, according to some this has heralded in the era of open journalism. Consequently, all those who contribute to the dissemination of information are subjected to the duties and responsibilities, and are to account for errors on the basis of the traditional criteria for dissemination of information, *viz.* good faith, prudence and diligence.

In Belgium, as remarked, no special model of citizens' journalism exists. As in other EU Member States, the number of blog has increased a lot. In Belgium, there are nowadays blogs on any topic or subject, either of private companies, public or semi-public institutions. In academia, a similar trend is noticeable. This increase of citizen journalism increase has not only happened in 'blogosphere', as almost any institution, public or private, regardless of their specific activity, have established a profile on Facebook or Twitter to inform and share

[63] The *Conseil de Déontologie Journalistique*, <http://www.deontologiejournalistique.be> and the *Raad voor de Journalistiek* < http://www.rvdj.be/node/58>.

information with citizens. Most of the time, behind this profile, acting on behalf of the represented institution, will be the 'community managers'.

7. OTHER OBSTACLES

The main remaining obstacle that might be considered here is the lack of regulation on the topic. This situation has its roots in the configuration of the freedom of expression and the freedom of press already established in Belgium. These rights are considered fundamental rights in the democratic state guaranteeing the rule of law, and appeal to an efficient system of self-regulation. In this sense, one could equally argue the absence of additional rules does not hinder, but actually further buttress the existing media freedoms.

8. THE CONCEPT OF 'CITIZEN-JOURNALIST' IN BELGIUM

As indicated above, a proper concept of 'citizen-journalist' cannot be identified in Belgium. However, as also mentioned, the concept of open journalism, understood as the possibility that anyone can engage in that activity, is increasingly gaining relevance. This emerging new trend is particularly manifest in Belgium in the evolution of websites and the proliferation of blogs. This can be considered 'amateur' or indeed 'citizen' journalism. In line with the legal principles outlined, all those who contribute to the dissemination of information in this manner are subjected to the corresponding duties and responsibilities, need to proceed with all due prudence and diligence. One of the obligations imposed on anyone disseminating information is to 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.[64]

It appears that it was actually the intention of the Belgian constituent to confer the enjoyment of the rights and guarantees attached to the press onto anyone wishing to express his/her opinion by similar means. In other words, the special protection granted to the press or professional journalism was *ab initio* not reserved only to an institutional or professional corporation.[65] From the contemporary case law of the Belgian Court of Cassation, it does not appear either that a special quality is needed to enjoy the preferential system established by

[64] J. ENGLEBERT, op. cit. (n. 10), p. 209.
[65] Q. VAN ENIS, op. cit. (n. 4), p. 67.

the Constitution in regard to the press. It is precisely on this basis that the Court of First Instance of Brussels in a judgment of 15 October 2009 stated that "anyone disseminating information regarding a legal dispute may be responsible for committing a tort or simple offence. This may result from a breach of any provision of law or of any obligation incumbent on journalists have or any person responsible for the dissemination of the information".[66] Equally, the Court of First Instance of Brussels indicated in its judgment of 17 March 2010 that for the applicability of the article 150 of the Constitution (regarding press offences through comments conveyed by a broadcaster), it is not necessary to make a distinction between authors depending on whether (s)he holds the quality of journalist or one who would not have it.[67] That Court also pronounced in its judgment of 23 of January 2007 that the press does not encompass only productions of journalists but may cover any writings whatsoever, whether articles, books or other periodicals, that there are no grounds for limiting the application of different principles governing freedom of the press to professional journalists only, and that article 25 of the Belgian Constitution establishes a principle of wide application.[68]

In similar vein, in 1976, the ECtHR concluded in *Handyside v. United Kingdom*, widely considered as a fundamental judgment regarding the freedom of expression, that everyone exercising his/her freedom of expression bears the corresponding duties and responsibilities regardless of his / her situation and the means employed to express it.[69] In its latest case law, which has not remained free from criticism, the ECtHR continues to apply its traditional case law on freedom of expression and freedom of the press to new manifestations of broadcasting information by non-professionals, especially in an on-line context.[70] In this respect it deserves noting that the representative of the OSCE for media freedom has recommended that users are encouraged to participate in self-regulatory mechanisms set up by and for professional journalists.[71]

9. GENERAL CONTEXT OF PROTECTION AND REGULATION OF JOURNALISM

[66] A summary of the judgment can be found in J. ENGLEBERT, op. cit. (n. 10), p. 209, footnote 706.
[67] A summary of the judgment can be found in Q. VAN ENIS, op. cit. (n. 4), p. 68.
[68] Ibid., p. 68.
[69] ECtHR, *Handyside v. United Kindom*, 7 December 1976, Application Nº 5493/72. The full text of this judgment is available via < http://hudoc.echr.coe.int>.
[70] J. ENGLEBERT, op. cit. (n. 10), pp. 209-210.
[71] Ibid., p. 210.

Status of journalists

In Belgium then, there does not exist only one type of journalist or journalism. The function depends on the type of media employed and the type of information conveyed, on the nature of the contractual relationship between the reporters and the news business,[72] and on whether or not those concerned carry the title of professional journalist.[73]

A specific approach to the concept of journalist is nevertheless to be found in article 1 of the Law of 30 December 1963 on the recognition and protection of the title of professional journalist.[74] It sums up the necessary elements that have to be met by the journalist in order to be considered as a professional. In this regard, the provision states that no one can be allowed to use the title of professional journalist if (s)he does not fulfil the following conditions: to be at least twenty-one years old, and not to be deprived, in whole or in part, of the rights listed in the articles 31 and 123*sexies* of the Belgian Penal Code.[75] This second prerequisite includes the requirement of not having incurred abroad a conviction that, if it had been passed in Belgium, would have resulted in a whole or partial forfeiture of such rights. The third condition required to be considered as a professional journalist is to carry out that occupation for remuneration, which includes e.g. paid work carried out for daily or periodic newspapers, radio and television news programs or news agencies. Hereby, it is also required that this activity has been carried out as a habitual profession for at least two years, and not having ceased for a period of over two years.

The provision also mentions an incompatibility for the professional journalist: (s)he is required not to be engaged in any kind of trade, including any activity aimed at advertising, except for contributing to information programs or new agencies. In addition, it has to be noted that professional journalists are subjected to ethical codes, including the Munich Charter, sometimes even to specific deontological codes and rules of the company they work for. In case of a breach of one of these codes and rules, a liability may ensue, as it will be developed further below in subsection c.[76]

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[72] Work contract, service contract, public statute, among others.
[73] S. HOEBEKE and B. MOUFFE, *Le droit de la presse. Presse écrite. Presse audiovisuelle. Presse électronique*, Louvain-la-Neuve: Bruylant 2000, pp. 44-45.
[74] Loi du 30 décember 1963 relative à la reconnaissance et à la protection du titre de journaliste professionnel / Wet betreffende de erkenning en de bescherming van de titel van beroepsjournalist, *Moniteur Belge / Belgisch Staatblad* 24 January 1964.
[75] Code Penal du 8 Juin 1867 / Strafwetboek, *Moniteur Belge / Belgisch Staatsblad* 15 October 1867.
[76] M. ISGOUR, op. cit. (n. 5), p. 84.

a. Privacy – protection of sources

The legal framework of the protection of journalistic sources is constituted by the Law of 7 April 2005 regarding the protection of journalistic sources.[77] This law can be considered to be very liberal in the protection that it grants.[78] This may especially be ascertained on the basis of the wide scope of application *ration personae*, further expanded by the decision Nº 91/2006 of the Belgian Constitutional Court[79], as it will be explained hereafter.

Article 2 of the abovementioned law settles its scope of application *ratione personae*. It states that "*bénéficient de la protection des sources telle que définie à l'article 3, les personnes suivantes: 1° les journalistes, soit toute personne qui, dans le cadre d'un travail qui indépendant ou salarié, ainsi que toute personne morale, contribue régulièrement et directement à la collecte, la rédaction, la production ou la diffusion d'informations, par le biais d'un média, au profit du public; 2° les collaborateurs de la rédaction, soit toute personne qui, par l'exercice de sa fonction, est amenée à prendre connaissance d'informations permettant d'identifier une source et ce, à travers la collecte, le traitement éditorial, la production ou la diffusion de ces mêmes informations*". Thus, the scope of application *ratione personae* of the present law is, on the one hand, the journalist understood as any person who, as part of independent or salaried work or any legal person, contributes regularly and directly to the gathering, writing, production or dissemination of information through media for the benefit of the general public and; on the other hand, to editorial staff, i.e., any person who through the exercise of his/her function, has to take knowledge of information identifying a source, collection of information, editorial processing, production or dissemination of the same information.

This provision has been the object of vehement parliamentary debate. From the above, two categories of beneficiaries from press secrecy can be distinguished: every person exercising journalistic activities, and the editorial staff. As regards the second category no controversy arose. The problem however was to define who may be considered "every person exercising journalistic activities". At has been highlighted in legal doctrine, the first intention of the legislator was to ensure the right of journalists not to disclose their sources, with a

[77] Loi du 7 avril 2005 relative à la protection des sources journalistes / Wet tot bescherming van de journalistieke bronnen, *Moniteur Belge / Belgisch Staatsblad* 27 April 2005. This law came into force on the 7 of May 2005. The full text of the law can be consulted at <www.ejustice.just.fgov.be >.
[78] Q. VAN ENIS, op. cit. (n. 16), pp. 261-269.
[79] Judgment 91/2006 of the Constitutional Court of 7 June 2006, *Moniteur Belge / Belgisch Staatblad* of 23 June 2006.

corresponding right to remain silent in this respect, even in judicial proceedings[80]. In this respect, the main problem was to determine the exact meaning of 'journalist' here, as under Belgian law no definition other than that of a 'professional journalist'[81] was given. Due to the narrowness of the concept of 'professional journalist', the necessity was keenly felt to not limit the right to secrecy of information to that category of journalist only.

Judgment Nº 91/2006 of the Belgian Constitutional Court of 7 June 2006 marked a turning point.[82] Upon the request of bloggers who considered too narrow and discriminatory the personal scope of the right to confidentiality of sources, the Court held that the right to secrecy of journalistic sources should be guaranteed to allow the press to play its watchdog role and inform to the public on questions of general interest. It also indicated that this right should not only protect the interests of journalists as a professional group of persons. It found therefore that any person engaged in a journalistic activity could claim the confidentiality of his/her sources of information. In this judgment the Court also struck certain parts, *viz.* the term journalist, of the definition contained in article 2 of the Law. Thus, the first category of beneficiaries of the protection of sources henceforth encompasses any person who directly contributes to the gathering, writing, production or dissemination of information through media, for the enjoyment of the public in general. This broad definition undoubtedly allows for the extension of the guarantees of the law regarding the protection of journalistic sources to bloggers, as long as the issues raised by them are relevant to the public in general.[83] This impacted in addition on the concept of 'journalistic activities' set out in article 2.1 of the Law. In the current state of the legislation, nothing prevents that the dissemination of the information on a social network or by a video posted on a content sharing site can be considered a journalistic activity and worthy of protection, as far as the information shared is relevant for the public in general.[84] It should be noted in this regard that the ECtHR has already recognised in several judgments that in a democratic society, non-journalists that become active in the world of traditional media must be able to benefit from the high level of protection afforded to the press under article 10 of the Convention when they express on matters subjected to the general interest of the public.[85] Article 3 of the Law of the protection of journalistic sources indicates that the abovementioned persons have the right to remain

[80] Q. VAN ENIS, op. cit. (n. 16), p. 262.
[81] The definition of professional journalist was given by the law of 30 December 1963 on the recognition and protection of the title of professional journalist in its article 1.
[82] A summary of the judgment can be found in Q. VAN ENIS, op. cit. (n. 16), p. 262.
[83] Ibid.
[84] Ibid., p. 262.
[85] Some relevant judgments of the ECtHR on the topic are *Steel and Morris v. United Kingdom* of 15 February 2005 or *Vides Aizsardzïbas Klubs v. Latvia* of 27 May 2004. Ibid., p. 262.

silent on their sources of information. At first blush, they thus cannot be forced to reveal their sources of information and communicate any information, registration and document which may include the identity of the informants, the disclosure of the nature of the source of information, the disclosure of the identity of the author of the text or the audiovisual production, or the revelation of the content of information and documents themselves if these may serve or facilitate to identifying the informant. The Belgian law not only excludes an obligation for a beneficiary to reveal his / her sources, but also prohibits forcing him/her to disclose documents which may have the same result.[86] This right to non-disclosure has a double application, namely in both criminal and civil law perspective.

In this vein however, if the extension of the scope of beneficiaries of the Law performed by the Belgian Court of Arbitration is justified by the special role assigned to the press, the benefits of the guarantees established by the Law should be restricted to the persons who meet certain ethical standards in the processing of that information, the guarantor of which would be the judiciary, on a case by case basis.[87] In any case, the beneficiary of the right of non-disclosure cannot escape from his/her criminal or civil responsibility.[88] However in Belgium, perpetrators of press offences have for decades systematically profited from criminal impunity. Even so, since 1999 press offences inspired by racism or xenophobia have been excluded from this sphere of impunity and subjected strictly to the jurisdiction of the criminal courts.

Regarding online media and the use of internet, no judicial decisions have yet been rendered on the question of the application of a privileged jurisdiction here. The Court of Cassation has thus consistently reserved the concept of 'press offence' for printed writings only.[89] In this fashion, the Court of First Instance of Brussels in its judgment of 15 October 2009 condemned journalists from the Dutch-language newspaper *Het Laatste Nieuws* to repair the damage suffered by the famous Belgian cycling team Quick Step, its manager and sports doctor. These journalists levelled some accusations to the latter regarding possible doping. The Court in this case rejected the argument raised in defence of the journalists based on their right to not disclose their sources. In this particular case, the Court stressed that the

[86] Q. VAN ENIS, op. cit. (n. 16), p. 263.
[87] Q. VAN ENIS, op. cit. (n. 16), p. 262.
[88] Q. VAN ENIS, op. cit. (n. 16), p. 263.
[89] Ibid., p. 263, footnote 29.

information obtained from anonymous witnesses has to be treated with the greatest prudence so as to control it veracity, in order to deliver correct information to the public.[90]

Under Belgian law, the protection of the secrecy of sources is considered a right and not an obligation for journalists, yet it does not constitute a professional privilege. At the same time, journalists are required to comply with professional ethics and the applicable deontology. In any event, only the wrongful disclosure of sources may, if necessary, compel the journalist to repair any damage caused to his/her informants.[91] Even so, the general interest can sometimes still justify disclosure. Article 4 of the Law of protection of journalistic sources contains an exemption to the abovementioned general rules. It indicates that it may be required to reveal the sources of information if a request from a judge is received. The information to be revealed must be necessary to prevent the commission of offences constituting a serious threat to the physical integrity of a person or persons, including the offences referred to in article 137 of the Belgian Penal Code.[92] However, the following conditions must be met: the requested information is crucial for the prevention of the commission of an offence, and the requested information cannot be obtained in any other way. In this regard, journalists and editors must often withstand strong pressure from judicial authorities so as to defend the absolute confidentiality of their sources, especially regarding the access to images.[93] To avoid this kind of pressure, article 5 of the Law on protection of journalistic sources establishes that it will not be allowed to use in legal proceedings, even when the case is still under examination, any source of information of the persons referred to in the article 2 of the Law. The only exception foreseen in this provision pertains to data that is likely to prevent the commission of the offences described in the abovementioned article 4.

In this light, the judgement of the Belgian Court of Cassation of 6 February 2008 deserves highlighting.[94] A policeman was suspected of violating the secrecy of the investigation by unveiling information obtained from a journalist. In order to assess the appropriateness of the suspicion, a tracking was conducted of the calls made and received by the mobile phone of the policeman. The device was later seized by the investigating judge.

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[90] Ibid.
[91] Ibid., p. 264.
[92] Referring to crimes involving the apology of terrorism.
[93] See e.g. X., *Etats Generaux des Medias d'Information. Atelier n° 3: La Liberté d'expression. Recommandations formulées par J. ENGLEBERT, S. DUSOLLIER et F. TULKENS sur la base du rapport de synthèse des audions établi par A. ROEKENS*, Fédération Wallonie-Bruxelles, Le Parlement, p. 40 (full text available at <https://www.pfwb.be/images/etats-generaux-des-medias-d2019information-atelier-ndeg-3-la-liberte-d2019expression>).
[94] A summary of the judgment can be found in Q. VAN ENIS, op. cit. (n. 16), p. 264.

The request to release the phone was rejected by the Court of Appeal. The Court pronounced on the scope of application of article 5 of the law, and ruled that the protection of journalistic sources does not prohibit the conducting of criminal investigation measures with regard to a person who is not a beneficiary of the protection of the sources and is suspected of having committed an offence, by transmitting information to one of these beneficiaries. As was also established by the ECtHR on several occasions, the guarantees pertaining to the journalistic sources can only be violated so as to prevent certain serious criminal offences. Doing so must also be adequate and effective, with the purpose of maintaining of the inevitable minimum of disclosure of journalistic sources.[95]

The Belgian Law regarding the protection of journalistic sources prohibits investigation measures concerning any data on sources of information. It is clear that the judicial authorities cannot carry out such measures in order to discover the sources of one beneficiary of the protection of the journalistic sources.[96] Exceptionally, it is allowed to obtain, analyse or exploit data protected by the secrecy of journalistic sources. To apply this exception, it is necessary that the soliciting services possess an indication that the journalist is involved, personally and actively, in a development that carries risks for a crucial public interest. The implementation of specific or exceptional methods is therefore subjected to compliance with the principles of subsidiarity and proportionality. In such specific cases, the Law regarding the protection of journalistic sources contains important procedural safeguards in order to protect professional journalists.[97] In any case, before the implementation of a specific or exceptional method to collect any information, it is necessary to request the reasoned consent of an administrative surveillance committee composed of three judges. Furthermore, such a specific or exceptional method cannot be applied without prior notification of the president of the association of professional journalists. This notification, normally, is made by the chairman of the supervisory board. The president of the surveillance commission must supply to the president of the association of professional journalists all necessary information not covered by professional secrecy. The president of the commission is responsible for verifying that all data and information obtained is directly linked to the threat. At the same time, this information and data remains subjected to the right to secrecy of

[95] Ibid., p. 264.
[96] Ibid., p. 265.
[97] Ibid.

journalistic sources. Finally, the president of the commission (or a delegated member) must be present when and where the exceptional method is implemented.[98]

Article 6 of the Law on protection of journalistic sources establishes that the persons referred to in article 2 of the Law cannot be prosecuted on the basis of article 505 of the Belgian Penal Code (unlawful concealment) when they are exercising their right to not reveal their sources of information. In this regard, it is deduced from the case law of the Belgian Court of Cassation that the offence of concealment requires the presence of two main components: the possession, in whole or in part, of an item obtained through a crime or offence committed by a third party, and the knowledge (pre-existing or concurrent with the possession or ownership) of the illicit origin of the item.[99] Thus, the right to secrecy of journalistic sources does not prevent the conviction of a journalist, or any other person, for publishing documents and seriously undermining the rights of others in absence of a sufficient public interest to inform/report on the matters concerned.[100]

In similar fashion, article 7 of the Law indicates that in case of violation of professional secrecy on the basis of what is established in article 458 of the Belgian Penal Code (crimes committed by persons who enjoy legal privilege), the persons referred to in article 2 of the Law cannot be prosecuted either on the basis of article 67.4 of the Belgian Penal Code (being accessory to a crime) when exercising their right to not reveal their source of information. It should be noted though that the latter article only sees to complicity. Journalists prosecuted as co-authors of a violation of professional secrecy therefore enjoy immunity under the law on the protection of journalistic sources. There are yet other provisions that punish, under Belgian law, the disclosure of confidential information. What is more, the evidence collected in violation of the conditions imposed by articles 4 and 5 of the Law shall be excluded from consideration, in order to avoid the nullity of the entire procedure.[101]

From the above it may be distilled that the Belgian law regarding the protection of the sources of journalists is very protective. The Law does not however foresee any explicit sanction when a journalist is pushed to reveal his/her sources. In this regard, nothing prevents the journalist who has become the victim of a violation of the right to confidentiality of

[98] Ibid., pp. 265-266, footnote 57.
[99] Ibid., p. 266.
[100] Ibid.
[101] Ibid., p. 266-267.

sources to hold accountable the public authorities concerned on the basis of the common law of civil liability.[102] In this regard, we may point to the judgment of the Court of First Instance of Brussels of 29 June 2007, in which case a Flemish journalist from the newspaper *De Morgen* as well as the newspaper itself sued the Belgian State. They claimed reparation for damages that resulted from the violation by the judicial authorities of their right to confidentiality of journalistic sources. The Court considered that the recording of phone conversations of a journalist can only be take place in a very exceptional circumstances. In this case concerned, the State was held accountable, and ordered to compensate for the (mainly moral) damages suffered by the journalist and the newspaper itself.

A. Protection of journalistic materials (photos, cameras, phones, etc.)

The legal framework applicable to the protection of journalistic materials is the same as the one on the protection of journalistic sources, i.e. the Law of 7 April 2005 regarding the protection of journalistic sources. The scope of application, as explained above, covers not only the original sources but also the materials which contain the sources. Thus, in accordance with the interpretation of the Law of 7 April 2005 of the Constitutional Court, not only the materials belonging to a professional journalist will be protected, but also the materials of a blogger who acts as a journalist. In this regard, again, the Belgian Constitution can be regarded as very 'liberal' with regard to the protection of the freedom of press of the journalists. There has not been any noteworthy occasion after the entry into force of the Law of 7 April 2005 where the police conducted an (unlawful) intervention to seize or destroy journalistic equipment.

Nevertheless, in Belgium, the Law of 4 February 2010 concerning the methods of data collection by the intelligence and security services has greatly expanded the powers of the state security organisations.[103] It has equally impacted on the protection of journalistic sources, since in case of serious evidence relating to the commission of a crime or misdemeanour, the intelligence and security services have to forward this to a surveillance committee. If this committee determines that there exists enough evidence, its president may

[102] Ibid., p. 268.
[103] 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. This law came into force on 1 September 2010.

inform the federal prosecutor.[104] However, this law seems to ignore the extension of the personal scope of the Law of 7 April 2005 by the judgment of the Constitutional Court of 7 June 2006, and is only concerned for the situation of the professional journalists. This limitation is highly questionable with respect to a functional definition of freedom of the press, as adhered to in Belgium. The law also 'deprives' the foreign journalist present on Belgian territory of the protection established by the law of 7 of April 2005.[105] In any event, the prohibition remains for intelligence and security services to obtain, analyse and use data, information or material protected by the secrecy of journalistic sources. An exception is the obtaining, analysing and using of data protected by the confidentiality of sources in case the 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.[106]

C. Freedom of expression and its limits

As has been highlighted, in Belgium the freedom of press forms a special consecration of the freedom of expression. In line with the present part of the case study in which journalism is analysed, the freedom of expression will be covered by a further study of the freedom of the press.

In Belgium, here exist no law on the press or general press code that covers the entire subject-matter in an autonomous text. The rights of the press in Belgium lie in the common civil law of liability, predicated on the usual maxim that one who can be held liable for damage caused is obliged to repair it.[107] As there is under Belgian Law no specific definition of journalist, freedom of expression or freedom or press, the definitions of these concepts are many and varied. Some definitions employed are more restrictive than others, and the approaches in legal doctrine do not always match the contours expressed in legislation and case law interpretations.[108] Some of the most traditional sources refer to the concept of freedom of press as an application of the freedom of expression by media actors.[109] The most innovative position departs from the point of view that considers that the concept of press

[104] Q. VAN ENIS, op. cit. (n. 4), p. 673.
[105] Ibid., pp. 673-674.
[106] Ibid., p. 674.
[107] L. BABILLOTE, 'Liberté d'expression: qu'en est-il en Belgique?', *Horizons médiatique*, 16 February 2015. The full text is available via <http://horizonsmediatiques.fr/2015/02/liberte-dexpression-quen-est-il-en-belgique/>.
[108] M. ISGOUR, op. cit. (n. 5), p. 82.
[109] Ibid., p. 83

includes all types of media, regardless of the mode of expression. [110] To this extent, the latter move beyond a narrow understanding, and tend to define 'the press' as encompassing all means and stages of mass dissemination, i.e. it will cover also the technical process.[111] In any event, distinguishing in practice between the freedom of the press and the freedom of expression will not always be an easy thing to do, especially since these can coincide in specific cases. A journalist will, for example, benefit from the freedom of expression as a citizen, and from the freedom of the press as a journalist.[112]

Regarding the scope of application *ratione personae*, it is necessary to indicate that the freedom will cover everybody who desires to express his/her opinion on Belgian territory. Thus, any person seeking to carry out a journalistic activity, or express him/herself through written media, can benefit from it. However, the professional journalist enjoys some benefits that a normal citizen, aiming to use his/her freedom of expression, would not have. The freedom of press is moreover narrower than the freedom of expression, since professional journalists bears a greater responsibility, subjected as they are to the application of ethical and deontological codes.[113] These codes are established by e.g. the *Raad voor Journalistiek* in the Dutch speaking part.[114] For the French and the German press in Belgium, there exist similar institutions that have set down frameworks for professional journalists active in their part of the Belgian territory.[115] The application of the freedom of expression is the same for editors as for journalists, due to the prevailing system of self-regulation regarding the press. The main difference is that editors have their own associations that have established specific ethical and deontological guidelines.[116]

In any event, the freedom of expression and thus the freedom of press are considered of such great importance in Belgium that the legislature and judiciary apply and construe it in a broader sense. Anyone who publishes on a regular basis can be considered a journalist, as

[110] Ibid., p. 82
[111] Ibid., p. 82.
[112] Ibid., p. 85.
[113] Ibid., pp. 84-85.
[114] As they put it themselves on their web page (<http://www.rvdj.be>), the *Raad Voor Journalistiek* is the independent body for self-regulation of the Flemish press in Belgium. It is a non-governmental organisation which responds to questions and handles complaints from the general public with regard to the conduct of journalists.
[115] The *Conseil de déontologie journalistique* is a self-regulatory body of French and German media in Belgium. It is composed of representatives of publishers, journalists, editors and civil society. It has three functions: informing, mediating and regulating. It has created its own deontological code. More information can be obtained through its web page, <http://www.deontologiejournalistique.be>.
[116] The main association of Belgian publishers is the so called 'Association of Belgian Publishers'; more information can be gleaned from <http://adeb.be/en>.

long as the target audience is the general public, (s)he publishes about events in society, regardless of the means employed.[117] In this regard, as the Belgian Court of Cassation confirmed, a special quality is not necessary in order to fall within the preferential system established by the Constitution with regard to the press and offences of the press. Instead, the Court considers the freedom of the press as an attribute of all citizens: the words freedom of the press must be understood in the legal sense assigned to them by the combined provisions contained in articles 19 and 25 of the Constitution.[118]

Zooming in further on the freedom of expression of the journalist, and in particular the 'citizen journalist', the key obligation incumbent on anyone disseminating information remains to provide to the public with accurate, complete and objective information. This implies a sufficient measure of caution, rigor and objectivity in terms of the research, analysis and dissemination of information.[119] The *Raad voor Journalistiek* has handled a number of complaints against web pages, bloggers or even professional (but independent) journalists who do not recognise the body itself.[120] It has also handled complaints against bloggers who, even when not been a professional journalist, were seen as acting in a journalistic capacity. Precisely in this context, the Court of First Instance of Brussels noted in its judgment of 15 October 2009 that the liability of journalists or any other persons disseminating information, in the context of a trial or legal dispute, can extend to both press offences and simple offences. This is because the violation will result from an infringement of a legal duty which can be committed by a journalist or any citizen responsible for disseminating information.[121]

This brings us to the subject of liability of journalists, either professionals or citizens, and of editors. A fault likely to engage the responsibility of a journalist can consist of a single penal or civil offence. The fault which constitutes a criminally punishable offence may be called a press offence, provided the offence was committed in the expression of a thought in writing, that it has been reproduced and published. In addition, the commission of a penal offence will usually also lead to a civil law accountability of the author.[122] In the second case,

[117] These elements are the ones that are taken into account by the *Raad voor Journalistiek* when they decide whether or not to consider a claim against a publication. When extending the scope of application to 'citizen journalists', the Belgian courts apply the same criteria.
[118] Q. VAN ENIS, op. cit. (n. 4), pp. 67-68.
[119] J. ENGLEBERT, op. cit. (n. 10), p. 209.
[120] Information obtained in an interview with a representative conducted in November 2015.
[121] A summary of the judgment can be found in J. ENGLEBERT, op. cit. (n. 10), p. 209.
[122] M. ISGOUR, op. cit. (n. 5), p. 87.

the commission of a civil offence may reside in the breach of a legal provision criminally sanctioned, or in the breach of any obligation resulting from applicable professional rules.[123]

Under Belgian law, the freedom of the press is limited in particular by the repression of press offences committed in the exercise of that freedom. Such offences not only benefit from the principle of cascading liability, but also from special procedural rules. They also benefit from being dealt with in a privileged jurisdiction. It is this privilege that for a long time led to a virtual impunity for press offences, due to the reluctance of public prosecutor offices to bring trials before (jury) courts.[124] It was this virtual (criminal) impunity with regard to press offences that sparked a considerable volume of civil proceedings for damages, the aim of which was usually to have a fault recognised, rather than to see damage compensated.[125]

Belgian legislation does not provide a clearly delineated concept of press offence, so that this was to be carved out by case law and legal doctrine. Three elements are commonly deemed to be required. First, there must have been an offence committed through the press, e.g. an act of slander, defamation, racism, xenophobia, etc. Second, there must be an intellectual element, i.e. the manifestation of a thought, expression of an illegal or abusive opinion. Finally, it a 'hardware' element is required: contents in a medium, reproduced and published, i.e. made available to the general public.[126] In this context, the classic case law and legal doctrine saw a need for writing in print as a strict prerequisite. However, due to the evolution of different ways of communication, this conception has changed; nowadays, in case law, the possible commission of press offences via the internet is equally recognised. This case law, which confirms the application of article 25 paragraph 1 and article 105 of the Constitution is based on an extension of the concept of publication to electronic communication networks.[127] The general trend in the case law of Belgian courts appears to be a firm adherence to a broad(er) scope of application of press offences committed online.[128] In this regard, we may e.g. point to the judgment rendered by the Criminal Court of Brussels on 21 June 2006, in which it considered press offences, and not only acts inciting hatred and violence, that the defendants had posted on an internet site two documents entitled '*Nazisme*

[123] M. ISGOUR, 'La presse, sa liberté et ses responsabilités', op. cit. pp. 87.
[124] *Tribunals d'assises.*
[125] M. ISGOUR, op. cit. (n. 5), p. 88.
[126] Ibid.
[127] Ibid., p. 91.
[128] Ibid., pp. 92-93.

et Sionisme ne font q'un' and '*La fin du people d'Israel*'.[129] We may equally refer to a significant judgment of 9 February 2006 rendered by the Court of Appeal of Antwerp.[130] In this case, the court held an act of distributing and reproducing written or typed words through the technical process of a newspaper, by fax, or in an electronic way to be all similar forms of 'press'. This court, therefore considered that, regarding the diffusion of the information, fax and e-mails match the criteria. All these pronouncements reinforce the idea that online publications fall under the scope of application of article 25.1 and 105 of the Belgian Constitution.

