EUROPEAN COMMISSION

Complaint – Infringement of EU law

Before filling in this form, please read '*How to submit a complaint to the European Commission*': https://ec.europa.eu/assets/sg/report-a-breach/complaints_en/
All fields with * are mandatory. Please be concise and if necessary continue on a separate page.

1. Identity & contact details

	Complainant*	Your representative (*if applicable*)
Title* Mr/Ms/Mrs		Miss
First name*		Valentina
Surname*		Pavel
Organisation:	The Association for Technology and Internet (ApTI)	The Association for Technology and Internet (ApTI)
Address*	General Emanoil Ion Florescu, nr. 2, ap. 8	General Emanoil Ion Florescu, nr. 2, ap. 8
Town/City *	Bucharest	Bucharest
Postcode*	030253	030253
Country*	Romania	Romania
Telephone		
E-mail	info@apti.ro	valentina.pavel@apti.ro
Language*	English	English
Should we send correspondence to you or your representative*:	☒	☒

2. How has EU law been infringed?*

	Authority or body you are complaining about:
Name*	Romanian Government
Address	Victoria Palace, Victoria Place no. 1
Town/City	Bucharest
Postcode	011791
EU Country*	Romania
Telephone	004 021 314 34 00 / 004 021 319 15 64
Mobile	
E-mail	

2.1 Which **national measure(s)** do you think are in breach of EU law and why?*

Romanian law no. 190/2018 implementing the General Data Protection Regulation introduces a series of problematic derogations that need to be checked against the European data protection framework, specifically Regulation 679/2016 and the EU Charter of Fundamental Rights.

The Romanian law includes a series of derogations in view of Article 6 (2), Art. 9 (4), Art. 37-39, Art. 42, Art. 43, Art. 83 (7), Art. 85 and Art. 87-89 of the GDPR.

In particular, Articles 7, 9, 13 and 14 of the Romanian law raise concerns as to the correct implementation of the GDPR, however, considerable critique can be addressed to the law as a whole.

An analysis of the problematic derogations is going to be presented below. Following, section

2.3 is going to systemize the problematic derogations and raise important aspects regarding the (lack of) practical implementation at national level. All the issues presented lay basis for concerns as to Romania's ability to ensure the independence and impartiality of the national data protection authority.

1. As one of the most serious concerns raised by the derogations prescribed under Romanian law is the provision allowing political parties, citizen organisations belonging to national minorities and not-for-profit organisations to process personal data from special categories without explicit consent and without inscribing appropriate safeguards. Article 9 of Romanian law no. 190/2018 specifies that:

(1) In order to ensure the proportionality and balance between the right to the protection of personal data and special data and the processing of such data by the political parties and the organizations of citizens belonging to national minorities, non-governmental organizations, the following guarantees shall be instituted:
a) informing the data subject regarding personal data processing;
b) safeguarding the transparency of information, communications and means of exercising the rights of the data subject;
c) safeguarding the right to rectification and deletion.

(2) The processing of personal and special data is allowed for political parties and organizations of citizens belonging to national minorities, non-governmental organizations for the purposes of achieving their objectives, without the express consent of the data subject, under the condition that the corresponding safeguards are provided, as mentioned in the previous paragraph.

Therefore, Article 9 of law no. 190/2018 allows for the processing of all special categories of personal data without explicit consent, by merely informing the data subject that personal data processing is taking place, and by showing the mechanisms through which the data subjects can exercise their rights to rectification and deletion (which would be mandatory anyway according to GDPR articles 13 or 14).

Moreover, Article 9 (2) of Romanian law no. 190/2018 allows the processing of all personal data, including special categories of data, without explicit consent, by all these types of parties (political parties, organizations of citizens belonging to national minorities and non-governmental organizations) for the purposes of "achieving their objectives", which is a much larger context than the "legitimate activities", as regulated by the GDPR in Article 9 (2) d).

Moreover, the GDPR limits this data to "members or to former members of the body or to persons who have regular contact with it in connection with its purposes", whereas the Romanian law has no limitation.

It is also important to remind that Recital 56 of the GDPR is an explanatory text, not a binding provision. Recital 56 does not intend to eliminate the legal basis under which political parties and organizations can process personal data. However, as law no. 190/2018 reads, it excludes the need to have consent, without indicating which legal basis *does* apply.

As consequence, this will very likely lead to political parties not ensuring any legal basis whatsoever, as Article 9 represents a *carte blanche* to process political opinions. Similarly, organizations will be able to process personal data unrestrictedly, with no safeguards in place.

Therefore, the derogation under Romanian law does not amount to the level of protection envisioned by the GDPR, breaches Articles 7 and 8 of the EU Charter of Fundamental Rights

and reduces the level of protection even to lower levels than in the previous national legislation (law 677/2001) which transposed the Directive 95/46/EC. Moreover, it raises serious concerns regarding the well-functioning of democratic processes, especially in the context of European and national elections in 2019.

2. Second, Article 7 of law 190/2018 is questionable in light of the potential misuse of the GDPR as a tool to limit freedom of expression and of the press, as reported in a letter to the European Data Protection Board (EDPB) by the Association for Technology and Internet (ApTI), Privacy International, European Digital Rights (EDRi), and 15 other civil society organisations in connection to the RISE Project case.

The RISE Project case has been addressed by Frans Timmermans, the vice-president of the European Commission, who highlighted that national authorities need to implement Article 85 of the GDPR in a manner that protects fundamental rights, and not in such a way that abuses journalistic freedoms.

Article 7 of Romanian law no. 190/2018 introduces derogations for the processing of personal data for journalistic purposes. The provisions of Article 7 mention only three alternative scenarios under which personal data can be processed for journalistic purposes:
1) if it concerns personal data which was clearly made public by the data subject;
2) if the personal data is tightly connected to the data subject's quality as a public person; or
3) if the personal data is tightly connected to the public character of the acts in which the data subject is involved.

If either of these three situations applies, the GDPR (except for the Sanctions chapter) is entirely excluded from application.

Personal data processing for