As regards press offences of a racist of xenophobic character, the Belgian law of 7 of May 2007 regarding the fight against certain forms of discrimination[131] removes some privileges of the press and takes away the jurisdiction that was here previously conferred onto a jury court. After the enter into force of this law, offences committed by press based on racism and xenophobia are tried before an ordinary criminal court. This new situation increases the speediness of the process, lowers the costs (compared to the one of the jury court) and is believed to enhance deterrence, in part because of the efficacy of the process.[132]

The internet has obviously enabled a greater number of persons than before to express their thoughts publicly. This has in turn resulted in a proliferation of procedures initiated against the press when exhibiting racist and xenophobic remarks. Such acts have been condemned on several occasions by Belgian criminal courts.[133]

One pillar of the protection of freedom of expression of journalists is the system of cascading liability, already referred to earlier.[134] The general rule is contained in article 25.2 of the Belgian Constitution, which states that when the author is himself known and resident in Belgium, the publisher, the printer and/or the distributor may not be prosecuted. The approach foreseen is that one of successive and isolated accountability that excludes criminal proceedings against the publisher, the printer or the distributor, one in the absence of the

[129] A summary of this judgment can be found in M. ISGOUR, op. cit. (n. 5), p. 93.
[130] A summary of this judgment can be found in M. ISGOUR, op. cit. (n. 5), p. 92.
[131] Loi tendant à lutter contre certaines formes de discrimination / Wet ter bestrijding van bepaalde vormen van discriminatie, *Moniteur Belge / Belgisch Staatsblad* 30 May 2007. This law came into force on 9 June 2007.
[132] M. ISGOUR, op. cit. (n. 5), p. 94.
[133] Ibid., p. 95.
[134] M. ISGOUR, op. cit. (n. 5), p. 95.

other, when the author is known and resident in Belgium.[135] The aim of the drafters of the Constitution of 1830 was to prevent censorship and corresponding obstacles to publication.[136] The prevailing cascade system does not mean that, in case the author is not resident, an injured party can impute any responsibility on the publisher, printer or distributor; in this particular case, (s)he is always entitled to invoke the responsibility of the editor. The constitutional system also does not wholly replace or derogate from the rules establish by the Civil Code; the CC rules can only not be applicable when the cascade liability establishes a subsequent regime of responsibility. Thus, the publisher, printer or distributor may be held civilly liable if they have assisted and facilitated the works of an anonymous or non-resident author whose remarks should have been adequately scrutinised beforehand.[137]

In light of the fact that in an online context, very often the author and publisher will be merged, it is feared that the responsibility for press offences may here fall back on the hosting service or access providers.[138] Nonetheless, Belgian case law does not yet appear unequivocally ready to apply the guarantee provided in article 25.2 of the Constitution to the digital realm.[139] Occasionally, judges have flatly excluded the dissemination of information online from the enjoyment of this guarantee. A clear example of such an exclusion is the judgement rendered by the Court of Appeal of Brussels of 23 January 2009.[140] In this judgment, the court stated that in its view, the cascading liability system does not apply to the intermediary of new communications networks, such as discussion forums. Consequently, the court saw no obstacle to apply the classic criminal law participation (complicity) rules to the web manager of the forum. The criminal liability for dissemination of a text in a forum by an internet user was thought to lie directly with its author, i.e. the person posting the message. The forum manager could nevertheless be prosecuted as a co-author or accomplice of this user, yet only in the situations listed in articles 66 and 67 of the Belgian Penal Code,[141] and if the conditions of such cases are met. In the view of the court, the forum manager could also be prosecuted as a perpetrator of the offence, especially if (s)he posted the offending message or maintained them in awareness of the criminal nature of the messages posted, or even in the absence of such awareness. In contrast, other courts have been more amenable to applying the system of cascading liability to an online context. The Court of First Instance of Brussels in

[135] Q. VAN ENIS, op. cit. (n. 4), p. 349.
[136] Ibid., pp. 353-354.
[137] Ibid., pp. 363-364.
[138] M. ISGOUR, op. cit. (n. 5), p. 93.
[139] Q. VAN ENIS, op. cit. (n. 4), pp. 374-375.
[140] A summary of the judgment may be found in Q. VAN ENIS, op. cit. (n. 4), p. 375.
[141] These two articles indicate when someone can be considered as a perpetrator of or accomplice to a crime.

its judgment of 23 January 2007 has, for instance, ruled that the manager of a website on which offending articles were published should be considered as an editor, and thus benefit from the cascading liability exemption included in article 25.2 of the Constitution.[142] Similarly, the Court of First Instance of Hasselt, in its judgment of 14 June 2010, ruled that cascading liability could be applicable in respect of a trade union newspaper published online.[143] In addition, the Court of Appeal of Antwerp in a judgment of 23 June 2010 determined that the cascading liability established in article 25.2 of the Constitution does not affect the fact that the one managing the website on which the offending articles were published can be held civilly liability, particularly in the case when the organisation that manages the website identifies itself with the content of the published articles.[144]

In contrast to the criminal liability regime regarding the press, there is no constitutional or other provision in Belgian law that expressly indicates a distinct civil responsibility of the press. Only the Law of 23 June 1961 on the right of reply[145] and the law of 4 March 1977 that inserted a second chapter of the law on the right of reply, addressed in an indirect way this matter by installing a right to reparation of any damages caused. Thus, as a default of particular legal precepts, it will ordinarily be necessary to resort to the Belgian Civil Code rules when seeking to incur liability for offences and quasi-offences committed by the press. To obtain a compensation in a civil procedure for damages caused by such offences, it is necessary that the plaintiff proves the existence of a fault, that this fault has caused damages, and that there exists a causal link between the fault and the damage.[146] The main legal basis for initiating civil proceedings against an abuse of the freedom of press is to be found in articles 1382 and 1383 of the Belgian Civil Code.[147] Article 1382 establishes that any act which causes damage to another obliges that person to engage in reparation. Further, article 1383 indicates that everyone is responsible for the damage (s)he has caused not only by his/her act, but also by his/her negligence or imprudence.

In theory, the compensation for damage must be integral, that is to say that the injured party should be re-established to the position it was in before the damage occurred, but that the compensation cannot exceed the real damage suffered. Effectively, Belgian law does not

[142] A summary of the judgment may be found in Q. VAN ENIS, op. cit. (n. 4), p. 375.
[143] A summary of the judgment may be found in Q. VAN ENIS, op. cit. (n. 4), pp. 375-376.
[144] A summary of the judgment may be found in Q. VAN ENIS, op. cit. (n. 4), p. 376.
[145] Loi relative au droit de réponse, *Moniteur Belge / Belgisch Staatsblad* 8 July 1961 (no longer into force).
[146] M. ISGOUR, op. cit. (n. 5), pp. 96-97.
[147] Code Civil de 21 March 1804 / Burgelijk Wetboek, *Moniteur Belge / Belgisch Staatsblad* 3 September 1807. This law came into force on the 13 of September 1807.

recognise punitive damages, so that in most cases reparation of the damage consists in the payment of a sum of money. Especially in cases of abuse of the freedom of the press, it can however also consist in the publication of the judgment in which the fault and the damage is recognised. Regarding moral damage, invoked when an offence affects the honour, good reputation, protection of privacy or copyrights, the Belgian courts nowadays in many cases demand the payment of a sum of money to the victim. This solution was adopted as it regularly proved difficult in assessing exactly the extent of the moral damages suffered and the type of detriment.[148] In this vein, for example, the Court of First Instance of Brussels in its judgment of 21 November 2006 estimated that the victim of the violation of his/her privacy had to be compensated not only with the publication by the defendant of the judgment in the satirical weekly '*Père Ubu*', but also a payment of EUR 2.500 in compensation for the immaterial damages.[149] Great disparities have cropped up in the requests for reparation for moral damages granted by Belgian courts in recent years. The sums awarded oscillate between EUR 1 and EUR 20.000. This may seem an arbitrary practice, only partially offset by judges who endeavour to apply fixed evaluation criteria (such as the circumstances in which the offence was committed, the duration of the infringement, the attitude of the victim, etc.). Yet, it remains difficult for tribunals to determine a 'fair' financial compensation for moral damage.[150]

Overall then, as will have become clear from the preceding, in Belgium limitations on the freedom of expression are strictly confined, and as article 25 of the Constitution indicates, censorship is not allowed. By way of conclusion, we may draw attention to one recent (still ongoing) case with regard to the (non-)publication of a magazine, which has sparked great debate. The journal in question, *Medor*, appears to have been subject to censorship preceding to its publication. As indicated on the website of the magazine, it was censored by order of 18 November 2015 rendered by the President of the Court of First Instance of Namur, on the basis of a unilateral application of Mithra Pharmaceuticals S.A. The magazine was prohibited from publishing and distributing an article on penalty of EUR 12.000 per infringement per day. The dispute concerns the Walloon success story of the *Mithra* pharmaceutical company located in Liège. This company has been the beneficiary of sizeable subsidies and other public aid. The investigation into this matter, conducted by a veteran journalist, lasted more than six

[148] M. ISGOUR, op. cit. (n. 5), pp. 109-110.
[149] A summary of the judgment may be found in M. ISGOUR, op. cit. (n. 5), p. 111.
[150] M. ISGOUR, op. cit. (n. 5), p. 112.

months and is based on dozens of sources and extensive documentation. The decision taken by the Court is exceptionally rare in the annals of the Belgian press, and vehemently contested. It was taken by the court in question on the basis of so-called 'extreme urgency and absolute necessity'. Obviously, it impedes the publication not only of the disputed article, but also the release of the first issue of the magazine in print. As the editors indicate on their website, the decision has already caused enormous damage to the magazine, the employees and the freedom of press.[151] How this affair plays out remains to be seen, but it is certainly a highly unusual one in a country where on the whole, few fetters are placed on the freedom of expression and the freedom of the press.

D. Cross-border issues

From the research conducted, there did not emerge any significant cross-border case on freedom of expression in the context of the media in which Belgian citizens or media are predominantly or exclusively involved.

[151] More about this story on <https://medor.coop/fr/en-attendant-medor/2015/11/19/la-justice-censure-la-sortie-de-medor/>.

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BEUCITIZEN
BARRIERS TOWARDS EU CITIZENSHIP

WP7: CIVIL RIGHTS

QUESTIONNAIRE'S ANSWERS

Italy

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

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Part I

1) Question 1 – Bloggers And Blog Editors

- ✓ Is there any legal (statutory, case law, judicial interpretation) definition for 'blogger' (or 'blog') in your country?
- ✓ Do blogs have to be registered or licensed, or do bloggers need to identify themselves in any particular way?
- ✓ What is the legal status of bloggers? How does it relate to the legal status of journalists? How does it differ?
- ✓ Please explain the extent to which bloggers or blog editors do - or do not - fall under similar legal regimes as journalists, and expose similarities and specificities, as they result from legislation, case law, practices, etc.
- ✓ In particular, are bloggers' sources protected? To what extent is bloggers' freedom of expression protected? What are the limits? What judicial and non-judicial proceedings can be brought against bloggers for violations of rules limiting free speech? What penalties or sanctions do they risk? Have there been any reported cases?
- ✓ Are blog editors/hosts responsible for publications or comments posted on their blog? If yes, under which circumstances and conditions (e.g. 'notice-and-take down'? Criminal, civil liability? etc.) What proceedings can be brought against them? What types of sanctions can be imposed? Have they been reported cases?
- ✓ Must bloggers or blog editors abide by the rules on responsible journalism (eg as stated in the press law or the Code of Ethics for Journalists, etc.)?
- ✓ Is anonymous blogging considered protected speech?
- ✓ What are the circumstances under which a blog can be closed down or access to it blocked (eg apology of terrorism in France)? Do you know of particular instances? Was the measure challenged? How? On which basis?
- ✓ Has there been any issues regarding cross-border aspects which (could) affect bloggers' freedom of expression?
- ✓ Are you aware of any threats of law suits against bloggers or any other types of pressure exercised on bloggers to intimidate them and prevent them from reporting on delicate issues (e.g. death threats, withdrawal of financial support/advertising revenue, pressure on family members, online harassment through comments, etc)?

In order to properly sketch the Italian framework for freedom of expression's issues concerning bloggers and blog editors, it is important to focus on some preliminary remarks as to the possible analogy between the concept of "press" ("*stampa*" according to the Italian legal system) and the various types of citizens' journalism[1].

[1] For a more detailed analysis of the rules applying to citizen-journalists see below answer to Question n. 10.

Indeed, the Italian legal system lacks statutory rules specifically dealing with web journalism and, more generally, with new technologies affecting the changing journalism landscape (blogs, online comments, etc.), especially as far as freedom of expression is concerned in connection to legal provisions protecting other fundamental rights and public interests (such as, for instance, libel offences or insults).

The Italian Law on the press has been passed in 1948 (law no. 47/1948, hereinafter the Press Law) and is still in force although only little modified during the years.

Accordingly, no statutory definition for "blogger" or "blog" does exist in Italy. No statutory law defines their legal status or legal regime distinguishing them from journalists.

Also with reference to registration, liability and preventive censorship the lack of a specific legal framework makes it difficult to avoid legal uncertainty and conflicting decisions by courts.

Nonetheless some important decisions, especially by the Italian Supreme Court, clarified some crucial issues concerning specific aspects of bloggers' freedom.

Without aiming at a comprehensive overview of the rules governing the activities of citizen-journalists, it is worth considering some features of the Italian regime, which proves to directly affect bloggers, their liability and freedom.

First of all, in Italy freedoms of speech and the press are fundamental rights, constitutionally guaranteed[2]. According to Art. 21 of the Italian Constitution "All have the right to express freely their own thought by word, in writing and by all other means of communication" and "The press cannot be subjected to authorization or censorship. Seizure is permitted only by a detailed warrant from the judicial authority in the case of offences for which the law governing the press expressly authorizes, or in the case of violation of the provisions prescribed by law for the disclosure of the responsible parties". The Article also states that "Printed publications, shows and other displays contrary to morality are

[2] An English copy of the Constitution is available at: http://www.senato.it/documenti/repository/istituzione/costituzione_ inglese.pdf. See especially Articles 15 and 21. For a more detailed analysis see answer to Question n. 10.

forbidden. The law establishes appropriate means for preventing and suppressing all violations".

Italy is also a signatory to the European Convention on Human Rights and other relevant international treaties, which have therefore a binding value in the Italian legal system according to Art. 117 of the Constitution, as also underlined by the Italian Constitutional Court. In particular as far as fundamental rights are concerned, it must be stressed that ECHR's rules act as "interposed norms" (*parametro interposto*) in the constitutional legitimacy judgment with reference to the parameter of international obligations, pursuant to Article 117.1 of the Italian Constitution, which states: "legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations"[3]. It means that Italian rules, which may affect freedom of expression at both the national and regional level, shall respect the Italian Constitution as well as EU law and other obligations deriving from international treaties, such as the ECHR.

As far as blogger are concerned the main point is to distinguish professional journalism from journalistic activity, meaning the individual activity of giving information and news (including expressing opinions on it); this said, it is then crucial to understand whether and under which conditions the rules concerning press, editors and professional journalism may be extended to different types of online journalism, and bloggers in particular.

As to the first point, the Italian legal system requires indeed a specific qualification to exercise the professional activity of journalist, notably the registration in the national journalists' Association (*Ordine dei giornalisti*), according to Law no. 69 of 1963[4].

To be more precise, there are two different registers which concern people exercising journalism on a professional basis: the first one concerns the so called "*giornalisti professionisti*" (professional journalists in the strict sense of the term), i.e. professionals practicing in an exclusive and continuous manner the journalist profession; the second one is related to the so called "*giornalisti pubblicisti*", meaning a kind of freelance journalists which

[3] Constitutional Court, decisions number 348 and 349 of 2007.

[4] Legge 3 febbraio 1963, n. 69, Ordinamento della professione di giornalista.

practice the journalistic activity in a paid and non occasional manner as one of their various jobs.

From a general perspective, practicing journalism without this registration can lead to criminal liability ("unauthorized practice of a profession", "*esercizio abusivo della professione*" according to Art. 348 of the Italian Criminal code). This issue needs nevertheless to be clarified in relation to the constitutionally protected freedom of expression. Indeed the prerequisite of the registration to the professional Register (*Albo*) is requested – mainly for rights' protection and liability reasons – only to exercise on a continuous and professional basis the roles specifically connected to the position of journalist, among which that of editor in chief ("*direttore responsabile"*, in Italian). The occasional collaboration with a newspaper or the individual activity of giving information do not need instead the membership in the national journalists' Association since the Italian Constitution, as already mentioned, grants to "all" the right to express freely their own thought by word, in writing and by *all* other means of communication.

Also in the opinion of the Italian national journalist's Association[5] and of the Italian Supreme Court (*Corte di Cassazione*) which stated on this topic since 1971 in one of the rare decisions on unauthorized practice of journalism[6], the law on the journalistic profession (law no. 69/1963) does not contrast with the principle according to which everyone can collaborate with a newspaper without registration in the national professional Register (*Albo*), since the ban concerns only the possibility to practice journalistic activity in a professional and therefore stable manner. For the same reason in the Italian legal system the role of "editors in chief" (*direttore responsabile*) and the resulting liability are strictly connected only to professionals registered in the national professional Register (see Art. 46 of law no. 69 of 1963). In this perspective it is also worth noting that the Italian Constitution acknowledges (Art. 18) the freedom of association also in its "negative" aspect ("*libertà negativa di associatione*", i.e. the right not to be obliged to enroll in an association), meaning that the duty to register in a professional association complies with the Constitution only under certain conditions based on the protection of public interests, as repeatedly clarified

[5] See for instance the decision of 19 April 2010.
[6] Cass., decision no. 256 of 2 April 1971.

by the Italian Constitutional Court (see, for instance, decisions no. 11 and 98 of 1969 on the role of the national journalists' Association[7]). The Italian Supreme Court also underlined that pursuant to art. 21 Const. (freedom of expression) everyone is free to practice occasionally a journalistic activity, thus excluding that the occasional collaboration with a newspaper without registration (although paid from time to time) can be considered as a criminal offence under art. 348 of the Italian Criminal Code.

Notwithstanding the lack of a specific statutory rule on citizen-journalism a distinction between journalistic activity and professional journalism, i.e. between non-professional and professional information, may therefore be clearly drawn. Accordingly, non-professional information, including the critical analysis and discussions of facts and debates affecting the public opinion, made on websites (in most cases not on business basis and lead by a single person), is included in the individual exercise of the freedom of expression protected by Article 21 of the Italian Constitution.

From an individual viewpoint, it must nevertheless be stressed that in Italy these freedoms are not absolute[8]. As we will see also below (especially in relation to the questions concerning social media users and on-line comments), these freedoms are limited by the protection of other individual rights and in particular by means of criminal sentences. Besides the limit of the so called "public morality" ("*buon costume*" according to the Italian Constitution, which expressly mentions this concept as an explicit limit to the freedom of expression[9]), there are several criminal offences which can be realized by means of the expression of one's opinion (i.e. by means of what is protected by art. 21 Const.): the so-called *"reati di opinione"* (literally "crime of opinion").

[7] For a more detailed analysis on the freedom of association in the Italian constitutional system, see, among others, G. Leondini, *Le associazioni tra autonomia privata e controlli pubblici : prospettive di riforma e principi costituzionali*, Padova, 2005; G. de Vergottini, Diritto costituzionale, Padova, 2010; R. Bin, G. Pitruzzella, Diritto costituzionale, Torino, 2015; G. Guzzetta, Il diritto costituzionale di associarsi, Milano, 2003; E. Rossi, *L'art. 2 della Costituzione Italiana*, in E. Rossi (a cura di), *Problemi attuali delle libertà costituzionali*, Pisa, 2010.

[8] For a general overview see answer to question no. 10.

[9] As well known, this concept is likely to change according to the cultural and social developments in the society.

Just to give a few examples, some comments or articles can be considered as an incitement to crime ("*istigazione a deliquere*", punished under several criminal rules) or as an attempt to defend criminal acts ("*apologia di delitti*"). In cases where comments or articles posted online are considered by the courts to go beyond the mere expression of a thought, being suitable to lead to dangerous actions, they cannot be justified under Art. 21 Const.

Moreover, the free expression of thoughts and opinions cannot offend the honor of a person ("*delitti contro l'onore*", i.e. crimes against the honor). Insult is indeed a criminal offence under Art. 594 of the Italian Criminal Code. In the field of information particularly important is defamation, punished as a criminal offence under Articles 595-597 of the Italian Criminal Code and article 13 on the Press Law. Penalties for defamation by means of the press or by other means of publicity ("*altri mezzi di pubblicità*") may amount to imprisonment between six months and six years. It means that irrespective of the qualification of a blog as "press", since it is a mean of publicity, to post a libelous article or a defamatory comment on it is an aggravating factor according to the Italian criminal system, due to the greater circulation of the illegal message that public means permit.

These contents may therefore be blocked or removed and the blog may also be taken down[10] and people posting them may be sentenced.

As to the possibility to block, filter or remove content it must also be stressed that in April 2015, after the terrorist attacks in Paris, the Italian Parliament passed an antiterrorism law, which also criminalizes online terrorist recruitment, endorsement or incitement, thus affecting online-comments and website that can be immediately blocked or taken down by service providers.

This said, it must be underlined that online information activities are numerous and differently characterized. Some of them may indeed be assimilated to the concept of "press" and a mere structural difference based on the tool used (web instead of paper) proves not to be enough to avoid the application of rules and principles concerning the "press". Nonetheless the Italian case-law reached a uniform interpretation clarifying that these rules

[10] As to the seizure of blogs see below.

may not be extended to website, bloggers and other types of citizens-journalism on a general basis, nor automatically.

In 2008 the Italian Supreme Court (*Corte di Cassazione*) clearly stated, on the one hand, that the law (and namely the provisions concerning the press) needs to be interpreted taking into due consideration technological developments, but on the other had that this necessity cannot lead to the consequence that new means of communication (newsletter, blog, forum, newsgroup, mailing list, chat, social network, etc.) may be included as a whole in the concept of "press" irrespective of the specific features of each single type of them[11].

That is why to properly deal with freedom of expression concerning bloggers it is important to understand whether a given blog can be properly considered as an online newspaper, thus subject to the general Italian legal framework for the press.

The possibility to extend this framework to online means of information directly affects some important issues connected to the freedoms of bloggers, namely the registration of the blog and the so-called crime of "clandestine press", censorship and liability of the blogger in cases of illegal comments (especially in relation to defamation issues), and seizure of the blog.

The definition of "press" is included in the Italian Press Law, according to which are considered as "stampa" (press) all "typographic prints" ("*riproduzioni tipografiche*" in Italian) or prints obtained by mechanic or physic-chemical means, in whatever way intended for publication[12].

Two conditions are therefore required: a typographic print and the purpose of publication of the results of that activity.

Law no. 62 of 7 March 2001 then extended the concept of "editorial product" *("prodotto editoriale"*) to the Internet landscape. According to this law *"prodotto editoriale"* is indeed "the product realized on a paper structure (*supporto cartaceo*), included a book, or

[11] Cass., decision n. 10535 of 2008.

[12] Art. 1 of the Press Law: *"Sono considerate stampe o stampati, ai fini di questa legge, tutte le riproduzioni tipografiche o comunque ottenute con mezzi meccanici o fisico-chimici, in qualsiasi modo destinate alla pubblicazione"*, English translation made by the Author.

on a IT structure (*supporto informatico*), intended for publication or in any case to the circulation of information at the public by any mean, also electronic …"[13].

The same provision states that articles 2 of the Press Law applies also to editorial product and that those products that are disseminated to the public with regular periodicity and characterized by a heading ("*testata*" in Italian) which represents an identifying element shall also respect the obligations deriving from article 5 of the Press Law[14].

Article 2 provides for specific elements which shall be contained also in editorial products, and notably the place and year of publication, name and domicile of the printer, name of the owner and of the editor in chief. According to Article 5 no newspaper can be published without the registration at the Tribunal. This registration is therefore needed only in case of dissemination to the public, regular periodicity and the existence of an identifying heading. Pursuant to Article 16 of the same law the violation of this rule is punished as "clandestine press" ("*stampa clandestina*" in Italian). Law no. 249 of 31 July 1997 also states that any news service must register within the Communication Workers' Registry (*Registro degli Operatori di Comunicazione* - ROC) held by the Italian Authority for Communications (AGCOM) and according to law no. 62/2001 products subject to this registration are exonerate from the obligation of the registration at the Tribunal.

Although rarely applied to bloggers, these rules, linked to the extension of the concept of editorial product to the Internet world, raised some interpretative issues as to the duty of registration for blogs.

The "Ruta Case" represents a landmark. The Court of first instance of Modica found Carlo Ruta guilty of publishing a "clandestine newspaper", namely the "*Acccade in Sicilia"*, in the form of a blog without registration. He was fined and forced to take down the blog. The

[13] Law 7-3-2001 n. 62 (Nuove norme sull'editoria e sui prodotti editoriali e modifiche alla L. 5 agosto 1981, n. 416), art. 1: *"Per «prodotto editoriale», ai fini della presente legge, si intende il prodotto realizzato su supporto cartaceo, ivi compreso il libro, o su supporto informatico, destinato alla pubblicazione o, comunque, alla diffusione di informazioni presso il pubblico con ogni mezzo, anche elettronico, o attraverso la radiodiffusione sonora o televisiva, con esclusione dei prodotti discografici o cinematografici"*, English translation made by the Author.

[14] Ibid.: *"Al prodotto editoriale si applicano le disposizioni di cui all'articolo 2 della legge 8 febbraio 1948, n. 47. Il prodotto editoriale diffuso al pubblico con periodicità regolare e contraddistinto da una testata, costituente elemento identificativo del prodotto, è sottoposto, altresì, agli obblighi previsti dall'articolo 5 della medesima legge n. 47 del 1948"*, English translation made by the Author.

case shows the possibility of two different interpretations concerning this duty and based on the possibility to equate or not a website (a blog in this case) to a press publication. The provisions regulating the press have been applied by the court of Modica and then also by the Court of Appeal of Catania in 2011 underlining the fact that the prerequisites of the dissemination to the public, the regular periodicity and the existence of an identifying heading were all features characterizing the blog concerned.

Nonetheless in 2012 the Supreme Court reversed that decision supporting the opposite interpretation. In particular, according to the Court an online newspaper (disseminated only in the internet) does not meet the two conditions required by the Press Law to define a product as "press" ("*stampa"*)[15]. Law no. 62/2001 has introduced the duty of registration of online newspaper only for administrative reasons and namely to benefit from the funds intended for the publishing industry (*"editoria"* according to the Italian law). And indeed this rule has been confirmed also by legislative decree ("*decreto legislativo"*, hereinafter d.lgs) no. 70 of 9 April 2003, whose Article 7.3 states that the registration of the online newspaper is mandatory only for those activities for which the service provider intends to benefit from the funds provided for by law no. 62/2001. In the opinion of the Supreme Court the extension of the duty of registration and therefore of the crime of "clandestine press" to blogs and online newspapers is an extension in *"malam partem"* forbidden by the Italian Constitution (Art. 25.2) and by the Italian criminal law.

Even the decision of the Court of Modica and of the Court of Appeal show anyway that the possibility to extend the framework for the press to bloggers is not automatic but needs to be based on the evaluation of the specific features of the blog and the intention of it.

Another tricky issue concerning the distinction between blogs and press is related to the crime of defamation and, more generally, to the duties of control which may be imposed on the blogger as to what is posted on his/her blog by other people.

Article 57 of the Italian Criminal Code imposes indeed on a newspaper editor the duty to control what is published, in order to prevent breaches of the law. Moreover

[15] See above.

according to Article 596 bis of the same Code, in cases of defamation by means of the press, the provisions punishing this criminal offence are extended also to re editor in chief.

These aspects will be further discussed below[16]. As far as blog are concerned it is nevertheless interesting to stress that, although some judges hold the possibility to extend also to bloggers the criminal liability for the contents published by other people[17], the Italian case-law is almost incline to deny it. Bloggers are therefore liable for their own comments and articles according to the general criminal rules (including the aggravating element represented by the "means of publication" in case of defamation) and for comments and articles posted by other people only in cases in which they played a role in filter them. In this case they are liable on the basis of their complicity in the crime ("*concorso*" according to the Italian criminal law) but not on the basis of the autonomous liability imposed on editors, deputy editor, publisher or printer (for non-periodical press), i.e. the liability for failure to conduct supervision of the content of the publication[18].

Recently, the Court of first instance of Varese (decision no. 116 of 8 April 2013) has confirmed that defamation by means of a blog is an aggravating hypothesis of the criminal offence. Moreover, with a particularly strict decision, although stressing the impossibility to extend the rules concerning the press to blogs, the Court held the blogger guilty on a direct basis (i.e. not under Article 57 of the Criminal Code) of all comments posted (by her herself or by others) on her website. The decision is due to the fact that she has a complete availability of the administration of her website and that the latter, though not having the features characterizing "the press", represented the basis for the building of a sector-based group of interest for writers through discussions on common themes.

From a general perspective, this uncertainty is also the reason why, although no legal requirement expressly exists, bloggers as well as "ISPs tend to exercise some informal self-

[16] Answer to question no. 10.
[17] See, for instance, Court of first instance of Aosta, decision no. 553 of 26 May 2006, then reversed by the Court of Appeal of Torino in 2010.
[18] See for instance Cass., V criminal section, decision no. 35511 of 1 October 2010; Court of Appeal of Torino, decision no. 1073 of 23 April 2010; Cass., criminal section, decision no. 10535/2008.

censorship, declining to host content that may prove controversial or that could create friction with powerful entities or individuals"[19].

Another issue concerning the freedom of blogger is related to seizure. In particular the impossibility to extend the concept of "press" to blogs, especially for those who does not have the characteristic of an online newspaper and are not registered, lead to an important consequence in cases of infringement of the law. The specific protection[20] provided for the press by Art. 21 of the Italian Constitution, pursuant to which "The press cannot be subjected to authorization or censorship. Seizure is permitted only by a detailed warrant from the judicial authority in the case of offences for which the law governing the press expressly authorizes, or in the case of violation of the provisions prescribed by law for the disclosure of the responsible parties"; and stating that "in such cases, when there is absolute urgency and when the timely intervention of the judicial authority is not possible, periodical publications may be seized by officers of the criminal police, who must immediately, and never after more than twenty-four hours, report the matter to the judicial authority. If the latter does not ratify the act in the twenty-four hours following, the seizure is understood to be withdrawn and null and void", cannot be extended to blogger.

They can therefore be seized without those limits[21]. Nevertheless the Supreme Court has recently clarified (in 2014) that the seizure needs to be balanced with the freedom of expression protected by the Italian Constitution. The seizure affects indeed not only the owner of the blog but the constitutional freedoms from a general perspective. Accordingly it can be legitimate only in cases of actual necessity and adequate reasons, i.e. reasons related to criminal offences and that serious to be reasonably balanced with the constitutional protection of freedom of expression[22].

[19] See the Report on Italy by Freedomhouse, available at: https://freedomhouse.org/sites/default/files/FOTN%202015%20Full%20Report.pdf

[20] See below answer to question n. 10.

[21] See, for instance, Court of first instance of Naples, decision no. 1184 of 18 February 2015; Cass, criminal section, 10594/13.

[22] In the case decided by the Court instead the blog, although used for libelous comments, was not considered to have an offensive potentiality ("*potenzialità offensive*" in Italian).

Question 2 – Social Media Users

- ✓ What is the legal framework for the protection of the freedom of expression of users of social media? Are different contexts or situations covered by different legal regimes?
- ✓ Is online speech subject to a different legal regime (e.g. aggravating circumstances)?
- ✓ Can privacy settings increase or decrease exposure to law suits for particular type of illegal speech (eg defamation)?
- ✓ Does the operation of social media groups (e.g Facebook open/closed groups, Google groups etc) pose particular problems for the protection freedom of expression?
- ✓ Who is responsible for illegal speech on social media? Are there any obligations imposed on social networks to prevent/sanction illegal speech?
- ✓ Are social media users' expressive activities hampered by the legal framework or its application to social media (eg mandatory blocking or deletion, etc.)?
- ✓ Has there been any legal case involving social media users or social networks? Are problems which affect freedom of expression on online media reported in the press, forums, etc?
- ✓ Has there been any issues concerning cross-border aspects of social media?
- ✓ Are you aware of any threats of law suits against online users or any other types of pressure exercised on them to intimidate them and prevent them from reporting or commenting on particular delicate issues (e.g. death threats, pressure on family members, online harassment through comments, etc)?

As to the legal framework for freedom of expression of users of social media, it must be stressed that there is no statutory rule specifically concerning this aspect.

The freedom of expression of users of social media is protected by the same provisions concerning this fundamental rights in the Italian legal system. First of all Art. 21 of the Italian Constitution. Moreover, as already mentioned, Italian rules must comply with the obligations deriving from EU law and from other international treaties regarding fundamental rights legally binding in Italy under Art. 117 Const.

Consistently, the freedom of expression of users of social media is subject to the same limits already mentioned above.

From this perspective it is worth underlining Italian courts have expressly decided on matters concerning social media users and social networks, in particular as regards Facebook and, more generally, the enforcement of libel law on platforms.

In 2013, for example, the Court of first instance of Livorno found guilty of libel a young woman who posted negative and racist remarks about her former employer on Facebook. She was fined EUR 1,000[23]. Under the Italian criminal code (art. 595) defamation is punished as a damage to the reputation of a person through communication with several persons. Accordingly, the Court argued, first of all, that a libel may occur through any means, traditional as well online, that can reach a larger public. In the opinion of the Court, Facebook implies a communication with several persons, due to the public character of the virtual space in which the user's expression of thoughts is spread, which come into contact with a potentially undetermined number of users, and consequently the knowledge by many people and an unverifiable circulation of it[24]. Moreover defamation shall be punished more strictly in cases in which the offence is realised through the press as well as through "any other means of publicity". Defamation on social media is therefore an aggravating circumstance.

In another decision the Supreme Court went further founding guilty a non-commissioned officer of the Italian finance police (*Guardia di Finanza*) who posted negative comments against a colleague on Facebook, even though he never mentioned his name. According to the Court "it is sufficient that enough details are included so that the offended person can be identified by as few as two persons"[25].

In 2015 the Italian Supreme Court decided a case about defamation on Facebook, concerning also privacy settings. The competence of two Italian judges was at stake in relation to the seriousness of defamation (whether normal or aggravated under Art. 595.3 of the Criminal Code as regards the aggravating circumstance "through the press or any other

[23] The decision has been debate on the web. See, for instance, 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.

[24] According to the ruling, Facebook "implica … una comunicazione con più persone alla luce del carattere pubblico dello spazio virtuale in cui si diffonde la manifestazione del pensiero del partecipante che entra in relazione con un numero potenzialmente indeterminato di partecipanti e quindi la conoscenza da parte di più persone e la possibile sua incontrollata diffusione".

[25] 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 .

means of publicity"). The Court of first instance of Rome stated that the mentioned aggravating circumstance did not exist since to post a comment on the Facebook timeline of the offended person does not imply publication nor diffusion of a libelous content, which is indeed possible only if the offended person does not activate the privacy settings. Accordingly the competence was to be held by the "*Giudice di Pace*" of Rome (Justice of Peace), which decides on less severe crimes.

The Supreme Court conferred instead the competence to the Court of first instance considering that defamation on the timeline of Facebook is an aggravating circumstance, due to the potential diffusion of the comment that this means implies[26].

As regards the liability of social media themselves, it can exist only on a negligence basis ("*responsabilità omissiva"*, meaning the failure to control and block illegal contents).

Another tricky issue concerning social media is the balance between freedom of expression and other individual rights, such as privacy. In this perspective it must be stressed that there is, again, a difference between the protection of the press and other forms of expression, meaning that from the higher protection acknowledged by the Constitution to the press usually derives a different degree of prevalence of other rights on types of expression other than the press.

The exercise of the right to news reporting (*diritto di cronaca*) is a case in point. The Italian case-law, as well as the legal literature, have constantly affirmed that the exercise of these rights and of the freedom of the press (Article 21 Const.) represents a cause of justification under Article 51 of the Criminal Code, thus making the acts (e.g. the communication of information damaging the honor, the reputation or the dignity of another person) non punishable.

Considering the lack of a thorough framework for new, the application of these principles in the field analyzed is still undefined and debated, especially as regards the application of Article 21 of the Constitution and the freedoms deriving from it in realities different from that of journalism in the professional meaning of the term.

[26] Cass., I criminal section, decision no. 24431 of 08/06/2015. See also Cass., V criminal section, decision no. 4741 of 17 November 2000; Cass., V criminal section, 28 October 2011, n.44126; Cass., V criminal section, decision no. 44980 of 16 October 2012.

Nonetheless, very recently, an Italian Court has for the first time based its decision on the principle of Art. 21 Constitution in a case regarding a social media (Facebook)[27].

The appellant asked for the removal of the libellous and slanderous contents posted on Facebook, which were considered to be against his honor and infringing his right to privacy.

The Court applied the criteria developed by legal scholars and by the case law as regard the right news reporting (*diritto di cronaca*), and namely the social utility or social relevance of the information; the truthfulness of the information (the so called "*verità putativa*" meaning that it may be presumed if the journalist has seriously verified his or her sources of information); restraint ("*continenza*"), referring to the civilised form of expression.

Since the comments met these criteria, the Court dismissed the appeal

Freedom of expression and the right prevailed therefore on the protection of the honor, the reputation and the privacy of the person concerned, in the sense that the comments could not be removed.

Question 3 – On-Line Comments

- ✓ What is the legal status of persons posting online comments? What are the scope and limits of freedom of expression of commenters?
- ✓ Are there different approaches depending on the nature of the host? (newspaper website, blog, or forum?)
- ✓ How different is it from the status of those publishing comments or reactions in the traditional media?
- ✓ Do the most important media outlets have a comment platform?
- ✓ Who is responsible for illegal comments and in what way? ('notice-and-take-down',? Criminal, civil liability? etc.)
- ✓ Is there any incentive for Internet Service Providers to close down or moderate comment platforms? Check specifically whether recent ECtHR jurisprudence in this regard (ie. Delfi v. Estonia) has had an impact in your legal system.
- ✓ What types of proceedings can be brought and against who? What types of

[27] Court of first instance of Rome, I civil section, decision no. 13275/15.

sanctions or penalties can be imposed, and on who?
- ✓ Have there been any important cases or proceedings involving online comments?
- ✓ Has there been any issues involving cross-border aspects in relation to online comments?

Considering the lack of statutory rules specifically defining or affecting the legal status of persons posting online comments, the scope and limits of expression of commenters are the same explained above. Accordingly, proceedings and sanctions are the ordinary ones[28].

Also in this case, the website can be considered as a "means of publicity", in the meaning of Art. 595 of the Italian Criminal Code. As to the difference from the traditional media it is worth stressing that, as already mentioned, in Italy the professional journalist activity is specifically regulated.

The profession of journalist is indeed a so-called "regulated profession" (*professione regolamentata*), the practice of which is subject to specific prerequisites, to the registration to the National Professional Register (Albo) held by the National Journalist Association, and to the respect of a code of ethic[29].

From this specific personal status derive different limits but also a different protection of the freedom of expression, if compared to those of "ordinary citizens".

Accordingly, in Italy the difference between professional and non-professional information and expression of opinion (or between professional journalism and journalistic activity) along with the different legal nature of the host (newspaper in the meaning of the Press Law, blog or forum) prove to perform an important role in determining the concrete scope and the actual limits of the freedoms granted by the Constitution.

In this perspective, the Supreme Court has clearly distinguished a forum from the concept of press stating that the principle to be applied is the general freedom of expression and not the more specific framework for the freedom of press. In particular, the seizure of a forum was at stake.

In the opinion of the Court the comments on a forum cannot be included in the concept of "press", nor in the wider one provided for by law n. 62/2001, which, as already seen, extended come rules of the Press Law to the "editorial product" (see above).

The fact that messages and comments are visible to everyone or at least to those who are registered in the forum does not imply that the latter might be considered as an editorial product, nor as an online magazine.

[28] See answer to Question no. 10.
[29] See below.

A forum is therefore – according to the Supreme Court – a mere "discussion area" which is not subjected to the rules and limits governing the press. At the same time a forum cannot benefit from the higher protection acknowledged to the press and in particular for the limits to seizure.

On the one hand, as already stated in other rulings, the law (and namely the provisions concerning the press) needs to be interpreted taking into due consideration technological developments, but on the other hand this necessity cannot lead to the consequence that new means of communication (newsletter, blog, forum, newsgroup, mailing list, chat, social network, etc.) may be included as a whole in the concept of "press" irrespective of the specific features of each single type of them.

The online comments published on a forum are thus considered as messages written on a notice-board (in a public or private place). They are therefore means of expression of one's thoughts or means of information protected by the Constitution, but they cannot be included in the concept of press, although in its wider meaning.

With reference to the liability for illegal comments, as already said, courts decisions are not uniform. This issue is indeed strongly connected to the nature of the host, which need to be defined case by case and not on an automatic basis.

Art. 57 of the Criminal Code (liability for failure in controlling), for instance, is usually considered as not applicable, due to the impossibility to extend the framework for the press to online means of communication as a whole.

Nonetheless, in line with what has then been stated also by the recent ECTHR jurisprudence, an Italian Court (Court of first instance of Varese) found guilty (criminal liability) the blogger on a direct basis (i.e. not under article 57 of the Criminal Code) of all comments posted (by her herself or by others) on her website.

This is a principle which may be generally applied to online comments and indeed, as stated also by the Report on Italy by Freedomhouse, in recent years several "cases of defamation have been brought against online content providers and intermediaries that have led to the blocking or filtering of ICT content"[30].

Question 4 – Types of Barriers

- ✓ What legal regime applies to Wiki contributors? Is the freedom of expression of Wiki contributors limited? In what way? Who is responsible for illegal statement on Wiki contributions? What proceedings can be taken against Wiki contributors? What sanctions or penalties do they risk?
- ✓ Have there been cases or controversies in which the freedom of expressions of wiki

[30] Report on Italy by Freedomhouse "Italy", op. cit.

contributors have been at stake?

- ✓ Has there been any issues regarding cross-border aspects which (could) affect bloggers' freedom of expression

From a general perspective, the freedom of expression protected by the Italian Constitution includes also the right to information and to be informed.

Wikipedia contributors do not act as citizen-journalist since their information aim at being sources of knowledge on different topics in a "encyclopaedic" manner. None of the aspects which may affect new forms of journalism or a wider concept of press may be therefore extended to Wikipedia.

No statutory rule specifically concerns the freedom of expression of Wiki contributors.

Also this field is therefore regulated by the ordinary provisions, limits and sanctions governing non- professional expression of thoughts.

A possible hindrance, which was likely to affect also Wikipedia, is represented by the rule included in a draft bill on wiretapping aiming at imposing to all online means of communication the duty of "*rettifica*" (meaning correction, to rectify) within 48 hours.

This rule, which is meant also for bloggers and other types of citizen-journalism (the so called "*comma ammazza-blog*", i.e. paragraph meant to "kill" blogs), has been strongly contested and raised several concerns also for Wiki contributors. See for instance the message published by the Italian Wikipedia in 2011, meant to inform as well as to protest against this reform[31]. In particular as a protest against this rule the contents of Wikipedia (Italian version) were hidden and the website was blocked by its administrators.

By now this rule has not been passed by the Italian Parliament.

There are no specific controversies in which the freedom of expressions of Wikipedia contributors have directly been at stake.

[31] https://it.wikipedia.org/wiki/Wikipedia:Comunicato_4_ottobre_2011

Question 5 – Others Types Of 'Citizen-Journalism'

- ✓ If not covered by the previous answers, please describe here the concept, status, legal framework, judicial interpretation etc. on any other type of person engaged in what could be considered 'citizen-journalism' and any problems and barriers to freedom of expression and information, which may result in your country. Please pay particular attention to situations involving cross-border dimensions.

Since, as already said, the Italian legal system lacks specific framework for new types of communication and of citizen-journalist, there are no other specific concept, status, legal framework or judicial interpretation in the field.

Question 6 – Institutional Context Of Citizen Journalism

- ✓ Discuss here whether there are any specific problems with the institutional context of citizen journalism in your country.
  In particular, this includes checking whether the media authority is independent, whether the courts are able to provide adequate protection to citizen-journalists, whether citizen-journalists are subject to pressures (eg. frequent audits, investigations on other grounds, etc.)

Since, as already said, the Italian legal system lacks specific framework for new types of communication and of citizen-journalist, there are no other specific concept, status, legal framework or judicial interpretation in the field.

In the Italian legal system, freedom of expression includes also freedom to inform and according to the Italian case-law the latter must be protected also in its passive meaning, i.e. the right to be informed. This right is properly granted only if characterized by the pluralism of sources from which knowledge and news may be derived[32].

This need lead to the so-called "anti-trust" law, which since 1981 has tried to control property issues concerning newspaper, radio and television services, in order to make them

[32] This is a principle stated by the Italian Constitutional Court since its decision no. 112/1993 *("qualificato e caratterizzato…dal pluralismo delle fonti da cui attingere conoscenze e notizie"*). See, for instance, R. Bin, G. Pitruzzella, *Diritto costituzionale*, Torino, 2015, at 530.

transparent and to avoid dominating and controlling positions (the so-called *"posizioni dominanti"* according to the Italian legal system) by some actors[33]. The Italian institutional context in this field is based on the role performed by the so-called "autorità amministrative indipendenti" (Indipendent administrative authorities), i.e. bodies which distinguish themselves from other institution because they:

- are independent from the Government and from its political orientation;
- perform control and arbitration functions in some economic sectors;
- they are intended to guarantee rules usually based on EU values, especially those concerning the competitive market.

In the field of information, the main regulatory body is the Authority for Communications (AGCOM), an independent agency established in 1997 (law no. 249/1997). The AGCOM is accountable to the Italian parliament. Among its tasks we may mention: providing access to networks, regulating advertisements, protecting intellectual property rights, and overseeing public broadcasting[34].

In recent years this authority had to deal with the various phenomena regarding technological platforms, social media, ultra-broadband networks and a variety of communication services. The technological development together with the changes in the role of the consumers and of the citizen in the world of web information posed new challenges not only to the Parliament but also to regulatory authorities: "alongside the traditional issues of competition, they must also face the new problems of the digital age represented, among others, by on-line fraud, from digital piracy to identity theft, in an economic and social context characterized by new players and by increased consolidation and integration between the leading telecommunications service providers, content providers and content producers"[35].

[33] See below answer to question no. 7 as regards state funds and the regulation of the advertising market, which represents the main source of founding in this field.
[34] More detailed information are available on the AGCOM website: http://www.agcom.it/home (the English versions of the Annual Reports of this Authority are also available).
[35] See the AGCOM Annual Report of 2015, where also the Authority's organization and relations with the institutions are deeply described. The Report is available at: http://www.agcom.it/annual-report

In its activities the Authority tries to promote and protect pluralism in granting equal access to the media, as well as to promote a culture of legality in the use of digital works, "combining the principles of transparency, effectiveness and efficiency in its administrative action"[36].

As far as freedom of information is concerned, AGCOM has undertaken several initiatives aimed at defending this freedom, especially by promoting to promote and protect information pluralism, while at the same time ensuring the necessary protection to the more vulnerable groups - such as children - in their access to communication services and content. In this perspective, one of the important measures adopted was the establishment of the highlights of the Observatory to protect minors and guarantee people's fundamental rights on the Internet[37].

Another independent Authority that should be mentioned is the Italian Data Protection Authority (*Garante per la protezione dei dati personali*, hereinafter IDPA) set up in 1997 to protect fundamental rights and freedoms in connection with the processing of personal data, and to ensure respect for individuals' dignity[38].

In particular, this Authority played an important role in defining some crucial rules governing journalism and the journalistic activity, as well as in granting the so-called "right to be forgotten" (*diritto all'oblio*) which may also affect freedoms of information and freedoms of expression on the web[39].

Question 7 – Funding

- ✓ How is citizen journalism funded? Are there any NGOs promoting citizen journalism? What about local or central government, universities, businesses etc.? As far as possible, try to gather information on the business models of blogs, institutional

[36] Ibid.
[37] Ibid.
[38] For more detailed information see the IDPA website (English version): http://www.garanteprivacy.it/web/guest/home_en
[39] See below Answer to Question no. 10. See also the National Report on Italy by P. Guarda in Deliverable 5.2. of the BEUCITIZEN Project "The implemementation of economic rights ins three areas in seven Member States".

hosts, etc. Play particular attention to blogs or other types of citizen-journalism which exercise a close scrutiny of government, business practice, and controversial policy areas (e.g. immigration, refugees, etc).

- art 21 Const on funds;

- law 62/2001 and the need for registration to profit from them.

With reference to funding issues, from a general perspective, it must be underlined that according to the Italian Constitution, "the law may introduce general provisions for the disclosure of financial sources of periodical publications.".

Accordingly, and also with the purpose to promote and protect information pluralism, the Italian Parliament has regulated one of the most important market for publishing industries, i.e. that of advertising and passed some acts governing state funds to journalism.

Again, as regards funding the difference between traditional press and new forms of digital journalism plays a crucial role in determining the possibility, the scope and the limits of this kind of funding. Indeed the Italian rules on publishing industries (*leggi sull'editoria*) have usually been meant only for traditional newspapers, providing for direct or indirect funding according to several criteria, such as the nature, the characteristics of the newspaper and the quantity of copies.

As already mentioned, law no. 61 of 2001 extended the concept of "editorial product" also to electronic forms of communication and provides for some funds[40]. The parliament has recently passed a law converting a decree in this field extending the possibility of funding also to the digital world: the already mentioned law no. 63 of 2012[41]. Anyway this possibility is provided only for type of publication which can be considered as online newspaper and is subject, as already underlined, to the registration.

[40] Law no. 61/2001 ("Nuove norme sull'editoria e sui prodotti editoriali e modifiche alla legge 5 agosto 1981, n. 416").

[41] 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".

For other types of citizen-journalism and social media the main source of funding is advertising. Indeed also according to the AGCOM Annual Report: "with regard to the economic resources, it can still be stated that advertising represents the main source of income for those who operate on the internet", and "In Italy, the online advertising sector has amply exceeded, in value, one billion euro, representing at present the second advertising means after television"[42].

There is anyway a partial change and the so-called premium models are becoming more common, i.e. financing through forms of direct payment. In some cases they are driven by a part of the contents that are free.

The internet is indeed a sector of growing importance, both from the pluralism of information viewpoint and with reference to the economic-competitive perspective. In this field, as stated also by the AGCOM "the economic models underlying the services on the internet extend from those that are completely free, funded entirely or partly by advertising, to services that are entirely for payment. In any case, the sale of advertising space is the major financial resource, above all of the news sites which produce effects on information pluralism. In this sense, online advertising takes on a strategic relevance not only for the competitive situation on the web, but also for the protection of pluralism"[43].

8) Question 8 – Other Obstacles

- ✓ Please provide here any other information which you deem relevant to assessing the freedom of expression of citizen-journalists, or their impact on the freedom of information or expression of citizens in general (e.g. issues regarding the quality or objectivity of information coming from citizen-journalists)

With reference to other obstacles, at least two further aspects need to be underlined: on the one hand the general impact of citizen-journalism in the Italian legal system and on the other hand some issues regarding their quality and/or objectivity.

[42] AGCOM, Annual Report, op. cit.
[43] Ibidem.

As to the first point, notwithstanding the lack of a specific legal framework for citizen-journalists and some strict rules concerning traditional journalism and the so called "*reati di opinione*", online forms of communications, especially blogs, forum and comment platforms in online newspaper, are widespread in Italy and increasingly used, also by political actors.

According to the Report on Italy made by Freedomhouse "Blogging is now very popular in Italy, though television remains by far the leading medium for obtaining news. Most policymakers, popular journalists, and figures in the entertainment industry have their own blogs, as do many ordinary citizens. Social-networking sites, especially Facebook and Twitter, have emerged as crucial tools for organizing protests and other mass gatherings, such as concerts, parties, or political rallies, although, at times, some content may be aggressive. As of end of 2013, the country was home to over 26 million Facebook users (42.4 percent of the population, up more than 5 percent from 2012), the 11th highest number in the world"[44].

This result is also due to the role played by the Italian case law in mitigating some limit or in balancing from a concrete perspective the different rights involved in various contexts in which the freedom of expressions is exercise.

As far as the role of case la is concerned it is also important to stress that "the Venice Commission observes that while the wording of Articles 595 and 596 of the Italian criminal code raises issues under the European Convention on Human Rights, the interpretation and application of these two provisions appear to have been corrected and brought more in line with European standards"[45].

As to the second point, it is important to underline that some types of citizen-journalism may lack adequate control, especially in relation to the objectivity and the quality of the information coming from them.

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[44] See the Report on Italy by Freedomhouse "Italy", op. cit., quoting Social Times Daily, 10 September, 2013, http://it.socialtimes.me/stat/IT. See also Censis, "XII Rapporto Censis/Ucsi sulla comunicazione. I media personali nell'era digitale", 2015 (http://www.censis.it/7?shadow_comunicato_stampa=121009).

[45] See the opinion n° 715 / 2013 by the European Commission for Democracy through law (Venice Commission): "Opinion on the legislation on defamation of Italy", adopted by the Venice commission at its 97th plenary session (Venice, 6-7 December 2013).

This might affect the trust of ordinary citizens towards journalism and turn to be a crucial problem if compared to the potentially wide and unverifiable diffusion of news and information that the online means permit.

The lack of a widespread, uniform, and legally based system of bottom-up regulation, including codes of conduct like that of journalist, does not help in creating a framework able to foster trust, verified and legal communications, while at the same time avoiding too strict forms of state control on the exercise of freedoms of expression by citizen-journalists.

Question 9 – The Concept Of 'Citizen-Journalist'

- ✓ Based on the above, would you suggest that there is such a concept as citizen-journalist in your country? If not, are they equivalent? (Please, specify it in the original language version.) Do (different type of) citizen-journalists have a particular legal status? If yes, who does this status cover (eg bloggers, authors of on-line comments, forum or wiki contributors or social media users, others?) If not, are citizen-journalists treated as 'ordinary citizens' or 'ordinary journalists'?

In Italy there is a concept that can be considered equivalent to citizen-journalism: "*giornalismo partecipativo*". This term stresses the participation of citizens to the journalistic activity. It therefore covers bloggers, forum, authors of on-line comments and various types of online information coming from citizens, including for instance videos, whereas Wiki contributors or social media users, if not involved in an information activity can hardly be considered as citizen-journalists.

As already stressed, in the Italian legal system, citizen-journalists do not have a particular legal status and are usually treated as "ordinary citizens" except for those cases in which the means used takes the form of a newspaper that might be included in the concept of "editorial product" and the citizen giving the news is registered as a professional journalist. In the latter case the person posting the news in the Internet acts and is treated as a "ordinary journalist".

Again, the difference between non-professional and professional information as well as the nature of the host are important in defining the applicable legal framework.

Question 10 – General Context Of Protection And Regulation Of Journalism

IMPORTANT NOTE
We do not expect here a full overview of rules regulating the activities of journalists or the press/media in general. What we need is a presentation of these rules, to the extent that they may apply to various types of citizen-journalists, and help understand the above. We encourage you to integrate this information in the relevant parts of the questionnaire, whenever they are applicable. We would however like you to pay particular attention to the three main following aspects.

Privacy – protection of sources

- ✓ Obtaining information is at the heart of journalistic work, and can often only be secured through offering protection to sources.
  How are journalists' sources protected? Identify and present the relevant constitutional, legislative, regulatory or caselaw which define the scope and limits of the protection of journalists sources?
- ✓ How can journalists preserve the secrecy of their sources? What kind of proceedings can be brought against journalists to force them to reveal their sources? Through which procedure or mechanisms can journalists challenge instructions or orders to give access to their sources? Are these sufficiently protective or would they incite journalists to reveal their sources?
- ✓ Have there been any legal controversy related to the protection of sources of journalists in the country under study.
- ✓ Are you aware of pressure being exercise on journalists to reveal sources although they were not legally obliged to? If so, what types of pressure?

Protection of journalistic material (photos, cameras, phones, etc.)

- ✓ Once journalists obtain information, they should be able to preserve their material support.
  To what extent are journalists, including citizen-journalists, equipement protected? What are the police stop, search, seizure powers in relation to evidence?
- ✓ Are you aware of destruction of evidence through seizure or destruction of journalistic equipement or information support (e.g. recorders, cameras, laptops, etc) by police, military or other security actors)?

Freedom of expression and its limits

- ✓ What is the scope of the freedom of expression of journalists/editors? Is it different from that of ordinary citizens? Are they subject to special obligations and duties which affect their freedom of expression and information?
- ✓ What are the limits on freedom of expression of journalists/editors (eg defamation, blasphemy, hate speech, government secrecy, privacy laws, etc.). Is the regime a preventive one (eg which requires authorization to publish certain materials), or repressive (eg which sanctions abuses of free speech)?
- ✓ What types of proceedings can be launched against journalists for abuse of free speech (eg civil tort action, criminal proceedings, disciplinary actions, special procedure under press law, etc,)? Which penalties and sanctions may be imposed? Please, discuss any problematic aspects of the proceedings, such as high costs, length, limited review, burden of proof, etc.
- ✓ Has there been any criticism in relation to the responsibility expected from journalists, or any other issues involving fears of chilling effect or self-censorship (e.g, unnecessary litigation against them, even if regularly ending without sanctioning the journalists, reported violence or threats against journalists, pressure from media owners or editors, etc.)?

Cross-border issues

- ✓ With the international distribution of newspapers, cross-border TV broadcasting, and the circulation of news through the Internet with portals which are accessible across borders, procedure for abuse of free speech can be brought before the courts of countries which have stricter legislation on defamation or privacy, and whose decision could then be enforced across border through the application of EU cross-border rules on the recognition of judgment in civil matters, or lead to prosecution and arrest under a European Arrest Warrant.
  Are you aware of any such case, which involve your country or one of its citizens? If so, please detail.

With particular reference to the duty of confidentiality and the professional secrecy (*segreto professionale*), it is worth noting that several sources of law do impose and protect it.

First of all to infringe the secrecy may be considered as a criminal offense under Art. 622 of the Italian Criminal Code. The principle is also embedded in law no. 69/1963 regulating the profession of journalist and in the code of professional ethics approved by the National Journalist Association. As a consequence the violation of the secrecy may lead to a disciplinary liability (Art. 48 Law no. 69/1963).

Professional secrecy is also protected by the Code of Criminal Procedure (Art.200) stating that the professional journalist cannot be obliged to testify and reveal the name of the people from which he/she has obtained the news. Nonetheless it is also provided that in cases where the information is essential for the evidence of the crime and its truth can be proven only through the identification of the source, the judge can oblige the journalist to reveal it.

The professional secrecy is therefore strongly protected but balanced with other important public interest and rights, especially as far as the administration of justice is concerned.

The Italian case law had to repeatedly settle disputes on it and on the protection of journalists' materials, trying to reasonably comply with the mentioned balance mitigating the duty to reveal or clarifying the framework for the seizure of materials, also considering the ECHR.

Just to give a few example, Italian judges extended the protection of the professional secrecy also to the so-called "*giornalisti pubblicisti*" (see above), even though the Criminal Procedure Code only refers to the "*giornalisti profesionisti*" (professional journalists in the strict sense of the term, as above explained)[46]. The principle is based also on Art. 10 of the ECRH which is binding in the Italian legal system.

As to the seizure of the laptop and other materials, the Italian case-law denies the possibility of indiscriminate invasive interferences in the professional sphere of the journalist.

In particular it has been stated that the seizure of the whole laptop in not legitimate when the search is aimed at founding only a document. Indeed, according to the case-law, the seizure of the laptop represents a significant and unlawful interference on the journalistic activity of the investigated journalist since it makes it possible for the investigating authorities to know the sources of the professional also with reference to facts

[46] See for instance the decision by the 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.

other than those concerned by the proceeding[47]. The Court of first instance of Ragusa has specifically underlined that the interference on journalists' sources and information likely to lead to their identification, in order not to infringe theECHR, must be provided for by the law an subject to the control of a third and impartial authority. Accordingly the seizure of the laptop in unlawful if it does not come after and order to display the acts need by the judicial authority. Only in cases in which the journalist refuses to display them opposing the professional secrecy and the judiciary authority has fulfilled other inspections with negative results, the seizure can be lawfully done[48].

Also the Italian Supreme Court has recently further clarified some important aspects concerning the seizure of journalists' materials, and laptop in particular, by making reference to both the ECHR and the UN pact on civil and political rights.

The Court held that:

- the protection of the professional secrecy does not represent an exclusive privilege of journalists, but rather a fundamental guarantee of the freedom of information;
- in order to properly balance this protection with the needs related to criminal investigations it is fundamental to respect the principle of proportionality in the search of evidences;
- it is consequently essential that the order to display and the possible consecutive seizure concerning a professional journalist are motivated not only with reference to the link between the news and the criminal investigation but also as regards the absolute necessity of that specifically mentioned material to the verification of the facts.

With reference to the limits of freedom of expression, as far as privacy is concerned it must be also underlined that rules on privacy matters are embedded in the Italian Data

[47] See for instance the recent decision of the Court of first instance of Ragusa in 2014.

[48] Ibid.

Protection Code (IDPC) (Legislative Decree 30 June 2003, no. 196), which has also incorporated provisions of EU directives[49].

The framework for privacy aims at ensuring that personal data is processed in compliance with the data subjects' rights, fundamental freedoms and dignity, with particular reference to confidentiality, personal identity, and the right to personal data protection.

The respect of this framework is granted by the already mentioned IDPA.

The processing of personal data for journalistic purposes is specifically governed by the IDPC, whose Art. 136 ff provides a specific exception to the consent of the data's subject. This exemption applies only to processing that are "carried out in the exercise of the journalistic profession and for the sole purposes related thereto", or "carried out by persons included either in the list of free-lance journalists or in the roll of trainee journalists as per Sections 26 and 33 of Act no. 69 of 03.02.63", or "carried out on a temporary basis exclusively for the purposes of publication or occasional circulation of articles, essays and other intellectual works also in terms of artistic expression".

As to newspapers, the online publication of personal data of people mentioned in an article is normally lawful. The IDPA has nevertheless passed a Provision in 2004 on "Privacy and journalism" clarifying some aspects also with reference to some concerns raised by the National Journalist Association (*Ordine dei giornalisti*). In particular the authority stressed that even without the consent of the parties concerned, the processing of data for journalistic purposes must comply with some specific principles, namely proportionality and reasonableness, indispensability compared to the journalistic duty of the press, veracity of the facts, real interest of the public opinion to be informed on matters of detail.

In this perspective, the IDPA has stated for instance that "the possibility of spreading this information must get to grips with some fundamental guarantees granted to such persons. The journalist has to assess, for example, whether to disclose the full generality of

[49] See G. Finocchiaro, *Privacy e protezione dei dati personali. Disciplina e strumenti operativi*, Torino, Zanichelli, 2012; P. Guarda, *Data Protection, Information Privacy, and Security Measures: an Essay on the European and the Italian Legal Frameworks*, in *Ciberspazio e dir.*, 2008, 65 (available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1517449)

those who are affected by an investigation still in very early stage, and modulate the assessment of the gravity of the judgment charge".

Alongside the already mentioned rules embedded in the IDPC, with specific reference to the processing of personal data on online means of information and publicity, it must also be considered that due to the global accessibility to online information, the disclosure and/or the journalistic purposes pursued through the processing of personal data concerning third persons must also be balanced with the data subject's right to be forgotten, meaning the right to avoid the indefinite staying on the Internet of data and information dating back in time, such as for instance in online articles or comments.

The IDPA intervened several times to guarantee the fundamental right to be forgotten[50]. Accordingly it imposes for instance to the editor of the website to take "every measure technically suitable to prevent the identity of the applicant contained in the article published online under investigation is found directly through the use of common search engines external to the Internet website (including, for example, by preparation of different versions or different presentation modalities of the web pages involved according to the research tools used by users – Internet search engines or search functions within the website".

Also the Italian Supreme Court has recently ruled on this right stating that "if the public interest underlying the right to information (Art. 21 of the Italian Constitution) constitutes a limit to the fundamental right to privacy (Artt. 21 and 2), the person to whom the data pertain is correspondingly given the right to be forgotten (see Cass., 4 September 1998, no. 3679), and that is that news are not further disclosed, when due to the passage of time they are already forgotten or unknown to the majority of associates. Since the processing of personal data may involve also public or published data (see Cass., 25 June 2004, no. 11864), the right to be forgotten actually safeguards the social projection of personal identity, the subject's need to be protected from disclosure of information (potentially) harmful, since missing the topical character (because of the lapse of time), so

[50] See for instance the Provision on "Online historical archives of newspapers and availability of data concerned by external search engines" (8 April 2009).

that its processing is no more justified and indeed likely to hinder the subject in the developing and enjoyment of his/her own personality".

As to the types of proceedings that can be brought, with reference to privacy issues, three remedies can be used before the IDPA: the circumstantial claim (*reclamo circostanziato*), used to report an infringement to the regulation regarding personal data processing; the report (*segnalazione*), that is used when it is not possible to claim through a "*reclamo*" to ask for the monitoring of the IDPA; and the claim (*ricorso*) aimed at claiming specified rights (art. 141).

Besides privacy matters, as already mentioned the Italian legal system provides for other specific limits to the freedom of expression.

The first one, expressly mentioned by the Italian Constitution is the "public morality".

As well known, this concept is likely to change according to the cultural and social developments in the society. Some contents that were considered against the "public morality" in a given period turned then to be legitimate on the basis of the changes in what is perceived as morally acceptable in the society. See for instance the cases decided by the Italian Constitutional Court on information aiming at persuading people to use contraceptives, that was considered as a propaganda against pregnancy, punishable under the Italian criminal code ("*incitamento a pratiche contro la procreazione*", Art. 553 Italian Criminal Code). In 1965 the criminal rule was not considered in contrast with the freedom of expression (Corte cost., decision no. 9/1962) whereas the decision was completely overruled in 1971 when the Constitutional Court considered the same article of the Criminal Code not in compliance with Art. 21 Const. on freedom of expression[51].

Limits and restrictions which may lead to content removal and/or to different kind of liability (civil, administrative, criminal or disciplinary) are linked to the already mentioned acts concerning the press (the Press Law, the law governing the profession of journalists, the code of professional ethics, etc. see above) or to specific hypothesis prohibited by Italian law as criminal offences.

[51] See R. Bin, G. Pitruzzella, *Diritto costituzionale*, Torino, 2015; G. de Vergottini, *Diritto costituzionale*, Padova, 2010.

According to the Freedomhouse Report: "Italian authorities continue to request the removal of specific content, though the amount is limited. According to Google, the government issued 65 requests for content removal between July and December 2013 (compared to 33 over the previous six months), a considerable increase[52]. 77 percent of the requests were broadly interpreted as "defamatory". Finally, a draft bill being introduced in parliament in March 2015, as part of new anti-terrorism law, may affect ISPs as well, because, if passed, it would oblige ISPs to remove controversial material (especially hate speech)[53]".

In this perspective, the antiterrorism law shall also be mentioned and as a consequence of the law passed in April 2015, after the terrorist attacks in Paris, online terrorist recruitment, endorsement or incitement are criminalized and therefore online-comments and website can be immediately blocked or taken down by service providers on this basis.

Filtering is also applied to protect vulnerable subjects, for instance against child pornography o against gambling.

In particular, as already mentioned, several criminal offences can be realized by means of the expression of one's opinion (i.e. by means of what is protected by art. 21 Const.): the so-called *"reati di opinione"* (literally "crime of opinion").

Some comments or articles can be considered as an incitement to crime ("*istigazione a deliquere*", punished under several criminal rules) or as an attempt to defend criminal acts ("*apologia di delitti*"). In this cases it must however be stressed that according to the Italian case-law, especially by the Italian Constitutional Court, a person can be found guilty only if comments or articles posted online are considered to go beyond the mere expression of a thought, being suitable to lead to dangerous actions, they cannot be justified under Art. 21 Const.

[52] Google, "Removal Request by Country," Transparency Report, January- June 2014, accessed May 31, 2015, http://bit. ly/1dWNrJq.

[53] AntiDigital Divide, "Decreto antiterrorismo: Troppi poteri nella mani della Polizia?" March 26, 2015, http://bit.ly/1MnveGn.

In this perspective, it is worth mentioning a recent Italian case concerning Erri de Luca, a famous Italian writer who risked a five year prison for inciting criminal damage to the so-called TAV, a high-speed rail link between Italy and France through the Alps which is highly controversial in Italy and which lead to many protests and attempts of sabotage. The main issue at stake was indeed the use by the journalist of the term "sabotage" in his speeches where he stated that the TAV had to be obstructed, and namely sabotaged. Finally he has been acquitted in October 2015.

Furthermore the free expression of thoughts and opinions cannot offend the honor of a person ("*delitti contro l'onore*", i.e. crimes against the honor). Insult is indeed a criminal offence under Art. 594 of the Italian Criminal Code. As already explained, in the field of information libel is particularly important since defamation actions are likely to lead to self-censorship by journalists and blogger and also because it represents a tricky issue in the balance between freedom of expression and other individual rights.

Defamation is indeed punished as a criminal offence under Articles 595-597 of the Italian Criminal Code and article 13 on the Press Law. Moreover, penalties for defamation by means of the press or by other means of publicity ("*altri mezzi di pubblicità*") may amount to imprisonment between six months and six years. To post a libelous article or a defamatory comment on the web is therefore an aggravating factor according to the Italian criminal system, due to the greater circulation of the illegal message that public means permit.

In this field, but also as far as privacy or other individual rights are concerned, the right to news reporting (*diritto di cronaca*) must be mentioned since its exercise represents a cause of justification under Article 51 (exercise of a right) of the Criminal Code, thus making the acts (e.g. the communication of information damaging the honor, the reputation or the dignity of another person) non punishable.

A landmark ruling of the Italian Supreme Court constantly set out the three criteria for the application of Article 51 in this field[54] and is constantly applied by Italian civil and criminal courts. The conditions under which an article or a comment is not punishable are:

- the social utility or social relevance of the information;

[54] Cass., I civil section, decision of October 18, 1984.

- the truthfulness of the information, which can also be a mere "*verità putative*" if the journalist has seriously verified his or her sources of information;

- restraint ("continenza"), referring to the civilised form of expression, which must not "violate the minimum dignity to which any human being is entitled" [55].

Also according to the Italian Constitutional Court the exclusions and the limitations of the so-called *exceptio veritatis* under Article 596 of the Italian Criminal Code "are not applicable when the defendant exercises the cause of justification related to the freedom of expression recognized by Article 21 of the Constitution, asserting the truthfulness of the information"[56].

Finally, it is worth underlining some specific guarantees provided for the press in relation to the seizure. From a general perspective the Italian Constitution prohibits forms of preventive controls and therefore preventive authorizations and censorships[57].

The guarantees are particularly strict.

First of all the so-called "riserva di legge", meaning that the matter can be regulated only by the law. Indeed according to Art. 21 of the Constitution "Seizure may be permitted only by judicial order stating the reason and only for offences expressly determined by the law on the press".

However the Article also adds "or in case of violation of the obligation to identify the persons responsible for such offences". It means that the press is free but it cannot be anonymous in order to protect the individual rights of people that might be affected by it. That is the reason why, as already seen, the Press Law provides for specific rules concerning the functions and liability of the editor in chief (*direttore responsabile*) and the law

[55] For a more detailed analysis see the Opinion n° 715 / 2013 by the European Commission for Democracy through law (Venice Commission): "Opinion on the legislation on defamation of Italy", adopted by the Venice commission at its 97th plenary session (Venice, 6-7 December 2013).

[56] Ibid. See Constitutional Court, decision no. 175, 5 July 1971.

[57] Art. 21.1 Const. "The press may not be subjected to any authorization or censorship". For a more detailed analysis see for instance R. Bin, G. Pitruzzella, Diritto costituzionale, Torino, 2015; G. de Vergottini, Diritto costituzionale, Padova, 2010.

governing the journalist profession requires the registration to the National Professional Register (Albo) held by the National Journalist Association (*Ordine dei giornalisti*).

Moreover the press is protected from seizure by the so-called “riserva di giurisdizione”, according to which it must be ordered by the judiciary authority, and only “when there is absolute urgency and timely intervention of the Judiciary is not possible”. In this case “a periodical may be confiscated by the criminal police, which shall immediately and in no case later than 24 hours refer the matter to the Judiciary for validation. In default of such validation in the following 24 hours, the measure shall be revoked and considered null and void”.

As already stated above, the difference between professional and non-professional information and between the press and other means of communication proves to play a crucial role in determining the scope, the limits and the specific guarantees of the freedoms of expression in Italy. At the same time, even though e specific legal framework is still lacking, the case-law plays an essential function in granting these freedoms and their balance with other individual righs in the field of citizen-journalism and new technologies.

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BEUCITIZEN
BARRIERS TOWARDS EU CITIZENSHIP

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

Task 7.3 (iii)

National reporter: Pauline Phoa, LLM (Utrecht University, the Netherlands)

QUESTIONS

1) BLOGGERS AND BLOG EDITORS

1.1 Is there any legal (statutory, case law, judicial interpretation) definition for 'blogger' (or 'blog') in your country?
A search on wetten.overheid.nl shows that there is no legal definition for 'blogger' or 'blog' in the Netherlands and that these words do not appear in any law or regulation. The word "weblog" is used in only two Dutch regulations:

- The "Aanwijzing Opsporingsberichtgeving" [Guideline Investigation Notifications] mentions using a "weblog" to disseminate an investigation notification, but it does not define "weblog".[1]

- The "Richtsnoeren publicatie van persoonsgegevens op Internet"[2] refers to "weblogs" as a way in which people use the Internet. It does not define "weblog", but this word is used in the context of keeping an online diary and "personal commentary on everyday events" [transl. PP]. Furthermore, in Chapter IV of the Richtsnoeren an exception to the privacy obligation is discussed when the online publication can be considered to be a journalistic publication. The Richtsnoeren explain that the test is not whether the author is paid for his or her publication, but that the public interest of the weblog is important, as well as the date and frequency of publications. It argues that a weblog

[1] http://wetten.overheid.nl/BWBR0032929/geldigheidsdatum_21-01-2016
[2] Guidelines published by the College Bescherming Persoonsgegevens in the Staatscourant of 11 December 2007, explaining how the College supervises and enforces the Dutch Data Protection Act [Wet bescherming Persoonsgegevens] on the Internet. Available at: http://wetten.overheid.nl/BWBR0033229/geldigheidsdatum_10-01-2014

with only a few out-dated entries would not qualify easily for the journalistic exception.[3]

1.2 Do blogs have to be registered or licensed, or do bloggers need to identify themselves in any particular way?

There is no legal requirement to register a blog or obtain a license, nor is there any legal requirement for bloggers to identify themselves. Registration and operating a blog is subject to the general terms and conditions of the blog's hosting provider. Hosting providers or other Internet Service Providers (hereafter: ISPs) may, however, be required to make the identity of a blogger known to an injured third party under strict circumstances, as will be discussed below.

1.3 What is the legal status of bloggers? How does it relate to the legal status of journalists? How does it differ? Please explain the extent to which bloggers or blog editors do - or do not - fall under similar legal regimes as journalists, and expose similarities and specificities, as they result from legislation, case law, practices, etc. To what extent is bloggers' freedom of expression protected? What are the limits? What judicial and non-judicial proceedings can be brought against bloggers for violations of rules limiting free speech? What penalties or sanctions do they risk? Have there been any reported cases?

Given the overlap under Dutch law between the answers to these questions, I have decided to answer them together. Since the Dutch legal system is strongly case law-based, I integrate both legislation and case law in my answer.

Bloggers and journalists

As stated before, there is no legal definition of "blog" or "blogger" in the Netherlands, so the activity of blogging does not have a specific legal status. The legal status depends on the specific circumstances and context of the blogging activity in questions. This brings us to the distinction, or overlap, between blogging and/or other online activities, and journalism.

In the Netherlands there is no definition of 'journalist', it is a free profession, so anyone can, in principle, be a journalist. The Dutch Council of State [Raad van State] refers to the fact that there are no professional qualifications required by law for the access to the profession of journalism, there is no compulsory membership of a professional journalists' association nor official disciplinary law.[4] Furthermore, the Dutch Supreme Court [Hoge Raad] has held that the rise of the Internet makes it increasingly difficult to define what constitutes "the press" or

[3] The main Dutch dictionary, Van Dale, defines 'weblog' as meaning "actuele website waarop regelmatig korte stukjes, foto's, filmpjes enz. verschijnen, al dan niet uit de persoonlijke sfeer" [up-to-date website on which short entries, photo's, video footage etc. are regularly published, whether relating to the publisher's personal life or not]. In lack of a legal definition, most lawyers and judges would tend to turn to the literal, common meaning of a word as given in such a dictionary.

[4] Dutch Council of State Advies W04.13.0151/I of 30 August 2013 on the legislative proposal for journalistic source protection in criminal cases.

"real journalism", since the Internet offers a myriad of ways to address the general public outside of the traditional news media.[5]

For legal purposes, the relevant element is the character of the activities pursued, not strictly speaking the professional or occupational status of the author. The Arnhem Court of Appeal has, for instance, ruled that everyone who publishes information of public interest, such as the enforcement activities of the police, must enjoy a high level of protection. This protection is, according the Arnhem Court of Appeal, not limited to journalists of newspapers, radio and television, but should also extend to whomever publishes new items, opinions and photos on a suitable and publicly known Internet website, with the objective of informing the public.[6] Like the ECtHR, Dutch courts also refer to journalists as performing an important "public watchdog" function.[7]

It can therefore be concluded that under Dutch law, it is not so much the legal status of a blog or bloggers or of journalists that counts, but rather the activity in question. The activity of publishing any kind of information or opinion on the Internet, whether it amounts to proper 'journalism' or not, is protected under the freedom of expression.

The freedom of expression

In the Netherlands, the freedom of expression is enshrined in Art. 7 of the Dutch Constitution [Grondwet, hereafter: Gw], which reads:[8]

1. No one shall require prior permission to publish thoughts or opinions through the press, without prejudice to the responsibility of every person under the law.
2. Rules concerning radio and television shall be laid down by Act of Parliament. There shall be no prior supervision of the content of a radio or television broadcast.
3. No one shall be required to submit thoughts or opinions for prior approval in order to disseminate them by means other than those mentioned in the preceding paragraphs, without prejudice to the responsibility of every person under the law. The holding of performances open to persons younger than sixteen years of age may be regulated by Act of Parliament in order to protect good morals.
4. The preceding paragraphs do not apply to commercial advertising.

Dutch courts generally directly apply the corresponding Art. 10 ECHR on the freedom of expression and follow the ECtHR's case law on the requirements for a justification of a restriction of this freedom under Art. 10(2) ECHR. The limits to the freedom of expression are formed by "the responsibility of every person under the law" (Art. 7(1) Gw), and must be "prescribed by law and necessary in a democratic society (art. 10(2) ECHR). Such further

[5] ECLI:NL:HR:2008:BB3210, Dutch Supreme Court, 18 Janaury 2008, pt. 3.7
[6] ECLI:NL:GHARN:2005:AT0895, Arnhem Court of Appeal 15 March 2005 pt. 4.5.
[7] ECLI:NL:RBNHO:2015:2320, District Court of North-Holland, 23 March 2015, pt. 3.3.
[8] English translation of the Dutch Constitution available at: https://www.government.nl/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008

(formal) law is contained in the Dutch Penal Code [Wetboek van Strafrecht, hereafter: Sr], the Dutch Copyright Act, and by other (fundamental) rights.

Generally, the freedom of expression of any individual, be it a blogger or a journalist, is scrutinized in either criminal or civil procedures, which shall be discussed in more detail.

In specific cases, online conduct may come within the scope of application of the Dutch Data Protection Act [Wet bescherming persoonsgegevens],[9] which is supervised and enforced by the Dutch Data Protection Authority.[10] The Data Protection Acts contains a general prohibition to publish information on the Internet about another person without his or her prior consent. There is an exception to this prohibition for the publication of information on a (partially) private social media page, and there is also an exception for journalistic publications. The Dutch Data Protection Authority assesses publications on a case-by-case basis, and has held that a publication may constitute a journalistic publication if: 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.[11]

The Dutch Data Protection Authority can undertake investigations, and if necessary, impose fines. The Dutch Data Protection Act can also be relied upon by individuals before the Dutch civil courts.[12]

A further regulatory body is the Netherlands Institute for Human Rights [College voor de Rechten van de Mens, hereafter: NIHR], which absorbed on 2 October 2012 the former Dutch Commission for Equal Treatment [Commissie Gelijke Behandeling]. Anyone who feels that he or she suffered from unequal treatment can lodge a complaint at the NIHR (without needing a lawyer), which will conduct an independent investigation and render a non-binding assessment.[13] Occasionally, the NIHR hears cases concerning the freedom of expression on the Internet when it is related to discrimination. An example of such a case will be discussed under the heading "Online comments", para. 3.5.[14]

Lastly, the Netherlands Press Council is a specific regulatory body for the press with its own non-judicial proceedings. It will be described below under para. 1.6.

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[9] Based on the European Privacy Directive: 95/46/EC.
[10] https://autoriteitpersoonsgegevens.nl/en/node/1930
[11] Data Protection Guidelines: https://autoriteitpersoonsgegevens.nl/sites/default/files/downloads/rs/rs_20071211_persoonsgegevens_op_internet_definitief.pdf
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[14] Commissie Gelijke Behandeling, Opinion 2011/69 of 28 April 2011. See also: http://www.mediareport.nl/persrecht/28042011/cgb-redactionele-vrijheid-elsevier-omvat-recht-reageerders-te-discrimineren-op-politieke-voorkeur/

Freedom of expression in civil law

Art. 6:162 Dutch Civil Code [Burgerlijk Wetboek, hereafter: BW] constitutes the general provision on Dutch tort law. It states that the party who commits a tort towards another is obligated to compensate the losses that the other party suffers as a result. An action based on Art. 6:162 BW must meet the requirements of unlawfulness, attributability, loss, causality and relativity. The law distinguishes between three types of unlawful acts: the infringement of a right, an action or failure to act in contravention of a statutory duty and an action or failure to act in contravention of generally accepted (unwritten) norms. Examples of infringements of a right include infringements of intellectual property rights and the right to privacy. However, not every infringement automatically constitutes an unlawful act warranting payment of damages; some level of nuisance must be tolerated.

The Dutch courts take a casuistic approach to Internet publications and the freedom of expression: in each case all relevant facts and circumstances have to be taken into account, and all the relevant interests have to be weighed. The legal standards that are applied in the balance of interests do not radically change when the author is a journalist or not.

The approach of the Dutch Courts can be summarized as follows:

The right to freedom of expression can, according to Art. 10 ECHR, be restricted only if prescribed by law and if the restriction is necessary in a democratic society, for instance for the protection of the rights of others such as the right to privacy under Art. 8 ECHR. A restriction can be justified if the expression is unlawful in the meaning of Art. 6:162 BW. The Dutch courts regularly emphasize that there is no hierarchy between the different fundamental rights: Art. 10 ECHR does not, as a rule, trump Art. 8 ECHR or vice versa, but they have to be truly weighed against each other, and all the relevant interests. The interest of the person who published the expression, may lie in the possibility to express him or herself in public in a critical, informative, opinion-forming and warning manner about wrongdoings. The interest of the person who is affected by the publication may lie in the fact that he or she should not be lightly or unnecessarily exposed to accusations or violations of his or her privacy or damages his or her reputation. In this weighing of interests, all relevant facts and circumstances must be taken into account.

Factors that Dutch courts regularly take into account as relevant are:

a. the character of the expression of an accusation, and the consequences that can be reasonably be expected to occur for the person who is accused;

b. the severity – also in a societal sense – of the wrongdoing that the expression aims to expose;

c. the level in which the accusations have reasonable factual or evidentiary support at the time of the expression/publication;

d. the context of the expression;

e. the possibility that the public interest could have been achieved in ways that are less harmful for the accused and the fact that the information would have found a way into the press without the expression at issue;

f. whether the principle of *audi et alteram partem* was respected, i.e. whether the accused person was put in the position to react to the accusations before publication;

g. the authority that third parties would lend to the person who made the statements;
h. The public position and behaviour of the person about whom the statements are made.[15]

This is basically the legal framework for all civil cases in which the freedom of expression is subject to review. There is no distinct legal regime for journalists or bloggers. However, within the parameters of the review summarized above, sometimes a larger responsibility of due care is put on professional journalists.

The Supreme Court has ruled in the so-called "Parool"-judgment (1995), a case concerning a professional journalist of the traditional media (a national newspaper), that his accusatory statements should meet a high level of due care, such as having sufficient evidentiary support and allowing the persons about whom he was writing to comment and/or offer exonerating evidence or attenuating circumstances. The journalists accused a third person in the newspaper article of killing a Jewish person who had been hiding in his house in Amsterdam during the Second World War for financial reasons ("a common robbery and murder"), instead of for the higher interests of the resistance. The accusations were deemed unlawful by the Supreme Court since they did not meet the aforementioned high level of due care for investigative journalism.[16]

However, in a more recent (2008) case involving similar (implicit) accusations of the same person as in the "Parool"-judgment by another journalist, the statements were ruled to be not unlawful. The difference lay in the fact that the (implicit) accusations were published on a personal website of the journalist in the form of an "open letter". The Supreme Court found that the open letter (on the personal website) could be regarded as a "press publication" since the rise of the Internet has made the concept of the "press" hard to define. However, the open letter resembled a 'column', which do not necessarily need to comply with the high standards of investigative journalism as set in the aforementioned "Parool"-judgment of 1995. According to the Supreme Court, a column and the open letter at issue have in common that they are both not necessarily or predominantly factual, but present an opinion in a provocative way. The Supreme Court has furthermore explained that if it is clear to the targeted audience that the statement concerns the presentation of an opinion, different standards for the legality of these statements apply than if it were a factual statement.[17]

In a more recent case (2010), the Amsterdam Court of Appeal ruled that although there is an important public interest in having a free press (free news gathering and dissemination) - and the Court of Appeal added that the term 'free press' has become outdated with the rise of the

[15] See for a very clear summary ECLI:NL:GHAMS:2013:3723, Amsterdam Court of Appeal, 29 October 2013, para. 3.6; see also ECLI:NL:HR:1995:ZC1602 (NJ 1995, 422) Dutch Supreme Court, 1 June 1995, para 5.8.3.2 ; ECLI:NL:GHAMS:2015:119, Amsterdam Court of Appeal, 20 January 2015, para. 3.3; ECLI:NL:RBAMS:2014:1680, District Court of Amsterdam, 4 April 2014, paras. 4.1-4.3; ECLI:NL:RBNHO:2013:11696, District Court of North-Holland, 5 December 2013, para. 4.6; ECLI:NL:RBAMS:2013:8660, District Court of Amsterdam,18 December 2013, para. 4.1.
[16] ECLI:NL:HR:1995:ZC1602 (NJ 1995, 422), Dutch Supreme Court, 1 June 1995, para. 5.12.4.
[17] ECLI:NL:HR:2008:BB3210, Dutch Supreme Court, 18 January 2008, para. 3.4.1, 3.7, 3.8, 3.10, and 3.13.

Internet -, journalists should be aware of their special responsibility for the content and presentation of their publications. Journalists often bring together and contextualize certain data about a person, and they bring this data to the attention of a large, general public. Journalists should also be aware of the fact that a part of the general public will not often doubt the veracity of their statements if published by a (traditional) news medium.[18]

It may therefore be no surprise that that same Amsterdam Court of Appeal attached less importance to a publication on a personal blog – instead of a wider dissemination in the well-known traditional newsmedia such as radio, TV or newspapers - in a case in 2013. In those circumstances, the Amsterdam Court of Appeal found that the blogger's freedom of expression outweighed the right to privacy of the person who was subject of the accusations in the statements at issue.[19]

Another case which illustrates the Dutch case-by-case approach concerned the publication of several statements by a journalist on his personal websites. In these publications he expressed his anger and frustration with a specific customer services employee of a large telephone company. He mentioned her full name several time, and also commented that it was exactly his intention that her name would be findable on Google, so as to hamper her future career opportunities. The District Court of The Hague did not afford him a special status as a journalist, but followed the general scheme summarized above. His publications were qualified as "Internet columns", which – however strong-worded and provocative - in principle enjoy protection under the freedom of expression, but this protection finds its limit in the rights of others, such as the employee's right to privacy. In this case, the District Court found that the employee's right to privacy was disproportionately violated, especially with a view to the mentioning of her full name and the consequences for her future career or private life. With regard to the special character of columns, the District Court held when third parties search for the employee's name on Google and encounter the negative publications, they may not always be able to place the strong-worded and/or exaggerated statements in the right, nuanced, context.[20]

This approach to Internet columns on a personal website or blog can be contrasted with a column or open letter in the "Opinion" section of more traditional news media such as a student newspaper. In such a section, the readers can easily recognize the emotional, exaggerated or strong-worded statements as opinion-forming, and place them in the right, nuanced context.[21]

It seems therefore that when journalists (or bloggers) write about other private persons, they may, under certain circumstances, have a higher responsibility of care.

[18] ECLI:NL:GHAMS:2010:BO5417, Amsterdam Court of Appeal, 30 November 2010, para. 3.6.
[19] ECLI:NL:GHAMS:2013:3723, Amsterdam Court of Appeal, 29 October 2013, para. 3.9 and 3.12.
[20] ECLI:NL:RBSGR:2007:BB8427, District Court of The Hague, 21 Nvoember 2007, para. 4.2-4.5.
[21] ECLI:NL:RBAMS:2008:BD1695 LJN BD1695, District Court of Amsterdam, 15 May 2008, para. 4.9.

However, when it comes to a more vertical relation, i.e., a citizen (blogger/journalist/other) vis-a-vis the public authorities such as the police, they enjoy, in principle the same protection. The Arnhem Court of Appeal has ruled that anyone who publishes information that has a public interest, such as speed checks by the police, enjoys, in principle a high level of protection. In this case, the appellant, a private person (not a professional journalist) took photographs of police officers who were performing speed checks, announcing that he would place these pictures on a publicly known website dedicated to reporting speed checks, while making the faces of the police officers blurred and anonymous. The police officers objected to such publication and seized his photo camera and memory card. The Dutch Public Prosecutor had demanded that the appellant sign a statement that he would not publish the pictures, which he rejected. Subsequently, the appellant reported these events on the website on speed checks, and mentioned the full names of the police officers who apprehended him. Many people reacted online to his publication.
With a civil law suit based on Art. 6:162 BW and Art. 21 Copyright Act (personal likeness/ portrait right), the police officers try to force the appellant to destroy the memory card, or, alternatively, prevent the photographs from being published. The Arnhem Court of Appeal emphasized that the high level of protection under Art. 10 ECHR extends not only to journalists of the traditional news media, but also to anyone who publishes such messages, opinions and pictures on websites that are known to the interested public and suitable for informing the public about this topic. Police officers are public figures, which, on the one hand, are and should be more easily exposed to public scrutiny, but, on the other hand, should also be able to perform their duties in a way that is conducive to a level of public trust and support.
In a careful examination of all the interests and circumstances, the Court of Appeal concludes that although the appellant has a (journalistic) interest in (critically) reporting on acts of government agents and civil servants, this interest is not necessarily best served when the full names and identity of the persons in question are exposed. The Court of Appeal concluded that the destruction of the memory card would be a disproportionate interference with the appellant's freedom of expression and newsgathering, but ordered that the pictures at issue may not be published with the faces and names of the police officers.[22]

Types of civil law claims

Civil law claimants may request a civil court various orders or injunctions. The following list is of the most common claims, but it is not exhaustive:

- Remove the specific unlawful publication from the Internet and refrain from reposting the unlawful statement;[23]
- Remove the (full) names or recognizable photos from the publication on the Internet and refrain from mentioning the (full) names or publishing recognizable photos again;[24]

[22] ECLI:NL:GHARN:2005:AT0895, Arnhem Court of Appeal, 15 March 2005 para. 4.5 – 4.8.
[23] See for instance ECLI:NL:RBAMS:2014:1680, Distrit Court of Amsterdam, 4 April 2014, para 5.1; ECLI:NL:RBALM:2012:BY1807, District Court of Almelo, 31 October 2012.

- Refrain from making any other unlawful comments online about the injured party;[25]
- (All of the above: under penalty of a fine for every new breach or every day that the breach continues;[26]
- Request the hosting provider/ISP to remove the unlawful publications from their cache/archive;[27]
- Publish a rectification of the earlier unlawful message;[28]
- Compensation of any material or immaterial damages.

Freedom of expression in criminal law

The Dutch Penal Code contains the following provisions that are may limit a person's freedom of expression:

Arts. 111-113 Sr: insulting the King (varying offenses, punishments varying from 1 to 5 years imprisonment, and fines up to € 20.250,-)
Arts. 131 Sr: prohibition of inciting violence and/or criminal behaviour (maximum 5 years imprisonment or a fine up to € 20.250,-)
Art. 132 Sr: prohibition of publishing or otherwise disseminating statements that incite to violence (maximum 3 years imprisonment and a fine up to € 20.250,-)
Article 137c, 137d, 137e Sr: anti-discrimination laws (punishments from 6 months to a year imprisonment, fines up to € 20.250,-)
Art. 147 Sr: smalende godslastering (blasphemy) [repealed in 2013]
Art. 261 (1) Sr: Smaad (not exactly the same as the Anglo-Saxon concept of "slander". Smaad consists of defamatory statements/accusations that are not necessarily untrue, but are stated publicly with the intention of damaging the other person's reputation. Punishments up to 6 months imprisonment or a fine up to € 8.100,-)
Art. 261(2) Sr: Smaadschrift [statements or images that constitute "smaad", which are published is a heavier offense, punished with max. 1 year imprisonment or fine up to € 8.100,]
Art. 262 Sr: laster [not exactly the same as "libel": laster are defamatory statements that the person knows are untrue] (imprisonment of maximum 2 years and a fine up to € 20.250,-)
Art. 266 Sr : eenvoudige belediging ["simple" insult] [3 months imprisonment or a fine up to € 4.050,-]
Art. 267 Sr increases the maximum punishments with a third, when the defamatory statements under Arts. 261, 262 or 266 Sr were addressed to a public authority/body, an officer/civil servant on duty, a statesperson of a befriended nation.
Art. 285b Sr: stalking (punishable with an imprisonment of maximum 3 years, or a fine up to € 20.250,-)

[24] See for instance ECLI:NL:RBAMS:2014:1680, District Court of Amsterdam, 4 April 2014, para 5.2; ECLI:NL:GHARN:2005:AT0895, Arnhem Court of Appeal, 15 March 2005, para. 5; ECLI:NL:RBALM:2012:BY1807, District Court of Almelo, 31 October 2012.
[25] See for instance ECLI:NL:RBAMS:2014:1680, District Court of Amsterdam, 4 April 2014, para 5.3
[26] See for instance ECLI:NL:RBAMS:2014:1680, District Court of Amsterdam, 4 April 2014, para 5.4
[27] ECLI:NL:RBALM:2012:BY1807, District Court of Almelo, 31 October 2012.
[28] ECLI:NL:RBALM:2012:BY1807, District Court of Almelo, 31 October 2012.

Persons who find that they are harmed under the latter provisions (various forms of defamation and stalking) can file a complaint with the police, upon which the public prosecutor will decide whether the alleged perpetrator will be prosecuted. The police will not usually investigate or prosecute these offenses of their own motion, which is why they are called "complaint offenses" [klachtdelicten].

The way in which online speech and the freedom of expression is reviewed in criminal cases does not differ very much from the way in which the substantive assessment takes place in civil cases. Generally speaking, the threshold for criminal liability is higher than civil liability: a statement that is unlawful in a civil liability sense, may not always constitute criminal defamation. Furthermore, without – however - having performed an exhaustive empirical analysis, the researcher notes that it seems as though online speech is more often subject to civil lawsuits than criminal prosecution.[29]

The following recent case before the District Court of North-Holland is illustrative of the usual approach by Dutch courts in criminal cases.
In the criminal case at hand a journalist published articles about the acts and policies of local politicians regarding local cultural activities. He compared the current cultural policies to the cultural policies of the Nazi regime. Upon complaints of the politicians, the journalist was indicted with defamation. The District Court of North-Holland referred to Art. 10 ECHR, and emphasized that the freedom of expression is not absolute but should be weighed against the rights of others. The District Court refers to ECtHR case law in which it is generally held that journalists who contribute to a public debate, should not be curtailed too easily in their activities, since the press plays an important role as public watchdog. The District Court reminds of the fact that Article 10 ECHR not only protects the right to publish ideas or opinions, but also to offend, insult or shock. Furthermore, the District Court reiterates that feeling insulted is a subjective experience. In a criminal case, this experience thus requires a certain level of objectification. Under Dutch law, the judge will review first whether the expression at issue is in itself insulting, i.e., whether the expression is suitable to violate a person's dignity. Secondly, the judge will review whether the context of the expression will detract from or add to its insulting character. Lastly, the judge will check whether the expression is not unnecessarily offensive.
It is noteworthy, that in the case at hand, the District Court concluded that the publications were not criminally defamatory. It regarded the fact that the articles were published on a blog as less conducive to criminal defamation, without explaining why a publication on a personal blog is less harmful.[30]

Combating Terrorism

Since the terrorist attacks in the US on 11 September 2001, the jurisdictional reach and the substantive scope of certain provisions (and their respective maximum punishments) of the Dutch Penal Code has been widened in order to prevent terrorism more effectively. The

[29] See the Freedom of the Press Report 2015 for the Netherlands of Freedom House, under "Political Environment" https://freedomhouse.org/report/freedom-press/2015/netherlands
[30] ECLI:NL:RBNHO:2015:2320, District Court of North-Holland, 23 March 2015 , pt .3.3.

Netherlands implemented the EU's Framework Decision of 13 June 2002 on combating terrorism[31] by way of the Dutch Crimes of Terrorism Act [Wet terroristische misdrijven].[32] A new article 83 and 83a were added to the Penal Code defining terrorism: crimes constitute terrorist crimes when they have been committed with a terrorist aim (art. 83 Sr), which is the aim to seriously intimidate the population or part of the population of a country, and/or to unlawfully force a government or international organization into acting, to refrain from acting or to tolerate, and/or to seriously destroy or disrupt the political, constitutional, economical or social structure of a country or international organization (art. 83a Sr).

Provisions that have been added or amended and that are relevant for the protection of online speech are, for instance, conspiracy to commit, and preparation of a terrorist crime (96 Sr), financial and/or material leadership or support of a terrorist organization (134a Sr), membership of a terrorist organization (140a Sr), recruitment for armed combat (205 Sr), inciting to commit a terrorist crime and dissemination of such inciting materials. In later legislative amendments, the Dutch Penal Code was extended by prohibiting the participation to and facilitating of training for terrorist acts, and the financing of terrorism.

Furthermore, the competences of the police to monitor and investigate suspected terrorism were extended by the Act on the authority to collect data [Wet bevoegdheden vorderen gegevens],[33] and by the Act on expanding the scope for investigating and prosecuting terrorist crimes (Wet ter verruiming van de mogelijkheden tot opsporing en vervolging van terroristische misdrijven).[34] Where in ordinary cases the police needs a concrete and reasonable suspicion of a criminal act before they may uses their special investigative powers, in case of terrorism it suffices if there are "indications" that a terrorist crime is being prepared.

In recent times, particularly since the civil war in Syria, the rise of ISIS and the increasing efforts of terrorist organizations like ISIS and Al-Nusra to recruit western Muslims to join the jihad, the aforementioned legislative changes have played a role in assessing the online behaviour of persons suspected of any kind of involvement with terrorism. The Internet and social media form an important means of communication and dissemination of propaganda, and there is an increasing number of cases in which Dutch court have to judge online activities for any alleged terrorist intent.

In a very recent case of December 2015, which will be discussed in further detail under "Social Media", the District Court of The Hague elaborately explained the scheme of reasoning in a case concerning publications that allegedly incited to terrorist violence.

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[31] Council Framework Decision of 13 June 2002 on combating terrorism, OJ 2002 L 164/3.
[32] Law of 10 August 2004, Stb. 2004, 290. For a full overview of the legislative changes, see the report of the Dutch Section of the International Commission of Jurists NJCM: "Terrorism, Counter-terrorism measures and human rights in the Netherlands" July 2007, available at: http://njcm.nl/site/uploads/download/210
[33] Law of 16 July 2005, Stb. 2005, 390.
[34] Law of 1 February 2007, Stb. 2006, 580.

The District Court provided a general outline of the factors that should be taken into account: 1) the (literal) content of the publication or utterance; 2) the context of the publication/utterance; 3) the place or occasion where the publication/utterance was made; 4) the intended audience and 5) the apparent intention of the publication/utterance
As to the (literal) content of the publications in question, the District Court held that the mere glorification or condoning of (terrorist) crimes, or the spreading of propaganda, - although shocking and morally abject - is not in itself inciting of violence. The District Court subsequently assessed the context of the utterances, which was not specifically religious (meriting protection under Art. 9 ECHR), but rather more general. It reminded of the fact that statements made in the context of a public or political debates, especially criticism of the government or public wrongdoings, enjoy a relatively high level of protection under Art. 10 ECHR. Participants to the public debate may use rhetoric and stylistic forms such as exaggeration, provocation, satire in order to draw attention to their vision on a public issue. Moreover, the press has an important role in the public debate, and journalistic publications enjoy a large scope of protection. However, an important factor in assessing the limits of this protection is the requirement of journalistic due care.
The District Court goes on to note that the exchange of messages and information on social media such as Facebook and Twitter is fairly fleeting. However, this does not mean that this is a licence to publish any kind of incendiary speech. The activities on social media are usually formed by short messages, often joined by a hyperlink or a picture. The messages are consumed at a high pace, often after only a superficial reading. Although this puts the impression that such a message may leave into perspective, the District Court argues that it also places a greater responsibility on the sender of the message, since only the superficial meaning of the message will sink in. If a large amount of messages with the same tenor is send in a short amount of time, this will usually reinforce the message.[35]

Furthermore, in this case the cumulation of actual activities such as organizing meetings and legally registering an association, and their online activities, such as activity on Facebook and Twitter accounts, but also the editing and hosting of a website, constituted as membership to a criminal organization with a terrorist aim.[36]

1.4 Press Cards

In the Netherlands, press cards are in principle unregulated. A press card is something that anyone can make for himself or herself, like a business card. Furthermore, many (privately organized) events such as sports matches or concerts require a press card as proof of accreditation as a journalist, and establish their own procedures for reviewing the credibility of the journalist in question. An important factor in such a review is usually whether the journalist publishes regularly, in what kind of medium and for which audience.
The Dutch Association for Journalists [Nederlandse Vereniging voor Journalisten] issues a widely accepted press card in cooperation with the International Federation for Journalists,

[35] ECLI:NL:RBDHA:2015:14365, District Court of Den Haag, 10 December 2015, para. 11.16-11.21, 12.4
[36] ECLI:NL:RBDHA:2015:14365, District Court of Den Haag, 10 December 2015, para. 18.27-18.34.

which proves membership to the NVJ. In order to get this membership and the accompanying press card, one must prove that he or she is a journalist by 'main occupation', i.e., that he or she earns at least 50% of his or her income from journalistic activities, and that he or she spends at least 50% of his or her time on these activities, for publication in a variety of media. The NVJ also has a special student membership (discounted membership fee) and accompanying student press card.[37]

The NVJ also issues the special police press card, which gives access to areas that are restricted for the public by the police, such as demonstrations, riots and disaster areas. The police press card is issued to persons who are journalists by main occupation, publish in a mass medium, and who need a police press card for their work (proof provided by employer or client/principal).[38]

There is also a press card issued by the National Sports Press Association [Nationale Sport Pers Service], which can be issued to persons who are either employed as professional journalists/photographers or who work fulltime as freelance sportsjournalist/photographer, earns at least 75% of his income from these activities, and who can prove that he/she has at least two clients. In the particular case of online publications, the NSPA demands that the sportsjournalists are employed by the website on a permanent basis, that the website is independent, has (preferably) editors' regulations (redactiestatuut), and is not a fansite.[39] The NSPA press card gives access to all main sports events, except for events that have their own, separate press accreditation procedure.

The Second Chamber of the Dutch Parliament has its own accreditation procedure to give journalists more access to its building and meetings. A journalist who can show (by a letter from his employer) that he needs to be in Parliament on a (near) daily basis, can get a press card for two years. Journalists who report only incidentally on the Parliament can register for a short-term press card, which is only valid for a day, when they show a valid ID and a 'valid press card', or an official letter from a client/principal on official letterhead paper.[40]
Furthermore, the Ministry for Foreign Affairs requires a valid ID and the NVJ press card.[41] Other ministries have press officers who are only available for journalists (without defining who is a journalist and how they will check their credentials).[42]

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[37] https://www.nvj.nl/onze-diensten/perskaarten/nvj-perskaart and https://www.nvj.nl/onze-diensten/perskaarten/studentenperskaart
[38] https://www.nvj.nl/onze-diensten/perskaarten/politieperskaart
[39] http://www.nsp.nl/registreren/ http://www.nsp.nl/over-de-nsp/nsp-kaart/
[40] http://www.tweedekamer.nl/over_de_tweede_kamer/persinformatie
[41] https://www.rijksoverheid.nl/ministeries/ministerie-van-buitenlandse-zaken/inhoud/contact/huisregels-bezoek
[42] See for instance the Ministry for Health and Sports: https://www.rijksoverheid.nl/ministeries/ministerie-van-volksgezondheid-welzijn-en-sport/inhoud/contact/media

The practice of requiring press cards or similar accreditation procedures seems to draw a relatively strong line between professional journalists and citizens who also report on public issues but do not earn their income with their journalistic activities.

1.5 Bloggers' source protection

The protection of journalists' sources is an important issue in the Netherlands. Since 2007, the ECtHR has rendered three judgments that were critical of the lack of a formal legal regime for journalistic source protection.[43] In response to these judgments, two legislative proposals were published in September 2014 regarding source protection. The first provides the possibility for journalists and 'publicists' (persons who structurally and frequently, but not for remuneration, contribute to the public debate) to refuse to reveal the identity of their source when they (i.e., the journalists/publicists) are heard as a witness in a criminal case (Wet bronbescherming in strafzaken).[44] The second proposes an amendment of the Intelligence and Security services Act 2002 [Wet inlichtingen en veiligheidsdiensten 2002] (Wiv 2002), according to which a preventive judicial review must be performed before special investigative powers of intelligence services can be deployed against journalists, aimed at identifying their sources.

In its Advisory reports on the two legislative proposals on source protection of August 2013 (which were disclosed at the same time of the publication of the final legislative proposals in September 2014), the Council of State criticizes the fact that they have different standards of protection: the source protection in criminal cases extends to 'publicists' as well as journalists, whereas the protection vis-à-vis special investigative powers is limited to professional journalists in the traditional sense.[45] Such a difference in treatment does not find support in the case law of the ECtHR, and it found the term 'publicist' too vague to define in a concrete case, according to the Dutch Council of State. It therefore advised to limit the source protection in both legislative proposals to journalists: "any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication,"[46] who, furthermore, comply with professional ethical standards such as the principles of careful, truthful, objective and balanced reporting.[47]

With regard to the proposal for journalistic source protection in criminal cases, the Council of State questioned the need to give journalists and publicists a general legal privilege, rather than a narrower procedural safeguard of getting prior judicial leave to investigate. The Council of State notes that the proposal goes further than the case law of the ECtHR requires.

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[43] 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).

[44] https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/kamerstukken/2014/09/22/wetsvoorstel-bronbescherming-in-strafzaken/cwv-verschjourn14-11-13-aangepast-door-anita-12092014.pdf

[45] See also the summary of the Dutch Council of State: https://www.raadvanstate.nl/adviezen/samenvattingen/tekst-samenvatting.html?id=267

[46] Raad van State (Dutch Council of State) Advise W04.13.0151/I of 30 August 2013 on source protection, published on 22 september 2014, referring to CoE Recommendation of 8 March 2000, nr. R(2000)7 on the right of journalists not to disclose their sources of information, definition "a".

[47] ECtHR 22 November 2012, nr. 39315/06, (De Telegraaf/Nederland)

Moreover, the Council of State advised the legislator to amend the proposal on the Intelligence and Security services Act 2002 to include a definition of "sources", i.e., the same definition it uses in the proposal on the source protection in criminal cases.

The legislator partially amended its proposal on the Intelligence and Security services Act 2002 in the light of the Council of State's advisory report on the requirement of remuneration (alternative compensation is accepted), professional ethics (the explanatory memorandum for the proposals pay more attention to ethics and refer to the Netherlands Press Council), and the definition of 'source'. However, the legislator rejected the suggestion of the Council of State to include a legal definition of 'journalists', since it undesirable to provide a strict definition of such a free profession.[48] Furthermore, the legislator decided not to amend the proposal for journalistic source protection in criminal cases on the issue of the extension of journalists' legal privilege to 'publicists', since the two laws cover different stages of national intelligence gathering and criminal procedure, respectively, and thus require different procedural safeguards. Furthermore, the legislator added that recent changes in the press and media landscape warrant a broader scope of protection than just journalists.[49]

The press and media sector reacted to the legislative proposal with a lot of criticism, among others relating to the definition of "source", the inclusion of 'publicists', the lack of procedural guarantees such as the sealing of information and the lack of judicial appeal.[50]

There has been no progress in the legislative process since a last minor amendment in August 2015; it is still being discussed in the Second Chamber of the Dutch Parliament.[51] This means that the 'old' regime continues to apply, in which the violation of source protection is subject to judicial review ex post facto.

To the knowledge of the researcher, there have been no cases regarding the source protection of bloggers (as distinct from professional journalists). Should such a case occur (before the adoption of the two legislative proposals), then I expect that the Dutch courts will decide in conformity with the ECtHR case law on this issue. In this case law, the protection is usually limited to professional journalists of the traditional media because of their 'public watchdog' function and safeguards such as ethical standards for careful and objective reporting. It seems as if the ECtHR is still rather conservative when it comes to the personal scope of source protection, so it remains uncertain whether Dutch courts would be willing to extend protection

[48] Further report of 9 September 2014, https://zoek.officielebekendmakingen.nl/kst-34027-4.html
[49] Further report of 10 September 2014, https://zoek.officielebekendmakingen.nl/kst-34032-4.html
[50] See, among others Arend Joustra, "Journalisten stappen in valkuil met wet voor bescherming bronnen", Elsevier, available at: http://www.elsevier.nl/Cultuur--Televisie/blogs/2014/9/Journalisten-stappen-in-valkuil-met-wet-voor-bescherming-bronnen-1006013W/ ; Folkert Jensma, "Waaraan kun je een journalist herkennen?" on the website of the Netherlands Press Council on 22 December 2015 http://www.rvdj.nl/weblog/waaraan-kun-je-een-journalist-herkennen; Otto Volgenant, "Journalistieke bronbescherming blijft een aandachtspunt": https://www.villamedia.nl/artikel/journalistieke-bronbescherming-blijft-een-aandachtspunt ; Wicher Wedzinga,"Wet op bronbescherming lijkt goed, maar andere wet gooit roet in het eten", 2 oktober 2014, http://www.denieuwereporter.nl/2014/10/wet-op-bronbescherming-lijkt-goed-maar-een-andere-wet-gooit-roet-in-het-eten/
[51] https://www.eerstekamer.nl/wetsvoorstel/34032_bronbescherming_in

to bloggers who are not professional journalists. The protection of bloggers' sources is more likely when the blogger has closer ties with the traditional media, or more closely resembles a traditional, professional journalist and abides by professional (ethical) standards.[52]

1.6 Must bloggers or blog editors abide by the rules on responsible journalism (e.g. as stated in the press law or the Code of Ethics for Journalists, etc.)?

The Netherlands Press Council [Raad voor de Journalistiek, the Dutch self-regulatory body for journalism] has a code of conduct for journalists, the so-called Guidebook for journalistic behaviour [Leidraad]. In its Articles of Association [Statuten] the Council does not define the activity of journalism, but it refers to persons who engage in journalistic activities as a professional, i.e. with journalism as their main occupation, or at least as an activity which they engage in regularly and for remuneration. [53]

The Guidebook for journalistic behaviour has been reviewed and amended in 2014-2015 in particular with a view to the influence of digital media.[54] The Guidebook states that "[p]roper journalism is *truthful and accurate, impartial and fair, verifiable and sound*." The supervision by the Netherlands Press Council is voluntary, so there is no obligation for neither journalists, nor bloggers to abide by its Guidebook. However, bloggers and other Internet publicists are not who are not journalists by main occupation are invited by the Press Council to abide by their code of conduct.[55]

The Press Council examines complaints against violations of good journalistic practice, after the complainant has first addressed the medium or journalist in question. The complaint must concern a specific journalistic practice of either a professional journalist or someone who, on a regular basis and for remuneration, collaborates on the editorial content of a mass medium. The Press Council cannot review standards of good taste or general complaints against the press. The Press Council is not a disciplinary body, but only a 'council of opinion', so it cannot impose a sanction on a journalist, nor award financial compensation. The Press Council gives its opinion on a complaint and publishes its decision on its website and in several other media.[56] This supervision mechanism of the Press Council is voluntary, i.e., if the medium at issue refuse to cooperate with the Press Council and refuses to subject itself to its 'jurisdiction', the complaint shall not be reviewed, unless there is a pressing social need for such review (Art. 9(5) of the Press Council Regulations).

1.7 Are blog editors/hosts responsible for publications or comments posted on their blog? If yes, under which circumstances and conditions (e.g. 'notice-and-take down'?

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[52] See for an extensive academic article on this subject: M. Oosterveld and M. Oosterveen, "Van 'public watchdog' naar 'public watchblog': het EHRM en journalistieke weblogs", in *Mediaforum* 2013-6, pp. 146 – 153.

[53] Article 4 of the Articles of Association of the Netherlands Press Council, available at: http://www.rvdj.nl/over-de-raad/statuten-stichting-raad-voor-de-journalistiek

[54] http://www.rvdj.nl/uploads/fckconnector/f60f0e13-cfde-43b7-9ea3-d3d49e012c78

[55] http://www.rvdj.nl/weblog/blog-leidraad-2015

[56] http://www.rvdj.nl/english

Criminal, civil liability? etc.) What proceedings can be brought against them? What types of sanctions can be imposed? Have there been reported cases?

A blog editor must be distinguished from the hosting provider of a blog, given the more active involvement by an editor in the publication process. The general rule under both Dutch civil and criminal law is that the author of a publication or comment is responsible for his or her own utterances. However, a blog editor may, under certain circumstances, be held liable for facilitating the publication and/or the dissemination of unlawful or statements, or even be prosecuted under criminal law for inciting to (terrorist) violence or disseminating inciting publications if he publishes such content without reservations.[57]

Given the recurrence of the question about the liability or punishability of ISPs (hereafter: ISPs) or hosting providers throughout this questionnaire, and the overlap between the answers to these questions, I shall give a detailed description of the legal regime at this point under the heading of "Bloggers/Blog Editors", and I will provide more specific answers or examples form case law in the other sections on "Social Media" and "Online Comments".

Property rights

In principle, an ISP or hosting provider has exclusive property rights and can determine how his server is used.[58] In order to regulate the use of their property, most ISPs use a so-called End User License Agreement or General Terms & Conditions in which they set out "house rules" about the use of their services, such as e-mailserver, a weblog or forum. In those house rules, ISPs can determine if and how the users of the service should register, and how their use of the service will be monitored and, if necessary, sanctioned. ISPs may remove potentially unlawful statements of their own motion, and may even, under certain circumstances, (temporarily) ban users from their service.[59] However, a ban may be unlawful to the user when it was automatic, without hearing the user or without sufficient evidentiary support.[60]

Exemption from liability of ISPs: Article 6:196c BW

The specific (exoneration from) liability of ISPs is regulated in Art. 6:196c BW[61], which implements the European E-commerce directive.[62] An ISP only transmits the online information and does not control the content. Under strict conditions, Art. 6:196c BW exonerates ISPs from being liable for unlawful behaviour by third parties.[63]

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[57] ECLI:NL:RBDHA:2015:14365, District Court of The Hague, 10 December 2015, para. 12.26 and 12.47.

[58] ECLI:NL:HR:2004:AN8483, Dutch Supreme Court, 12 maart 2004.

[59] See for instance Google's General Terms and Conditions for blogger.com: https://www.google.com/intl/en/policies/terms/

[60] ECLI:NL:GHARN:2006:AV0168, Arnhem Court of Appeal, 17 January 2006.

[61] Law of 30 June 2004, Stb. 2004, 285.

[62] Directive 2000/31/EC .

[63] See for a more elaborate discussion of Art. 6:169c BW A.P. de Wit, "De civielrechtelijke aansprakelijkheid van internetproviders (Deel I en Deel II), *Tijdschrift voor Internetrecht* 2009 nr. 2, pp. 37-42 and nr. 3, pp. 72-76.

Art. 6:196c (1) BW exempts ISPs from liability when they merely transmit information from third parties or give them access to a communication network, i.e. so-called "mere conduit". Such ISPs who facilitate mere conduit are also referred to as "access providers". The ISP is not liable for unlawful conduct of the third party if he: a) did not take the initiative for transmitting the information, b) is not the addressee of the information transmitted, and c) if he has not selected or amended the transmitted information. Art. 6:196c (2) BW extends the exception of paragraph 1 to the automated, temporary storage of data, provided that the storage of information only occurs for the transmitting of the information and the duration of the storage is limited to what is necessary for the transmission.
The second form of exemption from liability (Art. 6:196c(3) BW) is when the aforementioned automated, temporary storage of data happens in order to make the transmission of information more effective, i.e. so-called "caching" of data. The ISP is not liable for the data temporarily stored, when a) he does not change the data, b) he takes the conditions for access to the data into account, c) he complies with the usual and accepted rules of the industry relating to the effects of the data, d) he does not change the usual and accepted technology for the gaining information on the use of the data, and e) he promptly takes the necessary measures to remove the data from the original location or makes access impossible. These first two exemptions from liability of ISPs relate to the passive role they have in the technical, automated processes of mere conduit and caching of data.

The third exemption provided by Art. 6:196c(4) BW, according to which the ISP is not liable when he stores data on request of a third party (webhosting services like online fora and weblog hosting, and such an ISP is often referred to as a "hosting provider"), if he a) does not know or does not reasonably has to know that the activity or information is unlawful, and b) when he knows or reasonably should know about the unlawful character of the activity or information, promptly removes it or makes access to it impossible.
Lastly, Art. 6:196c(5) BW provides that these specific exemptions do not detract from the possibility of getting a court order/injunction on any other grounds. Therefore, ISPs and other (more active) hosting providers who may not fall under the strict conditions of Art. 6:196c BW, can still be liable under the more general liability rules of Art. 6:162 BW.[64]

General (residual) liability under Art. 6:162 BW

The strict conditions of Art. 6:196c BW, but also the general duty of care under Art. 6:162 BW leave ISPs and other hosting providers in a rather difficult position: they cannot escape liability if they know or should reasonable know when the data is unlawful. A mere complaint by the alleged hurt party is not sufficient, the ISP should not have a reasonable doubt about the alleged unlawfulness of the data, or that the information is manifestly unlawful.[65] However, it remains hard to assess how and when such knowledge is sufficiently present, and Dutch courts perform detailed case-by-case analyses.

[64] More actively involve website owners/hosting providers cannot rely on Art. 6:196c BW to escape liability: ECLI:NL:RBSHE:2006:AU9504, District Court of Den Bosch, 11 January 2006.
[65] Memorie van Toelichting, Kamerstukken II 2001/02, 28 197, nr. 3, p. 49. See also Dutch Supreme Court in Lycos/Pessers, 25 november 2005, ECLI:NL:HR:2005:AU4019.

Self-regulation: Code of conduct on Notice-and-Take-Down

In 2008 a code of conduct on Notice-and-Take-Down (NTD) was adopted in the context of a public private partnership that brings together stakeholders to collaborate in the fight against cybercrime [Nationale Infrastructuur Cyber Crime (National Infrastructure against Cybercrime - NICC)]. The partnership included broadband providers, cable providers and Dutch government authorities, and several ministries, IP-rightsholders representatives and companies like eBay participated in the drafting process. The code establishes a procedure for Internet intermediaries for online content that is punishable or unlawful, and it is based on an inventory of the existing Notice-and-Take-Down practices exercised in the sector, and seems to be largely in conformity with standard Dutch case law on this issue. Compliance to the code of conduct is voluntary and cannot be formally enforced.

In case of "unequivocally" unlawful or punishable content, the intermediary must remove the content immediately. However, when the unlawfulness or punishability is not "unequivocal", there is not such obligation of removal. When the lawfulness of the content cannot be clearly evaluated, the author and the notifier must either come to an agreement, or the notifier can make an official report to the police or start civil proceedings. The code of conduct states that, under certain strict circumstances as set out in Dutch case law (see the aforementioned Lycos, Google and Facebook cases), the ISP may be required to hand over data identifying the content provider.[66]

Dutch courts seem to demand more effort of ISP's and other hosting providers to detect and take down statements or data that violate a third party's right to privacy and dignity,[67] than to detect infringements of a company's intellectual property rights.[68]

The Pirate Bay

There is an ongoing dispute about the violation of intellectual property rights by a website. In early 2012, the District Court of The Hague ordered both ISP's XS4ALL and Ziggo to prevent Dutch Internet users from accessing the torrent file sharing website The Pirate Bay.[69] The ISP's complied with the order, but appealed the decision. After various other court rulings, several other providers also blocked The Pirate Bay.

The Hague Court of Appeal 2014 that blocking The Pirate Bay's website did not lead to a reduction in unauthorized file sharing. It determined the ISP's could reopen connection to The

[66] https://ecp.nl/werkgroep-notice-and-takedown; https://ecp.nl/bijlagen/3721/ntd-gedragscode-engels.pdf

[67] ECLI:NL:RBAMS:2007:BB6926, District Court of Amsterdam, 1 November 2007. This was a very specific case concerning the online forum of the Vereniging Martijn, an association for paedophiles. A picture of the young Dutch Princess Amalia was posted on the forum. The Amsterdam District Court held that, especially with a view to the special interest of the (now banned) association, the hosting provider of the forum should moderate the content of the forum more intensively.

[68] ECLI:NL:RBZLY:2006:AW6288, District Court of Zwolle Lelystad, 3 May 2006 (Stokke/Marktplaats)

[69] ECLI:NL:RBSGR:2012:BV0549, District Court of The Hague, 11 January 2012.

Pirate Bay. In cassation, the Supreme Court criticized the Court of Appeal's reasoning about the effectiveness of the blockade. The Supreme Court suspended the national proceedings and referred preliminary questions to the Court of Justice of the European Union. The Supreme Court asks whether The Pirate Bay is violating Europe's copyright directive by sharing torrent files and if ordering ISP's to block The Pirate Bay is allowed under the copyright directive's enforcement provision.[70]

1.8 Is anonymous blogging considered protected speech?

As stated before, there is no obligation to identify yourself or to register as a blogger, anonymous blogging is not prohibited. The freedom of expression may thus also extend to anonymous blogs. However, there is no right to remain anonymous when the statements published on the blog are unlawful towards another person or if they are punishable under criminal law. ISPs may be forced (during or after a Notice-and-Take-down procedure) to reveal the blogger's name and address.

In the Lycos case, the hosting provider Lycos was ordered to reveal the identity of a person who was anonymously publishing defamatory statements on his personal website. The Dutch Supreme Court ruled that since ISPs were not members of the press, they do not enjoy a legal privilege to refuse access to their clients' personal information.[71]

In another case, Google was ordered under the "notice-and-takedown" principle to remove blogs that contained unlawful statements, with a reference to Art. 6:196c BW, (to be discussed further below under "Online comments"). The Appeals Court of Den Bosch recognized a rather far-reaching duty to remove unlawful blogs, but made a careful review of the duty to reveal the blogger's name and address and the proportionality and necessity of such a limitation of the freedom of expression. The Appeals Court noted that if it is sufficiently clear that a statement on a blog is unlawful towards a third party and causes damage to her/him, it may be undesirable to prevent this third party from having any real possibility of suing the anonymous perpetrator. The refusal of the ISP to disclose the name and address of the blogger may be unlawful towards the third party when a) it is sufficiently plausible that the publication is unlawful towards the third party, b) the third party has a real interest in obtaining the name and address of the blogger, c) there are no less invasive ways to obtain his name and address, and d) the weighing of the interests of the third party, the ISP and the blogger (as far as the interests can be known) results in the prevailing of the interests of the third party.[72]

1.9 What are the circumstances under which a blog can be closed down or access to it blocked (e.g. apology of terrorism in France)? Do you know of particular instances? Was the measure challenged? How? On which basis?

[70] ECLI:NL:HR:2015:3307, Dutch Supreme Court, 13 November 2015.
[71] ECLI:NL:HR:2005:AU4019, Dutch Supreme Court, 25 November 2005, para. 5.3.5 and 5.3.7.
[72] ECLI:NL:GHSHE:2015:3904, Den Bosch Court of Appeal, para. 3.10-3.12.

The framework for deciding whether a blog can be closed down or access to it blocked, is formed by the general civil liability and criminal punishability as set out above, and it is supplemented by the liability of hosting providers or ISPs.

The closing or blocking of an entire website or blog is a rather extreme measure, and such a claim will only be awarded in rare cases. When determining the claims to be awarded to the injured party, a civil law judge will usually take into account whether the harm can be repaired by the simple removal of the unlawful comment, and an order to refrain from further unlawful publications.

As is clear from the description of the NTD procedure under para. 1.7 if an injured third party is unable to contact the author of the unlawful content or if he is unwilling to take it down, he can start a NTD procedure. Next up the "chain" from the author/publisher of the content, is the provider of the website, then the firm that hosts the website, the provider of the internet access, and lastly, and only as a last resort, the SIDN, the Dutch registrar that registers and manages all .nl domain names, may be requested to make a specific .nl domain inaccessible.[73] The SIDN received 18 such requests in 2014, 9 requests in 2013 but decided not to make the domain names unreachable in any of these cases, because for instance the content was not unmistakably unlawful, or another party was already taking sufficient action.[74] In 2012, the SIDN received 11 requests, and made a domain name unreachable in only one case.[75]

1.10 Has there been any issues regarding cross-border aspects which (could) affect bloggers' freedom of expression?
Not that I have found.

1.11 Are you aware of any threats of law suits against bloggers or any other types of pressure exercised on bloggers to intimidate them and prevent them from reporting on delicate issues (e.g. death threats, withdrawal of financial support/advertising revenue, pressure on family members, online harassment through comments, etc)?
As the NGO Freedom House states in its 2015 Freedom of the Press report on the Netherlands, government interference in media content is rare.[76] In my research, I have not come across cases in which there seems to be any threats or other kind of pressure by the government on a blogger.
I have only come across one instance in which a wealthy businessman started a rather aggressive lawsuit against a journalist who published articles on the Internet accusing him of sexual abuse of minors in Ghana, Africa. The hearing judge at the District Court reportedly even commented that the claims were unusually high, and inquired after the real reasons for

[73] https://www.sidn.nl/a/nl-domain-name/complaining-about-the-content-of-a-website?language_id=2
[74] http://jaarverslag.sidn.nl/jaarverslag2014/en/dot-nl ; https://www.sidn.nl/annualreport2013/dot-nl
[75] https://www.sidn.nl/annualreport2012/dot-nl
[76] See https://freedomhouse.org/report/freedom-press/2015/netherlands, under the heading "Political environment".

the high claims.[77] The District Court dismissed the businessman's claims and the Appellate Court of Amsterdam confirmed this judgment.[78]

2) SOCIAL MEDIA USERS

2.1 What is the legal framework for the protection of the freedom of expression of users of social media? Are different contexts or situations covered by different legal regimes? Is online speech subject to a different legal regime (e.g. aggravating circumstances)?
The same legal framework applies as described for bloggers: every person enjoys the freedom of expression, with the limitations provided for by Art. 10 (2) ECHR, and, specifically in Dutch law, in Art. 6:162 BW (for civil liability) and the Criminal Code.

The particular character of social media has brought further nuances in the Dutch courts' regular approach in Art. 10 ECHR cases.
The District Court of Amsterdam considers Facebook and Twitter to be media on which people share their opinions, and not always in a nuanced way. Although this does not mean that every opinion can be lawfully shared on Facebook, it does mean that individuals enjoy a large amount of freedom in their statements on such social websites. Only if a statement lacks factual basis/evidentiary support and damages the other person's reputation, can it considered to be unlawful and can the freedom of expression be restricted.[79] Furthermore, the Dutch courts have held that the exchange of messages and information on social media such as Facebook and Twitter is fairly fleeting. The often short messages do not lend themselves for a deep analysis of their background and context. A superficial reading of the message will determine how the tenor of the utterances is interpreted and how it will be remembered by the audience.[80]

With regard to negative and accusatory statements about a third party on the social network Hyves, the Amsterdam Court of Appeal considered that the readers of the messages on the personal Hyves-pages would understand from its context that the content should be "taken with a grain of salt" and that they largely contained subjective value-judgements.[81]

However, the Supreme Court has concluded that the publication of accusatory statements on a Hyves pages which is visible to 20-25 other persons, is sufficiently public to constitute defamation (smaad, art. 261 Sr). The publication of such a statement on easily and continuously accessible social media is different from making such a statement in the seclusion of one's living room to a limited number of people.[82]

[77] http://www.ftm.nl/exclusive/rechter-haalt-intimidatie-journaliste-terlingen-vastgoedmiljonair-paes/
[78] ECLI:NL:GHAMS:2015:119, Amsterdam Court of Appeal, 20 January 2015.
[79] ECLI:NL:RBAMS:2014:8364, District Court of Amsterdam, 1 December 2014.
[80] 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.
[81] ECLI:NL:GHAMS:2010:BL6050, Amsterdam Court of Appeal, 23 February 2010, para 4.7.
[82] ECLI:NL:HR:2011:BQ2009, Dutch Supreme Court, 5 July 2011, para. 2.5

Terrorism and social media

As stated above in para 1.3, the Internet and social media are playing increasingly important roles in the dissemination of extremist ideas and the recruitment of jihadi combatants. There is a growing number of criminal cases in which the suspect's online activities are subject of review.

In a case of a jihad-fighter who returned to the Netherlands from Syria, the District Court of The Hague concluded that he was guilty of preparatory activities for committing a terrorist crime, and disseminating publications that incite to the commitment of terrorist crimes. His terrorist intentions were, among others and apart from his actual joining the armed fight in Syria, deduced from his statements on Facebook in which he glorified the jihadist ideas and martyrdom.[83]

In another case the Hague Appeal Court convicted a person for several (preparatory) terrorist crimes, as the evidence showed, among others, that the suspect had searched on the Internet for instructions to fabricate an explosive, and he had purchased the necessary materials online. Furthermore, he had posted statements, photo's and video's on Facebook, Twitter and/or Youtube that showed his aversion of the Netherlands and of the USA, and his willingness/intention to join the jihad in Syria. Moreover, on an online forum the suspect had called upon the readers to join the jihad. As an additional relevant fact, the Court of Appeal noted that the suspect used the name of a well-known jihadist suicide bomber as his Facebook and Twitter names. The cumulative effect of all these online activities is that the Court of Appeal concluded that the requirement of "terrorist intention" was fulfilled.[84]

In the most recent case of 10 December 2015, the District Court of The Hague rendered judgment in a series of joined criminal cases regarding jihadism.[85] It concerned nine suspects: eight men and one woman. Six of the men were convicted of membership to a criminal organization with a terrorist aim. They were punished with prison sentences ranging from three to 6 years. Two other men were, according to the District Court, followers. One of them was convicted for inciting to terrorist violence and punished with a prison sentence of 43 days and 2 months on probation. The other man had taken part in a Syrian training camp for a short period of time, and was punished with a prison sentence of 55 days, and 6 months probation. The woman was convicted for a re-tweet that incited to terrorist violence, and was sentenced to 7 days in prison.

In an elaborately reasoned judgment, the District Court of The Hague first starts with preliminary remarks on the importance of the freedom of religion and the freedom of expression in a democratic, pluralist society like the Netherlands. It stressed that thoughts and beliefs cannot be criminally punishable, only concrete acts and behaviours. The Court reminded of the standard case law according to which the freedom of expression encompasses

[83] ECLI:NL:RBDHA:2014:14652, District Court of The Hague, 1 December 2014.
[84] ECLI:NL:GHDHA:2015:83, The Hague Court of Appeal, 27 January 2015
[85] ECLI:NL:RBDHA:2015:14365, District Court of Den Haag, 10 December 2015.

the freedom to shock, insult or distress, but also that the freedom is not absolute but can be limited in accordance with the requirements of art. 10(2) ECHR.

The District Court described Facebook as a social network on the Internet. Users of Facebook can put information (messages, photo's and video's) about themselves on their personal pages. Users can also share the information published by other users of Facebook. The District Court noted that the information that is published on a (partially) public Facebook-page, could be consulted by the general public, even without having a Facebook-account. The information on a (partially) private Facebook-page is only accessible for persons who also have a Facebook-account and whom the owner of the Facebook-page has accepted as 'friends'.[86]

The District Court described Twitter as a communication medium on the Internet, on which users can publish a message ('tweet') of a maximum of 140 signs. They can also share (re-tweet) other messages. The District Court noted that the entirety of the tweets and re-tweets on a persons' Twitter-page amounts to a kind of 'mini-blog'. Twitter pages are accessible to anyone; it is not necessary to have a Twitter account. The District Court furthermore recognized that on Twitter a "*retweet is not endorsement"*, and that such a retweet without further comments is not inciting to violence under Art. 131 Sr. However, a retweet does full within the scope of disseminating publications that incite to violence under Art. 132 Sr. The same holds, according to the District Court, for the sharing of a hyperlink on social media. [87]

An issue in the criminal procedure was the fact that the police created two fake Facebook accounts under two fictive Muslim names, and sent several of the suspects friendship requests, which some of them accepted. Furthermore, one of the fake accounts was invited by one of the suspects to a private Facebook group. These special investigative activities were undertaken in a period for which there was no official approval of the public prosecutor, thus amounting to a procedural error. However, the District Court decided that the procedural error needed no legal consequences, since the infringement was not grave and did not substantively affect the (defence) interests of the suspects. In order to reach this conclusion, the District Court took into account the fact that most Facebook pages were public, so anyone could have easily accessed the information published thereon; there was no actual need for (approved) special investigative powers. Furthermore, the Court considered that, had the police asked for such approval, the public prosecutor would have readily given it.[88]

The District Court states that although thoughts and ideas are not punishable, the information about the thoughts and ideas that the suspects held, as evident, among other, from their behaviour on social media, are relevant in order to determine the context and the intentions with their concrete (and punishable) acts.[89]

[86] Idem, para. 5.1.
[87] Idem, para. 5.3, 11.22.
[88] Idem, para. 5.34.
[89] Idem, para. 10.1.

2.2 Can privacy settings increase or decrease exposure to law suits for particular type of illegal speech (eg defamation)?

It can be concluded from a (civil) case before the Amsterdam Court of Appeal concerning the social network Hyves, that the fact that only a limited circle of people consisting of friends and friends-of-friends could access and read the messages posted on the Hyves-page, was a reason to conclude that the negative statements were not unlawful.[90]

As can be concluded from the recent criminal case concerning jihadism, the investigative powers of the police are different, and require more safeguards, when a social media account is not (entirely) public, since for most of the prohibitions in the Dutch Penal Code listed above, it is required that the statement was made publicly.[91]

2.3 Does the operation of social media groups (e.g Facebook open/closed groups, Google groups etc) pose particular problems for the protection freedom of expression?

To the contrary, statements posted on private, closed social media groups, will in principle not amount to criminally punishable inciting to (terrorist) violence, since the Dutch Penal Code requires the statements to be done publicly.[92]

Furthermore, a defamatory statement made in a private social media group will probably be considered less harmful and thus not immediately unlawful, since the circle of people who will be able to read the statement could be very limited.

2.4 Who is responsible for illegal speech on social media? Are there any obligations imposed on social networks to prevent/sanction illegal speech?

For an overview of the general legal regime, see para. 1.3 and 1.7.

In a recent case concerning 'revenge porn' on Facebook, the District Court of Amsterdam concluded that the ISP, in this case, Facebook, can, under certain circumstances, be under a legal obligation to provide the name and address of one of its users (see also the Lycos-case and Google-case discussed above under "Blogging"). The District Court held that this legal obligation may be even stronger in case of a provider of so-called User Generated Content such as Facebook, who exercises a certain influence on what is disseminated through its medium by, among others, publishing guidelines, setting requirements to persons who register for an account and the fact that it intervenes when inappropriate or offensive content is published. In such a case, the UGC provider must disclose the name and address of one of its anonymous or untraceable users when it is plausible that this person has published unlawful statements or other content on the provider's medium, and that the injured third party can only remedy this unlawfulness by the disclosure of the user's identity. When Facebook submitted (without further substantiation, however) that it had deleted the complete account of the user after a notice-and-take-down, and did not have the name and address of the perpetrator, the District Court held that this amounted to a violation of its duty of care towards the injured

[90] ECLI:NL:GHAMS:2010:BL6050, Amsterdam Court of Appeal, 23 February 2010, para. 4.7

[91] ECLI:NL:RBDHA:2015:14365, District Court of The Hague, 10 December 2015, para. 5.34.

[92] ECLI:NL:RBDHA:2015:14365, District Court of Den Haag, 10 December 2015, paras. 12.91-12.92; 12.133-12.134.

third party. It held that Facebook can be required to make all reasonable efforts to see if the name and address can be located, and that, if necessary, an independent investigation should take place to verify the veracity of Facebook's statements in this regard.[93]

2.5 Are social media users' expressive activities hampered by the legal framework or its application to social media (eg mandatory blocking or deletion, etc.)?

There has been one case in which a person was ordered to remove all of his social media accounts, and prohibited from opening any new social media accounts for the duration of one year. Furthermore, the injured third party would get a judicial approval to order any ISPs to remove the social media accounts in case the person still refused to remove his accounts. It has to be emphasized that this person had been held liable for unlawful statements on social media before, and had refused to comply with this previous judgment.[94]

It can therefore be concluded that, yes, the expressive activities of social media users in the Netherlands are affected by the legal framework, but not gravely or disproportionately.

2.6 Has there been any legal case involving social media users or social networks? Are problems which affect freedom of expression on online media reported in the press, forums, etc?

There seems to be no restriction in the reporting on cases in the press, or online. As stated before, there is very little government interference in the content of the media.[95] If a case is news-worthy, it is likely that interested news media or private persons on fora will freely report about it.

2.7 Has there been any issues concerning cross-border aspects of social media?

There have been jurisdictional issues concerning content placed on social media (Facebook) from Turkey. In that case, while the content was placed from Turkey, it was placed on the Facebook page of a driving school registered in the Netherlands, with Dutch as the main language of both the Facebook page and also of the video that was uploaded. The District Court of Amsterdam therefore concluded that the content was aimed at a Dutch audience, and so assumed jurisdiction.[96]

2.8 Are you aware of any threats of law suits against online users or any other types of pressure exercised on them to intimidate them and prevent them from reporting or commenting on particular delicate issues (e.g. death threats, pressure on family members, online harassment through comments, etc)?

Not really. However, Dutch newspaper NRC Handelsblad of 23 January 2016, reports that the police have started a new practice: individuals who have placed messages on social media such as Twitter that incite to protests (for instance protesting against the setting up of a

[93] ECLI:NL:RBAMS:2015:3984, District Court of Amsterdam, 25 June 2015, paras. 4.3, 4.4, 4.10.
[94] ECLI:NL:RBAMS:2012:BY9149, District Court of Amsterdam, 4 December 2012, para. 4.2 and 4.3.
[95] https://freedomhouse.org/report/freedom-press/2015/netherlands
[96] ECLI:NL:RBAMS:2014:7728, District Court of Amsterdam, 19 November 2014, para. 3.3.

refugee centre in the municipality), have been getting "housecalls": the police have monitored their Tweets, and show up at their house, and these persons are warned to "watch their tone". The police have responded that it is similar to their public monitoring duties, i.e., when they are walking in the streets, and someone has bad behaviour, they can also warn that person. However, critics have called this intimidation and limiting freedom of speech.[97]

3) ON-LINE COMMENTS

3.1 What is the legal status of persons posting online comments? What are the scope and limits of freedom of expression of commenters? Are there different approaches depending on the nature of the host? (newspaper website, blog, or forum?)

In the Netherlands, there is no specific legal status of persons posting online comments. The scope and limits of the freedom of expression of online commenters are determined in a case-by-case review that follows the structure and elements of the scheme summarized above. In some cases, the courts even follow the general scheme set out in para. 1.3 without dedicating special attention to the character of Internet fora as a medium.[98]

The District Court of Amsterdam has given a judgment (2009) in a case which concerned an online forum. It emphasised the fact that online fora often exist to discuss issues of public concern, such as wrong-doings in the financial sector. Participants to a discussion on such an online forum who accuse other individuals of wrongdoings, enjoy protection of their freedom of expression, but they do have a certain responsibility of due care. Elements that the District Court found relevant were the status of the person who wrote the accusation and the authority that the audience may attach to his statements, whether the statements we made in a longer discussion or if the person started the discussion thread himself. Furthermore, even strong-worded opinions, which are common on online fora and of which most readers know that they should not always be taken seriously, must have some evidentiary support if they contain serious accusations. In the end, the writer of the accusations was held liable for two unlawful comments, since they contained serious accusations of fraud, which were unnecessarily offensive, and lacked the necessary evidentiary support.[99]

3.2 How different is it from the status of those publishing comments or reactions in the traditional media?

As stated above, the Dutch Supreme Court has refused to give a narrow definition of "the press", since the rise of the Internet allows individuals to address the general public without using the traditional news media.[100]

[97] NRC Handelsblad, 23 & 24 January 2016, p. 8-9, "Angst voor twitterend rapalje" and "Zo'n huisbezoek is niet zo onschuldig als het lijkt".
[98] ECLI:NL:GHAMS:2013:BZ7310 LJN BZ7310, Amsterdam Court of Appeal, 2 April 2013.
[99] ECLI:NL:RBAMS:2009:BL3549 LJN BL3549, District Court of Amsterdam, 4 November 2009, para. 4.1-4.5.
[100] ECLI:NL:HR:2008:BB3210, Dutch Supreme Court, 18 January 2008, para. 3.7

However, in a case concerning particularly negative statements online about a person, mentioning her full name, the court considered that the subsequent appearance in Google search results may not allow Google users to place those statements in the appropriate, nuanced, context.[101] Although the court did not expressly draw this comparison, it may be safe to conclude that this decontextualising 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.[102]

3.3 Do the most important media outlets have a comment platform?

[There are no parameters to establish which media outlets should – for the purpose of this research – be considered as "most important". I have taken the question to relate to the largest news papers and television networks of the Netherlands. I have selected a few, but the list is not exhaustive, nor representative.]

NRC Handelsblad www.nrc.nl (Dutch newspaper) – yes, but only in the "Opinion" section
Volkskrant www.volkskrant.nl (Dutch newspaper) - yes, but only in the "Opinion" section
De Telegraaf www.telegraaf.nl (Dutch newspaper) – yes, but not under every article
Het Parool www.parool.nl (Dutch newspaper) - yes, but only in the "Opinion" section
AD www.ad.nl (Dutch newspaper) - yes
Het Financieel Dagblad www.fd.nl - yes
Nu.nl (news website) – has a special version of the website to allow reactions: www.nujij.nl
Geenstijl.nl (popular website/blog/forum, describes itself as "tendentious, unfounded, and unnecessarily offensive) – yes
Fok.nl (popular website/forum which publishes daily news and opinions) - yes
NOS.nl (news website of the public broadcasters) - no
RTLnieuws.nl (news website of commercial broadcaster RTL) - yes
De Correspondent www.decorrespondent.nl (online news medium) - yes
Elsevier.nl (opinion-forming magazine and news website) - yes

3.4 Who is responsible for illegal comments and in what way? ('notice-and-take-down',? Criminal, civil liability? etc.) Is there any incentive for ISPs to close down or moderate comment platforms? Check specifically whether recent ECtHR jurisprudence in this regard (ie. Delfi v. Estonia) has had an impact in your legal system.

The same regime applies to the liability of the website host or ISP of a forum or any other platform for online comments, as described above in para. 1.7.

In a specific case concerning online comments on a forum, the District Court of Zutphen has held that the owner of a website, the ISP, nor the forum moderator, cannot be held liable for (facilitating the publication of) online comments of (anonymous) third parties, unless they

[101] ECLI:NL:RBSGR:2007:BB8427, District Court of The Hague, 21 November 2007, para. 4.2-4.5.
[102] ECLI:NL:RBAMS:2008:BD1695, District Court of Amsterdam, 15 May 2008, para. 4.9.

knew or could have known that the comments were incorrect or unlawful. The burden of proof of such knowledge, rests on the complainant. Furthermore, the District Court took into account the fact that the website had several security measures in place to prevent unlawful comments, such as a registration procedure, a requirement in the house rules that negative comments must be supported by arguments, a practice that persons who post negative comments were contacted for further explanations, and bundled messages generated from the same IP-address, threats or calls to action were deleted from the forum.[103]

In a case concerning a website/online forum aimed at exposing web shop fraud, the website host was not liable for the continuation of the discussion thread on a different website since the relocation and continuation of the discussion thread was done by independently operating online moderators. There was no hierarchical relationship between the website host and the moderators.[104]

With regard to the particular question concerning the ECtHR's Delfi judgment, it may be concluded that the interplay between the strict conditions for the exemption of liability under Art. 6:196c BW, and the general liability regime of 6:162 BW as already apparent from the line of case law before the Dutch courts, seem to fit with the ECtHR's judgment in Delfi: the more actively involved a website host/ISP, the higher his duty of care is; in case of manifestly unlawful comments, they should be taken down promptly. However, there have been no cases before the Dutch courts involving a concrete application of the Delfi-judgment yet.

3.5 What types of proceedings can be brought and against who? What types of sanctions or penalties can be imposed, and on who? Have there been any important cases or proceedings involving online comments?

As stated before in para. 1.3 and 1.7, the person who wrote the comment (if the identity is known) is the first person to hold liable, or prosecute. It is only under the strict circumstances outlined above that the website owner, hosting provider or even ISP can be held liable.

The ISP may be ordered to remove the unlawful comments, or block/remove the accounts of the person who wrote the comments. If the person commented anonymously, the ISP may be ordered to reveal his/her name and address in order to provide the injured third party effective judicial protection. See the Google and Lycos judgments discussed above under para. 1.7.

In a rare case, the issue of banning a person from an online forum has been reviewed by the Commissie Gelijke Behandeling [Equal treatment committee; now the Netherlands Institute for Human Rights]. The case concerned the website of weekly opinion-forming magazine Elsevier (www.elsevier.nl) which has a rather clear liberal/right-wing preference. The website moderators removed the complainant's online comments because of a different (more left-wing) political preference and strong, offensive wording. The Equal Treatment Committee

[103] ECLI:NL:RBZUT:2007:AZ8634, District Court of Zutphen, 8 February 2007, para. 4.3- 4.8.
[104] ECLI:NL:RBAMS:2009:BJ1669, District Court of Amsterdam, 2 July 2009.

stated that such removal was – in the light of the freedom of the press and the value of having a pluriform press (including clear choices for certain political issues) – not unlawful.[105]

Recently, a local newspaper has removed the possibility to comment online on articles concerning the refugee crisis, because of too many disrespectful and insulting comments.[106]

3.6 Has there been any issues involving cross-border aspects in relation to online comments?
Not that I found in my research.

4) WIKI

4.1 What legal regime applies to Wiki contributors? Is the freedom of expression of Wiki contributors limited? In what way? Who is responsible for illegal statement on Wiki contributions? What proceedings can be taken against Wiki contributors? What sanctions or penalties do they risk?
Wiki contributors fall under the same general regime as outlined at the start of this report. The interest of wiki contributors, such as the free dissemination of knowledge, and the character and aim of a wiki website, will have to be weighed against the rights and interests of others.
In principle, only the authors are responsible for their statements. Although the general terms of Wikipedia exclude liability,[107] a NTD procedure (as described above) can be started, and the injured party can move "up the chain" of suing the author, the website host, the hosting provider, and the internet provider, respectively.

The general terms of Wikipedia clearly state that it is the Wikimedia Foundation, Inc. in the USA that has the final responsibility, and not the local chapters such as Wikimedia Nederland. This was confirmed by the District Court of Utrecht, in which the claims of an injured party directed against Wikimedia Nederland were dismissed. The District Court of Utrecht concluded that Wikimedia Nederland did not have control over the content and the registered user data (in order to disclose the identity of the author).[108]
The research has shown that to date, there have been no other legal cases against wiki contributors or a wiki website.

4.2 Have there been cases or controversies in which the freedom of expressions of wiki contributors have been at stake?

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[105] Commissie Gelijke Behandeling, Opinion 2011/69 of 28 April 2011. See also: http://www.mediareport.nl/persrecht/28042011/cgb-redactionele-vrijheid-elsevier-omvat-recht-reageerders-te-discrimineren-op-politieke-voorkeur/
[106] http://www.gelderlander.nl/regio/geen-reacties-meer-onder-berichten-over-vluchtelingen-1.5567883
[107] https://nl.wikipedia.org/wiki/Wikipedia:Vrijwaringsclausule
[108] ECLI:NL:RBUTR:2008:BG6388 District Court of Utrecht, 10 December 2008.

No, on the contrary, King Willem Alexander has presented the Erasmus-prize to Wikipedia. The Erasmus Prize is an annual award (a cash prize of € 150,000) and it is given to a person or institution that has made an exceptional contribution to culture, society or social science, in Europe and beyond. [109]

4.3 Has there been any issues regarding cross-border aspects which (could) affect wiki contributors' freedom of expression?
No.

5) OTHERS TYPES OF 'CITIZEN-JOURNALISM'

If not covered by the previous answers, please describe here the concept, status, legal framework, judicial interpretation etc. on any other type of person engaged in what could be considered 'citizen-journalism' and any problems and barriers to freedom of expression and information which may result in your country. Please pay particular attention to situations involving cross-border dimensions.
The term 'burgerjournalist' [citizen-journalist] has been used recently when Ms. Rianne Schuurman, not a professional journalist, reported on a bomb threat live through livestreaming service Periscope (owned by Twitter) on 6 June 2015. Apparently, she was even supported by professional journalists from RTV Noord, who provided extra battery power when her smartphone battery life almost expired and provided her with a press card. The police initially did not allow Rianne in the press area, but decided to let her in later on. The public news broadcasting service NOS used Rianne's livestream to report on the issue.[110] It seems as though her reporting was not hampered in any way.

6) INSTITUTIONAL CONTEXT OF CITIZEN JOURNALISM

Discuss here whether there are any specific problems with the institutional context of citizen journalism in your country. In particular, this includes checking whether the media authority is independent, whether the courts are able to provide adequate protection to citizen-journalists, whether citizen-journalists are subject to pressures (eg frequent audits, investigations on other grounds, etc)
[NB: the normative framework for 'adequate' protection of citizen-journalists is not set out in the questionnaire]

Dutch Media Authority

[109] http://www.erasmusprijs.org/?lang=en&page=Erasmusprijs ; https://www.wikimedia.nl/nieuwsbericht/koning-willem-alexander-reikt-woensdag-erasmusprijs-uit-aan-wikipedia-vrijwilligers
[110] https://www.linkedin.com/pulse/van-ramptoerisme-naar-burgerjournalistiek-met-erik-jan

The Dutch Media Authority [Commissariaat voor de Media] independently[111] supervises and enforces the Dutch Media Act [Mediawet] as well as the regulations based on this act, such as the Media Decree [Media Besluit] and the Media Regulation [Media Regeling]. The Dutch Media Authority supervises audiovisual content and distribution matters,[112] as it grants licences to broadcasters, registers Video-on-Demand services and systematically monitors compliance with the rules on quotas, advertising and protection of minors. The Dutch Media Authority supervises the three main, and several thematic, public broadcasting TV channels, approximately 300 local public broadcasting TV channels, almost 250 commercial licensed TV programs (including around 10 main national private channels, many satellite channels and text TV services), providers of Video-on-Demand services, radio channels (both public and private service providers) and secondary activities of public broadcast services. The Dutch Media Authority can issue warnings, impose fines and suspend or revoke a licence. If a sanction decision is not complied with, the Media Authority can impose additional penalties. The budget of the Media Authority consists for approx. three quarters of state funding and one quarter of surveillance fees paid by market players. Fines are transferred to the state budget, but these funds have to be used for purposes of media policy. The Board of Commissioners consists of Prof. dr. Madeleine de Cock Buning, drs. Eric Eljon and Jan Buné RA.

The Dutch Media Act and related regulations are still largely focused upon the traditional media such as (cable or satellite) television and radio. However, in 2009 the Dutch Media Act was adapted to conform with the European Audiovisual Media Services Directive, in such a way that the Media Act is now "technology-neutral", i.e., the definition of a media service is not related to the distribution platform or the distribution technology, bringing Internet media services within its scope of application. The Dutch Media Act regulates on the one hand the state-funded public audiovisual broadcasting networks, and on the other hand the commercial audiovisual broadcasting networks, but these latter networks are only supervised when it comes to the maximum frequency and duration of advertisements and product placements.

It is unclear whether the Dutch Media Act applies to media content placed on the Internet by parties that do not fall under the definition of public or private/commercial broadcasting service, such as UGC platforms like Youtube.com or Vimeo.com. In that respect, the Dutch Media Act does not fully correspond the recital 21 of the EU's Audiovisual Media Services Directive, which defines 'audiovisual media services' as "mass media (…) which are intended for reception by, and which could have a clear impact on, a significant proportion of the general public." According to the Directive, such audiovisual media services "should not cover activities which are primarily non-economic and which are not in competition with television broadcasting, such as private websites and services consisting of the provision or

[111] http://medialaws.ceu.hu/netherlands1_more.html

[112] It guarantees the plurality and diversity of the (public) media, without, however, interfering with the actual content of the broadcasts. This is set out in article 7 of the Dutch Constitution and in the Dutch Media Act.

distribution of audiovisual content generated by private users for the purposes of sharing and exchange within communities of interest".[113]

A proposal to amend the Dutch Media Act is currently being discussed in the Dutch Parliament. The main amendments will, however, concern the position of the public broadcasting services, and have been met with considerable criticism.[114]

Netherlands Press Council [Raad voor de Journalistiek]
See para. 1.6 for further information about the Raad voor de Journalistiek.

Netherlands Association of Journalists [Nederlandse Vereniging van Journalisten]
The Netherlands Association of Journalists is a combination between a professional organization and a trade union, and it has over 7.500 members. The Netherlands Association of Journalists has 11 subdirectorates, which represent each of the different professions within the area of journalism, including "Internet".[115]
As stated before, the Netherlands Association of Journalists issues highly respected press cards. They negotiate collective labour agreements for journalists, provide legal counseling, training and career services.
Furthermore, in 2007 the Netherlands Association of Journalists together with the Netherlands Society of Chief-Editors set up the Press Freedom Fund, a foundation that promotes the freedom of the press. It can start and financially support legal proceedings with a fundamental character for the freedom of the press.[116]

Netherlands Society of Chief-Editors [Nederlands Genootschap van Hoofdredacteuren]
The Netherlands Society of Chief-Editors is a professional organization for editors of newspapers and radio- and tv-programmes. Similar to the Raad voor de Journalistiek, it has published a code of conduct for journalists in 2008. This code of conduct is voluntary, i.e., not legally binding and there is no enforcement mechanism.

Miscellaneous
Reporters covering the Dutch Parliament in The Hague can join the Parliamentary Press Association [Parlementaire Pers Vereniging].[117] Foreign correspondents can become a member of the Foreign Press Association of the Netherlands [Buitenlandse Persvereniging in Nederland].[118] Since 2012, there is an association for online journalists [Vereniging voor

[113] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).
[114] http://www.tweedekamer.nl/kamerstukken/wetsvoorstellen/detail?id=2015Z14958&dossier=34264 ; https://www.villamedia.nl/artikel/mediawet-passeert-tweede-kamer ; https://www.villamedia.nl/artikel/italiaanse-toestanden-door-nieuwe-mediawet ; http://www.volkskrant.nl/opinie/programmamaker-betaalt-rekening-nieuwe-mediawet~a4158113/
[115] https://www.nvj.nl/over-nvj/wie-is-wie/sectiebesturen/
[116] http://www.persvrijheidsfonds.nl
[117] http://www.tweedekamer.nl/over_de_tweede_kamer/persinformatie
[118] http://www.bpv-fpa.nl/wordpress/

Online Journalisten]. Membership is also open to bloggers whose blog has a (semi-) professional character.[119]
There is also a Dutch Publishers Association [Nederlands Uitgeversverbond], which organizes publishers of books, daily newspapers, magazines, and professional and scientific journals.[120] Furthermore, there is a separate Dutch Association of local newspapers [Nederlandse Nieuwsbladpers], which brings together publishers of weekly and bi-weekly local newspapers and cable news.[121]
The Professional Association of Film and Television Workers (Beroepsvereniging van Film- en Televisiemakers) represents professionals working in the film and television industry,[122] and production companies in this sector are organised in the Dutch Trade Association of Independent Television Producers [Onafhankelijke Televisie Producenten].[123] Local and regional media are united in the Dutch Federation of Local Public Broadcasters [Organisatie van Lokale Omroepen in Nederland].[124]
Lastly, Bits of Freedom is a Dutch NGO focusing on digital rights, focusing on privacy and communications freedom in the digital age.[125]

Conclusion

The freedom of expression and freedom and diversity of the press are quite well protected in the Netherlands, as Freedom House also concludes.[126] Any publication, irrespective of its specific qualification as ("citizen-")journalism is protected in a case-by-case, nuanced way.

7) FUNDING

How is citizen journalism funded? Are there any NGOs promoting citizen journalism? What about local or central government, universities, businesses etc.? As far as possible, try to gather information on the business models of blogs, institutional hosts, etc. Play particular attention to blogs or other types of citizen-journalism which exercise a close scrutiny of government, business practice, and controversial policy areas (e.g. immigration, refugees, etc).

Many of the traditional news media now have a "blog" section on their websites. Consequently, it becomes increasingly hard to distinguish blogs from more formal journalistic websites. Many blogs and other (news) websites get their revenues from online advertisements on a pageview basis.

Funding of blogs

[119] www.vojn.nl
[120] http://www.nuv.nl
[121] http://www.nnp.nl
[122] http://www.nbf.nl
[123] http://www.otpnederland.nl/Home
[124] http://www.olon.nl
[125] www.bof.nl
[126] https://freedomhouse.org/report/freedom-press/2015/netherlands

The popular right-wing, strong-worded blog GeenStijl.nl which started in 2003, is owned by Telegraaf Media Group.

The progressive blog Sargasso.nl, started in 2002, received a single subsidy from the Dutch Journalism Fund in 2011, but now operates on donations and revenue generated by advertisements.[127]
Dagelijksestandaard.nl is a right-wing blog, but founded and run by experienced, professional journalists.[128] There is very little information about the funding of Dagelijksestandaard.nl, although it is mainly funded by advertisements.[129]

Jalta.nl is the right-wing, conservative answer to the popular progressive online news- and opinion platform Decorrespondent.nl. Both websites strive for innovative journalism, and are predominantly funded via subscriptions.[130]
In 2013, De Correspondent received a 450.000 euro subsidy from the Foundation for Democracy and Media (Stichting Democratie en Media). For its innovative research into education, De Correspondent received a grant of 100.00 euros from the Dutch Journalism Fund. De Correspondent received a 150.000 euro subsidy from the European Journalism Centre to report about the UN Climate Change Summit in Paris in 2015.[131]

Funding of journalism
Through the Dutch Journalism Fund [Stimuleringsfonds Journalistiek], the Dutch government supports the innovation, quality, diversity and independence of journalism in The Netherlands. The fund provides grants to innovative projects, research and it stimulates knowledge sharing across the industry. The fund receives approx. € 2 million annually from the Ministry of Education, Culture and Science.

The Dutch Cultural Media Fund [Stimuleringsfonds Nederlandse Culturele Mediaproducties] promotes the development and production of high-quality artistic programmes by the national and regional public broadcasting corporations. The fund provides more than 16 million euros in subsidies annually for radio- and television programmes in the following fields: drama, documentary, feature film, youth, new media and performing arts. The fund also stimulates new genres, like video clips and games in collaboration with other organizations and funds.[132]

The Fund for Special Journalistic Projects [Fonds Bijzondere Journalistieke Projecten] gives

[127] http://sargasso.nl/over-sargasso/
[128] http://www.dagelijksestandaard.nl/over/
[129] http://nieuwejournalistiek.nl/startup-jalta/2015/03/02/een-ouderwets-opiniemagazine-voor-het-smartphonetijdperk/
[130] https://decorrespondent.nl/en
[131] https://www.svdj.nl/nieuws/innovatiesubsidie-voor-zeven-projecten/ https://decorrespondent.nl/398/Stichting-Democratie-en-Media-steunt-De-Correspondent/38550636608-6a8acddd http://www.elsevier.nl/Cultuur--Televisie/achtergrond/2015/11/De-Correspondent-krijgt-150000-euro-aan-groene-subsidie-2723286W/
[132] http://www.mediafonds.nl/english

financial support to journalists who undertake a special, lengthy investigation in a certain topic.[133]

8) OTHER OBSTACLES

Please provide here any other information which you deem relevant to assessing the freedom of expression of citizen-journalists, or their impact on the freedom of information or expression of citizens in general (e.g. issues regarding the quality or objectivity of information coming from citizen-journalists)

Freedom of Information Act

In principle, Dutch government information should always be public, unless there are valid, legal reasons to withhold certain information. The public, and thus also journalists and/or other publicists such as bloggers, can obtain access to government information under the Dutch Public Access to Government Information Act (*Wet openbaarheid van bestuur, WOB*). A request based on this Act is referred to as a 'Wob' request. A Wob-request may be declined if a) security is compromised by making the information public; b) it concerns confidential data related to people or companies or c)other interests carry more weight than making the data public.

The government body that provides the document may only charge costs for the photocopies of documents. Furthermore, the deadline for deciding on a Wob-request is four weeks, which may be extended with another four weeks.

In 2009, the Dutch legislator adopted a law on penalty payments for not rendering a decision in time [Wet dwangsom en beroep bij niet tijdig beslissen]. Under this law, the citizen who made the request and has not received a decision in time, can declare the government body in default. If there is still no decision after two weeks, the citizen can claim a penalty payment of 20 euro per day for the first fourteen days, 30 euros per day for the next fourteen days, and 40 euros for the remaining day until a decision, with a total maximum of 1260 euros.[134] The aim of this law was to speed up the general decision making by governmental bodies. However, since this new law offers a lucrative way of getting money, there has been a growing practice of "professional wob-bers", i.e, persons who submit numerous Wob-requests, not for the information, but hoping that the government body will not decide in time, and that they can claim the penalty payments.[135] These bogus Wob-requests clog the system, and have caused the decision-making process on Wob-request to slow, hampering the information-gathering by serious citizens and journalists. The government is looking into ways to make the system more effective. There have been proposals to stop the system of penalty payments in order to remove the incentive for bogus requests, but this proposal has met with severe criticism from, among others, the Netherlands Association for Journalists. Without the penalty payments, journalists would have no way to pressure government bodies to decide in time.[136]

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[133] http://www.fondsbjp.nl/over/

[134] https://zoek.officielebekendmakingen.nl/stcrt-2014-30255.html

[135] https://www.nvj.nl/nieuws/voorstellen-voor-betere-werking-wob

[136] http://www.binnenlandsbestuur.nl/bestuur-en-organisatie/nieuws/uitstel-schrappen-dwangsom-wob.9480698.lynkx ; https://www.nvj.nl/nieuws/voorstellen-voor-betere-werking-wob

Drones

Since 1 juli 2015, it is unlawful to make photos and video recordings with drones for professional (journalistic) purposes without an official license. Citizens, however, are free to may make such recordings for private use. The rules for drone use by professional journalists are similar to those applied to flying with helicopters. Professional journalistic use of drones without a appropriate license is punishable with maximum 6 months imprisonment or a fine of an amount up to 7.800 euros. In 2015, the Netherlands Assocation for Journalists started a law suit against the Dutch government to challenge the validity of this law.[137]

Legislative Proposal: Cybercrime Act III

On December 22, 2015, the Dutch government submitted a legislative proposal to the Dutch Parliament for extending the investigative powers relating to cybercrime.[138] If this proposal is accepted, the police will get very extensive investigative powers, such as the power to hack computers/servers which are suspected to carry illegal data, and remotely accessing (turning on) webcams and microphones. It's not immediately relevant for citizen-journalism, but since the private and professional use of the Internet is so intertwined, it may be relevant for citizens' right to freedom of expression and privacy. The legislative proposal was done with two main spearheads: combating online childporn, but also curbing radicalisation/recruitment for jihadist combat.

9) THE CONCEPT OF 'CITIZEN-JOURNALIST'

Based on the above, would you suggest that there is such a concept as citizen-journalist in your country? If not, are they equivalent? (Please, specify it in the original language version.) Do (different type of) citizen-journalists have a particular legal status? If yes, who does this status cover (eg bloggers, authors of on-line comments, forum or wiki contributors or social media users, others?) If not, are citizen-journalists treated as 'ordinary citizens' or 'ordinary journalists'?

Based on my research, I conclude that there is such a concept like citizen-journalist in the Netherlands. There are no clear, distinct definitions of 'journalists', 'publicists' or 'bloggers'. The case law of the Dutch courts is sufficiently nuanced to protect (in an ex post facto review) the freedom of expression of any person who reports on issues that are relevant to the public debate.

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137 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

138 https://www.rijksoverheid.nl/actueel/nieuws/2015/12/22/wetsvoorstel-computercriminaliteit-bij-tweede-kamer-ingediend; https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/kamerstukken/2015/12/23/wetsvoorstel-computercriminaliteit-iii/wijziging-van-het-wetboek-van-strafrecht-en-het-wetboek-van-strafvordering-in-verband-met-de-verbetering-en-versterking-van-de-opsporing-en-vervolging-van-computercriminaliteit-computercriminaliteit-iii.pdf ; see also https://oerlemansblog.weblog.leidenuniv.nl/2015/10/

There are still remnants of the more traditional identification of professional journalists when it comes to press accreditation through press cards, and the new legislative proposals on source protection. Although this practice is somewhat exclusionary of 'citizen-journalists' and other forms of freedom of expression, it relates to an exceptional position that is afforded to the journalist in question. In the light of that exceptional status, it is logical that certain qualitative conditions are imposed.

Although Dutch law seems to sufficiently protect the freedom of speech of users of digital media in general, it has to be noted that there is a growing concern about the investigative and monitoring powers of the authorities in case of suspicions of cybercrime and/or links with terrorism. Also, the very heated and polarized debate among Dutch people about the refugee crisis show that on the one hand, Internet users are stretching the boundaries between acceptable speech and illegal (offensive or defamatory) statements, and on the other hand, both government authorities and media platforms seem to intervene more often in online speech, for instance, closing down online comments sections.

BEUCITIZEN
BARRIERS TOWARDS EU CITIZENSHIP

WP 7. DELIVERABLE 7.3

UNIVERSIDAD DE OVIEDO

Case study (ii) on Freedom of Expression in the context of the Media

Country Report: SPAIN

(UNIOVI Report 30/12/2015)

Ignacio Villaverde Menéndez[1]
Javier A. González Vega (coord.)[2]

BEUCITIZEN
BARRIERS TOWARDS EU CITIZENSHIP
SEVENTH FRAMEWORK PROGRAMME
CEU CENTRAL EUROPEAN UNIVERSITY

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QUESTIONNAIRE FOR COUNTRY REPORTS
CASE STUDY (II) ON FREEDOM OF EXPRESSION IN THE CONTEXT OF THE MEDIA

Task 7.3 (Iii)

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

Extract from the DoW
Task 7.3
Cross-national examinations of specific barriers that EU citizens (and third-country nationals) face when exercising their civil rights through four case studies:

(ii) A case study exploring difficulties faced by EU citizens when trying to enjoy the freedom of expression in the context of media law and policies

Deliverable 7.4) Report on case study (ii):

"Difficulties faced by EU citizens when trying to enjoy freedom of expression": Report on the results of case study (ii): An in-depth case study on "difficulties faced by EU citizens when trying to enjoy freedom of speech in the context of media law and policies". A cross-national, comparative study for a number of Member States, which score either higher or lower in the 'free speech index', including the United Kingdom, **Denmark, Belgium, Hungary, Italy, Spain,** the **Netherlands,** Germany, France, the Czech Republic and/or Croatia (more countries may be involved as the exact number of Member States will need to be identified.

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

The questionnaire below seeks to gather relevant information on the freedom of expression of citizen-journalists from selected member states**: Belgium, Denmark, Spain, Hungary, Italy, the Netherlands.**

Contributors should look for relevant materials in legislation, case law, academic commentaries or in the media, which can help elucidating the questions asked.

PRACTICAL INFORMATION AND GUIDELINES

Please try to structure the country report based on the questionnaire below (including headings).

Make sure to include precise references to constitutional, legislative and regulatory provisions, cases and other relevant policy and legal documents. We also encourage you to look for and identify relevant empirical evidence of specific obstacles to civil rights implementation and enforcement in the EU (NGO reports, statistics, press extracts, testimonies, interviews, surveys, etc.)

The country report should be written in English. If certain concepts or notions do not translate well in English, we recommend that you use both the original language as well as the most appropriate English translation the first time a concept is referred to. Later mention may be in either language. Language editing is the responsibility of each author.

Please use the Kluwer author guidelines for references and citations: http://www.kluwerlawonline.com/files/COLA/COLAHOUSERUL2013.pdf.

Deadline for the report: 31 December, 2015
Please, be reminded that the deadline is a very strict one. In case of delay, we will not be able to submit the deliverable on time.

QUESTIONS

1) BLOGGERS AND BLOG EDITORS

Is there any legal (statutory, case law, judicial interpretation) definition for 'blogger' (or 'blog') in your country?

In Spain there is no legal definition of blog or blogger. In the Spanish legal system there is not even a legal definition of who can be considered a (professional) journalist. The Statutes and the collective work-agreements in the sector of the mass media are the places to seek and find the definition of journalist (e.g., those of the daily El Mundo, El País or Radio Televisión Española) [3]. However, none of these definitions have been used either by legislation or by jurisprudence to identify whether the person is or not a journalist for the purposes of the exercise of freedom of expression and information. It should be noted that in the Spanish system the condition of titular subject of both freedoms is unitary and no differences are established between professionals of the media or mere citizens since the judgment of the TC 30/1982 relating to the withdrawal of accreditation for journalists to access the courts.

In the Spanish case, there are no normative or judicial rulings that give a specific treatment to blogs or bloggers for the purpose of clarifying the scope of protection of free speech expressed through these means, nor has their use been taken into account to measure the intensity of the possible damage to the rights of others. See the case of the sentence of the Barcelona Provincial Court, Section 3, Order 333/10, March 19, about defamation in a blog.

Do blogs have to be registered or licensed, or do bloggers need to identify themselves in any particular way?

No. Their legal regime is that resulting from the acceptance of the contractual terms of use provided by the supplier of the blog hosting service.

In Spain there is no legal condition to be a blogger. From a constitutional point of view the condition of blogger is irrelevant. See the cases of the sentences of the TC 174/2006, 208/2013 or 7/2014 in which the controversial message was reported through the web.

There is no register of bloggers, 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[4].

[3] Estatuto de la redacción del diario El Mundo, El País, de la Corporación pública de Radio Televisión Española o la Agencia EFE. Todos ellos se pueden consultar en http://www.fesp.org/index.php/documentos/itemlist/category/38-estatutos-de-redacci%C3%B3n. Convenio Colectivo de la Prensa Diaria, file:///C:/Users/Nacho/Downloads/convenio-prensa-diaria-2007-2010.pdf.

[4] BOE núm.166, 12 de julio de 2002.

What is the legal status of bloggers? How does it relate to the legal status of journalists? How does it differ?

Bloggers in Spain do not have a specific legal status. In the same way, in Spain there is no specific legal status of journalists. Recognition of the condition of journalists is linked from a professional point of view to the condition of contracted personnel by a mass media through which they exercise freedom of expression or information, making them co-responsible for the opinions or information published in said media (even in the case of the so-called "letters to the director" section, which has been extended also to the case of private comments posted on the media-web). If that condition is recognized, linked to working in a means of communication, it only serves jurisprudentially to consider the condition as news of the reported message and demand greater care and diligence in the standard of truthfulness of the information required by article 20.1 d) CE (STC 192/1999).

Please explain the extent to which bloggers or blog editors do - or do not - fall under similar legal regimes as journalists, and expose similarities and specificities, as they result from legislation, case law, practices, etc.

A blog or a blogger, unless inserted in a means of communication in digital format, is not regarded by Spanish law as a "journalistic communication" or a "journalist". Hence, blogs or bloggers are submitted to a stricter test about the character of "public information relevance".

Blogs in social/digital media are covered by the clause of conscience according to article 20(2) against the editor of the medium, but with limitations. The clause is regulated in Law 2/1997, of 19 June, regulating the Conscience Clause of the Professionals of Information[5]. The TC has admitted that the trend or ideology of the media can condition the freedom of expression and information of its journalists. The constitutional interpretation of this clause is contained in the judgments TC 199/1999, 225/2002 and 125/2007.

In Spain this has not been a particularly controversial issue, however, and the TC has insisted that information professionals do not enjoy a privileged constitutional position (although the TC has admitted that they can enjoy preference in access to places where there may be a shortage of space as it is presumed that they will carry out the function of disseminating information to the public in general). Sentences TC 30/1982, and 56 and 57/2004.

In particular, are bloggers' sources protected? To what extent is bloggers' freedom of expression protected? What are the limits? What judicial and non-judicial proceedings can be brought against bloggers for violations of rules limiting free speech? What penalties or sanctions do they risk? Have there been any reported cases?

[5] BOE de 20 de junio de 1997

In Spain the protection of the sources of information is contemplated by the constitution under freedom of information. The argument is that people cannot exercise free speech, if their sources are not protected, especially in the case of professional journalism. Article 20.1 d) EC guarantees this professional secrecy in the exercise of freedom of information, and article 24.2 CE refers to the law to regulate the cases with exemption from testifying about alleged criminal acts under the protection of professional secrecy. This Law at the moment is still article 418 of the Criminal Code:
"No witness may be compelled to testify about a question whose answer can impair materially or morally and in a direct and important way either the person, or the fortune of one of the relatives mentioned in article 416".
"Except 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".

There have been no cases in Spain that offer a response, but the hypothesis is also possible that considers that the constitutional protection of the secrecy of sources only protects information professionals, so if the blog is not inserted in a digital communication media and its editor is not an employee of the medium, they will not be considered professional and to that extent will not enjoy such protection.

Are blog editors/hosts responsible for publications or comments posted on their blog? If yes, under which circumstances and conditions (e.g. 'notice-and-take down'? Criminal, civil liability? etc.) What proceedings can be brought against them? What types of sanctions can be imposed? Have they been reported cases?

We must distinguish between resident blogs in the media and those supported by web service providers/hosts. In the first case the treatment is similar to that of the responsibility of the media concerning the messages contained therein. They are criminally or civilly responsible if they do not or cannot identify the effective author of the message. They are subsidiary civilly responsible, both in criminal and civil proceedings, in the remaining cases.

In the case of blogs supported on servers or web services, providers are responsible under the terms of 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, in particular article 16:
Article 16 liability of providers of hosting or data storage services.
"1. Providers of an intermediation service consisting in the storage of data provided by the recipient of this service shall not be liable for the information stored at the request of the recipient, provided that:"
(a) they do not have actual knowledge that the activity or information stored is unlawful or harms goods or rights of third parties liable for compensation, or
(b) if they do, they act with diligence to remove the data or make their access impossible.
It will be understood that the service provider has actual knowledge referred to in paragraph a) 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.
2. The exemption from liability established in paragraph 1 will not operate if the recipient of the service acts under the direction, authority or control of the provider".

And article 13 establishes a general clause:
"1. The providers of information as a service to society are subject to civil, criminal and administrative responsibility established in general in the legal system, without prejudice to the provisions of this law".

Must bloggers or blog editors abide by the rules on responsible journalism (eg as stated in the press law or the Code of Ethics for Journalists, etc.)?

Only if the blogger is part of a digital media. It is generally accepted (in the Statutes of Media) that a blogger is a journalist of that media if they continually communicate.

Is anonymous blogging considered protected speech?
TC has considered that anonymous messages are not protected by article 20. The media has the responsibility to identify of the author, or at least the media must diligently check the identity of its author (or may reveal it, without disclosing the author or disclosing a pseudonym or an alias signing the message) under penalty of incurring criminal or civil responsibility. STC 153/2000 and ATC 56/2002.

What are the circumstances under which a blog can be closed down or access to it blocked (eg apology of terrorism in France)? Do you know of particular instances? Was the measure challenged? How? On which basis?
The Spanish legal system does not provide for specific measures of suspension, blocking etc of a blog, website or similar.
Although there has been no case in Spain, pursuant to the provisions of article 20(2), the EC prohibits any kind of prior censorship. And paragraph 5, however, allows the seizure of information media through judicial resolution. The sentence TC 187/1999 has defined the jurisprudential doctrine on both constitutional rules, which must be integrated with the jurisprudence of the TC considered constitutionally permissible "private" censorship and self-censorship (judgments of the TC 176/1995, 199/1987 and 187/1999). In other words, the possibility that a web service provider may cancel or block a blog or web page. However, this has still not been the case in Spain.
In civil matters, the possibility of ordering the judicial seizure of a website or a blog is regulated in general by article 721 and following the Law of Civil Procedure as a precautionary measure, and in cases of urged prosecution in protection of honour, privacy and personal image in article 9 of the organic law 1/1982, May 5, of civil protection of the right to honour, personal and family privacy and personal image[6].
In criminal matters such measures are not expected as a penalty, but seizure may be expected as a precaution once criminal proceedings have been initiated for offences against honour, privacy, personal image or through the use of any type of publication media, (article 816 et seq. of the Criminal Procedure Act). Or in the case of crimes of hate (hate-speech), article 510.6 CP:

[6] BOE, núm. 115, de 14 de mayo de 1982

"6. The judge or court shall agree the destruction, erasure or retirement of books, files, documents, articles and any kind of support of the offence referred to in the preceding paragraphs or through which it has been committed. When the offence has been committed through information and communication technologies, the withdrawal of the contents will be ordered.
In cases in which, the contents referred to in the preceding paragraph are disseminated exclusively or predominantly through a portal of Internet access or service of the society of information, the blocking of access or the interruption of their provision will be ordered ".

Article 39 of the law 34/2002, of 11 July, for services of the society of information and electronic commerce, pecuniary sanctions are only expected for service providers that fail to comply with the duties arising from the law.

The systematic interpretation of articles 19.2 and 36.23 Organic Law 4/2015, 30 March, on the protection of public safety[7] allows to maintain that the Government can cancel and block a website or a blog if it shows images of agents of the authority without prior authorization. At this point, this law has been appealed before the TC.

Article 53 EC, in relation to article 116, allows the general suspension of freedom of expression and information in the cases legally foreseen of a declaration of a state of emergency. Organic law 4/1981, of 1 June, on the states of alarm, exception and siege provides measures of suspension in the case of a declaration of a state of emergency (article 13) and siege (article 32), under the terms of its article 21:
"1. The governmental Authority may suspend all types of publications, radio transmissions and television, cinematographic projections and theatre representations, providing the authorization of the Congress includes the suspension of article 20, articles 1, a) and d), and 5 of the Constitution. It will also be able to order the seizure of publications."
2. The exercise of the powers referred to in the preceding paragraph cannot be accompanied by any kind of prior censorship".

Have there been any issues regarding cross-border aspects which (could) affect bloggers' freedom of expression?

In this extreme, it could only be affected as provided for by article 39.3 of the Law 34/2002, of 11 July, on services of the society of information and e-commerce:
"3. When the punishable offences pursuant to the provisions of this law had been committed by service providers established in States which are not members of the European Union or the European economic area, the organ which would have imposed the corresponding penalty may order that the providers of intermediation services take the necessary measures to prevent access from Spain to the services offered by those for a maximum period of two years in the case of very serious offences, one year in serious offences and six months in minor offences with respect to its recipients, where it depends on whether they have an office or permanent installation in which the blog is located".

[7] BOE núm. 77, 31 de marzo de 2015

Are you aware of any threats of law suits against bloggers or any other types of pressure exercised on bloggers to intimidate them and prevent them from reporting on delicate issues (e.g. death threats, withdrawal of financial support/advertising revenue, pressure on family members, online harassment through comments, etc)?

In the Spanish legal system, there are no specific means or type of pressure. The jurisprudence which has dealt with the breach of rights of third parties by means such as Twitter or similar, has done so without distinguishing them from other more traditional media. See the case of the decision of the Audiencia Nacional, Sala Penal, appeal 255/2015, from October 1, 2015, or judgments of the Audiencia Provincial de Albacete, section 1, 194/2015, July 24; or the judgment of the Audiencia Provincial de Madrid, section 26, 394/2015, May 27.

Some concern has been raised in Spain about the disclosure through mobile messages, Twitter, Facebook or whatsapp etc, of images taken of third parties without their consent, revealing areas of personal or sexual privacy (sexting, see the judgment of the Audiencia Provincial de Granada, section 1, 351/2014, 5 June 2013). This has led to the reform of the Criminal Code[8] with the insertion of a new section 7 in article 197[9]:

"It will be punished with imprisonment of between three months and one year or a fine of six to twelve months, who, without the authorization of the person concerned, disseminates, discloses or transfers to others images or audiovisual recordings obtained without consent in a home or anywhere else away from the eyes of third parties when said dissemination seriously undermines the personal privacy of that person.
"The upper half of the penalty shall be imposed when the acts had been committed by the spouse or by a person who is or has been connected by an analogous relation of affectivity, even without living together, the victim was under age or a person with disabilities in need of special protection, or the facts had been committed for lucrative purposes".

SOCIAL MEDIA USERS

What is the legal framework for the protection of the freedom of expression of users of social media? Are different contexts or situations covered by different legal regimes?

In Spain it is protected by article 20.1 CE and is not subject to a specific legal regime, except for the rights of reply and rectification (in Spain there are no mechanisms of access to the media, but only to rectification of facts) regulated by Organic Law 2/1984, of 26 March, regulating the right of rectification[10]. Therefore, the legal regime is that of any citizen who wants to access or make use of communication media.

[8] Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal (BOE núm. 281, de 24 de noviembre).
[9] Apartado incorporado al artículo 194 por el número ciento seis del artículo único de la Ley Orgánica 1/2015, de 30 de marzo, por la que se modifica la 10/1995, de 23 de noviembre, del Código Penal (BOE núm.77, de 31 marzo).
[10] BOE 74 of 27 March 1982

Is online speech subject to a different legal regime (e.g. aggravating circumstances)?

No, except in the case of crimes of hate (hate-speech).

Article 22 of the Criminal Code does not foresee among the aggravating circumstances the use of networks or social media, neither in the articles governing offences against privacy - Title X, Chapter I-, opinion (slander, libel) - Title XI, Chapters I and II, articles nor those committed by any means of communication. Not even in the case of the aforementioned article 194.7, does the use of those means to disclose facts concerning the privacy of persons constitute aggravating circumstances.

However, in the case of hate crimes (article 510 CP), the aggravation of the penalty is contemplated if the incitement to hate is carried out through this type of media. Article 510.3:
"3. The penalties provided for in the preceding paragraphs shall be imposed in their upper half when the facts had been conducted through a social communication media, via Internet or through the use of information technology, making them accessible to a large number of people".
And the blocking of the page by judicial order, article 510.6:
"6. The judge or court shall agree the destruction, erasure or retirement of books, files, documents, articles and any kind of support of the offence referred to in the preceding paragraphs or through which it has been committed. When the offence has been committed through information and communication technologies, the withdrawal of the contents will be ordered.
In cases in which the contents referred to in the preceding paragraph are disseminated exclusively or predominantly through a portal of Internet access or service of the society of information, access will be blocked or the interruption of the provision of the same will be ordered ".
The legal persons involved in the commission of such offences may be responsible, article 510 bis CP.

It is worth noting the judgment of TC 235/2007 which partially considered the question of unconstitutionality about the article 607.2 CP, considering it harmful to the freedom of expression of the article 20,1 a) CE. This precept provided:
"The dissemination by any means of ideas or doctrines that deny or justify the offences established in the previous paragraph (genocide) of this article, or intend to rehabilitate regimes or institutions that protect practices which generate said offences, shall be punished with the penalty of one to two years".

That article has been removed from CP by the organic law 1/2015, March 30[11].

Can privacy settings increase or decrease exposure to law suits for a particular type of illegal speech (eg defamation)?

Of course. In fact the overwhelming majority of cases resolved by the ordinary and constitutional jurisdiction are related to hypothetical violations of rights to honour or privacy through messages reported in the media or social media, digital or not.

[11] BOE núm.77, de 31 de marzo.

Does the operation of social media groups (e.g Facebook open/closed groups, Google groups etc) pose particular problems for the protection of freedom of expression?

Not in Spain.

Who is responsible for illegal speech on social media? Are there any obligations imposed on social networks to prevent/sanction illegal speech?

In Spain, the author of the message is criminally responsible. The media (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.
Article 30 CP defines the chain of criminal responsibilities in the case of offences committed through the media:
"1. For offences committed using media or mechanical broadcast means, neither accomplices nor those who have favoured them personally or really will respond criminally."
2. The authors referred to in article 28 will respond, exclusively and in a subsidiary way, according to the following order:
1st. Those who really drafted the text or produced the sign in question, and those who 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.
4th. Managers of the recording, reproductive or printing company.
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 can be pursued, the procedure against those mentioned in the number immediately following shall apply ".

This circumstance could affect the owners or administrators of servers or providers of web services in the application of the provisions of article 30 et seq. of the CP (in relation to article 510 bis):
"Article 31
Those who act as administrator of fact or right of a legal person, or in name or legal or voluntary representation of another, will respond personally, although the conditions, qualities or relations are not fulfilled that the corresponding figure of crime requires in order to be an active subject, if such circumstances occur in the entity or person on whose behalf or representation they act.

"Article 31 bis"
"1. In the cases referred to in this code, the legal persons shall be criminally liable for:"
(a) crimes committed in the name of or on behalf of them, and in their direct or indirect profit, by their legal representatives or by those acting individually or as members of an organ of the legal person, are authorized to make decisions on behalf of the legal person or hold powers of organization and control within said organ.
(b) crimes committed, in the exercise of social activities and on behalf of and direct or indirect benefit of the same, by those who, being subjected to the authority of the natural persons mentioned in the preceding paragraph, may have carried out the facts

due to a serious breach of the duties of supervision, surveillance and control of their activity by the former depending on the specific circumstances of the case.
2. If the offence is committed by persons referred to in letter a) of the preceding paragraph, the legal person shall be exempt from liability if the following conditions are met:
1st. The administrative organ has adopted and implemented effectively, before the commission of the offence, models of organization and management that include appropriate surveillance and control measures to prevent offences of the same nature or to significantly reduce the risk of their commission;
2nd. Monitoring of the performance and compliance of the prevention model implemented has been entrusted to an organ of the legal person with autonomous powers of initiative and control or has been legally entrusted the function to monitor the efficiency of the internal controls of the legal person;
3rd. Individual authors have committed the crime by fraudulently eluding the organization and prevention models and
4th. There has not been an omission or insufficient exercise of the functions of supervision, monitoring and control by the authority which is referred to in the 2nd condition.
In cases where the previous circumstances can only be partially accredited, this circumstance shall be valued for the purposes of mitigation of the penalty.
3. For legal persons of small dimensions, the functions of supervision referred to in the 2nd condition of paragraph 2 can be assumed directly by the administrative organ. For these purposes, legal persons of small dimensions are those who, according to the applicable legislation, are authorized to submit abbreviated profit and loss accounts.
4. If the crime were committed by the persons referred to in point b) of section 1, the legal person shall be exempt from liability if, prior to the commission of the offence, it has adopted and effectively implemented a model of organization and management that is appropriate to prevent crimes of the nature of which was committed or to significantly reduce the risk of its commission.
In this case it will be equally applicable the mitigation referred to in the second paragraph of section 2 of this article.
5. The models of organization and management referred to in condition 1 of paragraph 2 and the previous paragraph shall meet the following requirements:
1st. Identify the activities in whose scope the offences that must be prevented may be committed.
2nd. Establish protocols or procedures that materialize the formation process of the will of the legal person, decision-making and execution thereof in relation to them.
3rd. Have adequate financial resources management models to prevent the commission of offences that must be prevented.
4th. Impose the obligation to inform the body responsible for monitoring the performance and observance of the model of prevention of possible risks and non-compliance.
5th. Establish a disciplinary system that adequately punishes the breach of the measures established by the model.
6th. Carry out checks on a regular basis of the model and of its eventual modification when relevant infringements of their provisions become evident, or when changes occur in the organization, the control structure or the activities developed that make them necessary."

"Article 31 third
1. The criminal responsibility of legal persons will be enforceable if it is found that the commission of an offence which has been committed by the person who holds the positions or functions mentioned in the previous article, even if the specific individual responsible has not been individualized or it has not been possible to direct the procedure against said person. When as a consequence of the facts a fine is imposed on both, the judges or courts must influence the respective amounts, so that the resulting sum is not disproportionate to the seriousness of the infraction.
2. The concurrence, in people who physically carried out the facts or who would have made them possible by not exercising proper control, of circumstances that affect the guilt of the accused or aggravate their liability, or the fact that such persons who have died or have been removed from the action of justice, shall not exclude or amend the criminal responsibility of legal persons, without prejudice to what is laid down in the following article.

"Article 31 fourth
Mitigating circumstances of the criminal responsibility of legal persons may only be considered after undertaking, subsequent to the commission of the offence and through their legal representatives, the following activities:
a) They have proceeded to confess the infringement to the authorities, before being aware of judicial procedure directed against them.
b) They have collaborated in the investigation of the facts, giving evidence at any time during the process, which proved new and decisive to clarify the criminal responsibilities arising from the facts.
(c) They have proceeded at any time during the procedure and prior to the trial to repair or reduce the damage caused by the offence.
(d) They have established effective measures before the start of the trial, to prevent and discover crimes which in the future could be committed by the media or under the auspices of the legal person".
See also the abovementioned in relation to the application of Law 34/2002, 11 of July, on services of the society of the information and of electronic commerce, BOE 166, 12 of July 2002.

The most striking case in this area is that of the 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, concerning the hosting of different magazines and newspapers accessed through the youkioske.com website. In this important judgment at no time was a question of freedom of information raised by the defendants. They claimed under the law 34/2002, of 11 July, on services of the society of information and electronic commerce, that they were simply owners of a server and not responsible for the contents that were uploaded and stored therein.

Are social media users' expressive activities hampered by the legal framework or its application to social media (eg mandatory blocking or deletion, etc.)?

Not in Spain. In addition, the TC has greatly insisted on and acted against any action or ruling of public power which can be either a system of prohibition subject to authorization, or produce a "chilling" effect on the exercise of communicative freedom (by all judgments of the TC 187/1999, and 56 and 57/2004).

Nowadays, and as already indicated above, doubts are generated about the constitutionality of provisions in articles 19.2 and 36.23 of the Organic Law 4/2015, 30 March, on protection of public safety related to the prohibition of the acquisition of images or data of agents of the security forces of the State in the exercise of their functions and the seizure of cameras, mobile phones or any instrument to support the images, data or information (currently appealed before the TC).

Has there been any legal case involving social media users or social networks? Are problems which affect freedom of expression on online media reported in the press, forums, etc?

No

Have there been any issues concerning cross-border aspects of social media?
No

Are you aware of any threats of law suits against online users or any other types of pressure exercised on them to intimidate them and prevent them from reporting or commenting on particular delicate issues (e.g. death threats, pressure on family members, online harassment through comments, etc)?

I am not aware of any.

(2) On-line COMMENTS

What is the legal status of persons posting online comments? What are the scope and limits of freedom of expression of commenters?

The legal status is similar to that of the abovementioned "letters to the director", which is no different to any other form of dissemination of a message (judgments of the TC 65/2015, 126/2003, 3/1997): the author is responsible. STC 3/1997 FJ 3:
"Indeed, authorizing the publication of a letter of a third party whose author has been identified previously, it will be said author who will held responsible if the content is damaging to the right of honour of a third person." However, the situation is very different if the writing is published without the media knowing the identity of its author, as in such writing this course does not constitute an action that can be separated from that of its publication by the media, according to the doctrine exposed in the STC 159/1986. So that by authorizing the publication of the letter in spite of not knowing the identity of its author it has to be understood that the media, by that fact, has assumed its content. This implies a double result: firstly, that the exercise of the freedom which article 20.1 recognizes and guarantees will be judged, exclusively, in relation to the media, given that the author of the writing is unknown. Secondly, that the media shall be responsible or not for the possible liability that might arise from the writing if its content has exceeded the scope of constitutionally protected freedom of information and, where appropriate, of the freedom of expression, damaging the honour of a third party or, on the contrary, it has respected said honour".

The limits are similar to any message (especially honour and privacy, and other fundamental rights and goods worthy of constitutional protection).

Are there different approaches depending on the nature of the host? (newspaper website, blog, or forum?)

No.

How different is it from the status of those publishing comments or reactions in the traditional media?

No different.

Do the most important media outlets have to comment platform?

Yes.

Who is responsible for illegal comments and in what way? (does 'notice-and-take-down'? Criminal, civil liability? etc.)

The author, if known, and if not the media that supports the comment (STC 3/1997).
Article 30 CP sets the chain of criminal responsibility:
Article 30.

"1. For offences committed using media or means of mechanical broadcast neither accomplices nor those who have favoured them personally or really will respond criminally."

2. The authors referred to in article 28 will respond in order, exclusive and in a subsidiary way according to the following:
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.
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 ".

Civilians are responsible for the damages caused by the commission of a crime, according to the article 116.1 CP:
"Anyone criminally responsible for an offence is also civilly liable if damages arise. If two or more persons are responsible for a crime, the judges or courts will mark the quota applicable to each one".

And the article 120 CP:
"2nd. Natural persons or legal owners of publishing houses, newspapers, magazines, radio stations or television companies or any other means of written, spoken or visual,

broadcasting for the crimes committed using means of which they are owners, except for as provided in article 212".

The Organic Law 1/1982, of 5 May, on civil protection of the right to honour, personal and family privacy and self-image, article 9, establishes that moral and patrimonial damages arising from injury to civil rights of honour, privacy and self-image should be compensated, but does not state who is responsible. The authorship is therefore determined according to the 1902 article of the Civil Code[12]:
"Who by action or omission, causes harm to another, intervening fault or negligence, is obliged to repair the damage caused."

This is the legal criteria to identify the authorship and civil liability in other cases in which damage is caused to a third party on the occasion of the dissemination of a message, whatever the medium employed.

Is there any incentive for Internet Service Providers to close down or moderate comment platforms? Check specifically whether recent ECtHR jurisprudence in this regard (ie. Delfi v. Estonia) have had an impact in your legal system.

To my knowledge no. The judgment of reference in this matter is that already cited in the Audiencia Nacional, criminal court, second section, no. 6/2015 March 5.

What types of proceedings can be brought and against who? What types of sanctions or penalties can be imposed, and on who?

The ordinary proceedings for the protection of fundamental rights and the intellectual property contained in the civil and criminal procedural legislation.
In civil law the conviction is compensatory and not of a punitive nature.
In criminal courts, sentences are loss of freedom and monetary (fines).
In the case of hate crimes, the accessory penalty of disqualification is accompanied in the following terms:
Article 510.5: "In all cases, the penalty of special disqualification will also be imposed for educational posts, in the field of teaching, sports and leisure, for a period of time longer than between three and ten years of the duration of the penalty of the deprivation of liberty imposed in the sentence, according proportionally to the seriousness of the crime, the number of crimes committed and the circumstances of the offender.

Have there been any important cases or proceedings involving online comments?

Have there been any issues involving cross-border aspects in relation to online comments?

(3) WIKI

[12] Real Decreto de 24 de julio de 1889 por el que se publica el Código Civil, BOE núm. 206, de 25 de julio de 1889.

What legal regime applies to Wiki contributors? Is the freedom of expression of Wiki contributors limited? In what way? Who is responsible for illegal statement on Wiki contributions? What proceedings can be taken against Wiki contributors? What sanctions or penalties do they risk?
They are not subject to a specific regime.

Have there been cases or controversies in which the freedom of expressions of wiki contributors have been at stake?
No

Have there been any issues regarding cross-border aspects which (could) affect bloggers' freedom of expression?
No

(4) OTHERS TYPES OF 'CITIZEN JOURNALISM'

If not covered by the previous answers, please describe here the concept, status, legal framework and judicial interpretation etc. on any other type of person engaged in what could be considered 'citizen-journalism' and any problems and barriers to freedom of expression and information which may result in your country. Please pay particular attention to situations involving cross-border dimensions.

(5) INSTITUTIONAL CONTEXT OF CITIZEN JOURNALISM

Discuss here whether there are any specific problems with the institutional context of citizen journalism in your country.

In particular, this includes checking whether half the authority is independent, whether the courts are able to provide adequate protection to citizen-journalists, whether citizen-journalists are subject to pressures (eg frequent audits, investigations on other grounds, etc.)

No.

(6) FUNDING

How is citizen journalism funded? Are there any NGOs promoting citizen journalism? What about local or central government, universities, businesses, etc.? As far as possible, try to gather information on the business models of blogs, institutional hosts, etc. Play particular attention to blogs or other types of citizen-journalism which exercise close scrutiny of government, business practice, and controversial policy areas (e.g. immigration, refugees, etc.).

(7) OTHER OBSTACLES

Please provide here any other information which you deem relevant to assessing the freedom of expression of citizen-journalists, or their impact on the freedom of information or expression of citizens in general (e.g. issues regarding the quality or objectivity of information coming from citizen-journalists)

(8) THE CONCEPT OF 'CITIZEN-JOURNALIST'

Based on the above, would you suggest that there is such a concept as citizen-journalist in your country? If not, are they equivalent? (Please, specify it in the original language version.) Do (different type of) citizen-journalists have a particular legal status? If yes, who does this cover status (eg bloggers, authors of online comments, forum or wiki contributors or social media users, others?) If not, are citizen-journalists treated as 'ordinary citizens' or 'ordinary journalists'?

(9) GENERAL CONTEXT OF PROTECTION AND REGULATION OF JOURNALISM

IMPORTANT NOTE
We do not expect a full overview here of rules regulating the activities of journalists or the press/media in general. What we need is a presentation of these rules, to the extent that they may apply to various types of citizen-journalists, and help understand the above. We encourage you to integrate this information in the relevant parts of the questionnaire, whenever they are applicable. We would however like you to pay particular attention to the three main following aspects.

Privacy - protection of sources
Obtaining information is at the heart of journalistic work, and can often only be secured through offering protection to sources.

How are journalists' sources protected? Identify and present the relevant constitutional, legislative, regulatory or Professor which defines the scope and limits of the protection of journalists sources?

In Spain, this is a particularly complex issue. Article 20. 1 d) of the EC rules establishes that the law shall regulate the professional secrecy in the exercise of the freedom of information, and the article 24.2 CE also refers to a law governing the exemption of declaring in criminal proceedings under the protection of professional secrecy. No specific law has yet been enacted in development of both, and this circumstance has generated an intense doctrinal debate, in particular on the scope of this constitutional protection in the case that legally requires a professional of the information reveals their sources.

The TC has not directly addressed this issue, but did so indirectly when resolving cases where the proof of the veracity of the information requires disclosure during the judicial process of the source from which it was obtained. TC 15/1993 judgments (the director of a media refused to reveal the identity of the author of a libellous "letter to the director" against a politician) and 123/1993 (a journalist sentenced for libel who refused to reveal the source). The TC has not made the test of veracity more flexible as some journalists wanted, appealing to anonymous or unidentified sources (the typical "well-informed sources") under the cover of professional secrecy. This has been the case of the sentences TC 123/1993, 21/2000 and 54/2004.

In the ordinary courts the problem arises with the criminal proceedings, since, unlike the accused or defendants, witnesses have the duty to tell the truth under the penalty of

being charged with the crime of not pursuing or preventing offences (article 450 CP), concealment (article 451 CP), or false testimony (article 458 CP).

Article 418 of the Criminal Procedure Act[13] is intended to grant protection to the journalists who claim source secrecy:
"No witness may be compelled to testify about a question whose answer can impair materially or morally and in a direct and important way either the person, or the fortune of one of the relatives mentioned in article 416.
An exception are cases in which the crime is very serious for national security, the public peace or the sacred person of the King or his successor".

In recent years two cases have earned some media attention in which two journalists who refused to reveal the identity of their sources of information were charged with offences of disobedience. In the first, a fine of 1000 euros was imposed by a magistrate in Madrid on a journalist from the newspaper El Mundo that refused to reveal who had given him a document in which the identity of a protected witness was revealed (Case Antonio Rubio, 2009). In the other case, a journalist was initially sentenced for not revealing the identity of the source from which documents and information about subsidy fraud were obtained (Caso Jesús Giménez, 2009). In this case, the Audiencia Provincial de Madrid, Section 3, Auto no.328/2009, May 7th ordered to continue with the criminal investigation and the hearing of the journalist, who had to disclose his source. Usually, this kind of cases ends with the closure of the file on the journalist without a penalty and the information declared null as evidence if the source is not known (Judgment of Audiencia Provincial de Madrid, section 4, no.97/2007, July 10th).

How journalists can preserve the secrecy of their sources? What kind of proceedings can be brought against journalists to force them to reveal their sources? Through which procedure or mechanisms can journalists challenge instructions or orders to give access to their sources? These are sufficiently protective or would they encourage journalists to reveal their sources?
See the previous answer.

Have there been any legal controversy related to the protection of sources of journalists in the country under study.
See the previous answer.

Are you aware of pressure being exercised on journalists to reveal sources although they were not legally obliged to? If so, what types of pressure?
I am unaware of any such cases.

Protection of journalistic material (photos, cameras, phones, etc.)
Once journalists obtain information, they should be able to preserve their material support.
To what extent is journalists', including citizen-journalists, equipment protected? What are the police stop, search and seizure powers in relation to evidence?

[13] Real Decreto de 14 de septiembre de 1882, aprobatorio de la Ley de Enjuiciamiento Criminal, Gaceta de 17 de septiembre de 1882.

(Are you aware of destruction of evidence through seizure or destruction of journalistic equipment or information support (e.g. recorders, cameras, laptops, etc) by police, military or other security actors)?

Article 20.5 establishes that only the judicial authority can order the seizure of information support material. Currently doubts are being raised with the implementation of the aforementioned Organic Law 4/2015, of March 30, on the protection of public safety, which has previously mentioned.

Freedom of expression and its limits

What is the scope of the freedom of expression of journalists/editors? Is it different from that of ordinary citizens? Are they subject to special obligations and duties which affect their freedom of expression and information?

According to repeated and constant doctrine of the TC from the SSTC 13/1985 and 104/1986, information professionals do not have a privileged position in the Spanish constitutional system of the guaranteeing of freedom of information. However, a special position is recognized in certain cases, such as access to courtrooms (SSTC 13/1985 and 56 and 57/2004), or the protection of confidentiality and the protection of the conscience clause, as indicated above (article 20.1 d) and 5 CE). The TC has repeatedly argued, following the doctrine of the ECHR, that the constitutional protection of the freedom of information and expression reaches its maximum level when it is exercised by the professionals of information through any institutionalized means for the diffusion of public opinion (SSTC 105/1990 and 29/2009).

The TC has insisted on the special duty of diligence in checking the facts for the purposes of testing the veracity of the information, which is the constitutional condition for their protection (article 20.1 d) EC) in the case of the professionals of information (STC 192/1999). The TC has demanded greater care in the accuracy of the information transmitted by these professionals, more than in the case of simple individuals.

What are the limits on freedom of expression of journalists/editors (eg defamation, blasphemy, hate speech, government secrecy, privacy laws, etc.)? Is the regime a preventive one (eg which requires authorization to publish certain materials), or repressive (eg which sanctions abuse of free speech)?

The Spanish system is repressive. Article 20(2) EC prohibits any kind of prior censorship and the TC has extended this prohibition to any kind of prior restraint (STC 187/1999). Although the TC has admitted self-censorship within the framework of the mass media as editorial decisions which, in a given case, may limit the freedom of journalists (SSTC 199/1987, 176/1995 and 3/1997).

The limits of journalists are similar to those of any other citizen. Article 20.4 gives special importance to the protection of children and youth, the right to honour and privacy. But the TC has considered that any other fundamental rights may limit the freedoms of article 20.1 CE (especially freedom of enterprise in the field of labour relations, dignity and moral integrity of certain groups, the presumption of innocence - parallel trials - or the secrecy of communications), without distinguishing between

journalists, publishers and individuals, and also other goods and interests worthy of constitutional protection such as the secrecy order, of good faith, security and national defence, the prevention and prosecution of crimes.

What types of proceedings can be launched against journalists for abuse of free speech (eg civil tort action, criminal proceedings, disciplinary actions, special procedure under press law, etc),? Which penalties and sanctions may be imposed? Please, discuss any problematic aspects of the proceedings, such as high costs, length, limited review, burden of proof, etc.

In Spain, there are no special procedures for journalists. The channels are the ordinary and general proceedings aimed at the protection of the fundamental rights of third parties. The Organic Law 1/1982, of May 5, on the civil protection of the right to honour, personal and family privacy and self-image provides specific rules with regard to civil proceedings aimed at protecting the rights to honour, privacy and self-image. In this case, the penalty is compensation of patrimonial or moral damages suffered (in Spain there is no punitive compensation).
The criminal courts are regulated in the criminal procedural law which sets the following special cases. Crimes against honour and privacy are prosecutable only by those offended through a lawsuit. Titles IV (articles 804 et seq) and V (articles 816 et seq) regulate special cases of the ordinary criminal proceedings in the case of criminal proceedings for offences of libel and slander, and those committed through the press and other public media, respectively. But they are strictly procedural techniques (accreditation of the libellous or slanderous message support, dissemination, witnesses, etc.), or referring to the seizure of the support of the publication and the identification of the authorship of the message.

Has there been any criticism in relation to the responsibility expected from journalists, or any other issues involving fears of chilling effect or self-censorship (e.g, unnecessary litigation against them, even if regularly ending without sanctioning the journalists, reported violence or threats against journalists, pressure from media owners or editors, etc.)?
See what was stated above about the organic law 4/2015, of March 30, on the protection of public safety in relation to the prohibition of the recording of images and data of police officers in the exercise of their functions, and the seizure of the informational support in the case of infringements of said law.

Cross-border issues
With the international distribution of newspapers, cross-border TV broadcasting, and the circulation of news through the Internet with portals which are accessible across borders, procedure for abuse of free speech can be brought before the courts of countries which have stricter legislation on defamation or privacy, and whose decision could then be enforced across border through the application of EU cross-border rules on the recognition of judgment in civil matters, or lead to prosecution and arrest under a European Arrest Warrant.
Are you aware of any such case, which involves your country or one of its citizens? If so, please detail.

I have no knowledge of any such case

RELEVANT BACKGROUND INFORMATION

- Article 19 report on blogging: https://www.article19.org/data/files/medialibrary/3733/Right-to-Blog-EN-WEB.pdf
- Freedom house yearly general and country reports: https://freedomhouse.org/
- World Press Freedom Index: http://rsf.org/index2014/en-index2014.php
- Media Pluralism monitor: http://monitor.cmpf.eui.eu
- CEU CMCS report on media laws in comparative perspective http://medialaws.ceu.hu/summary.html#top

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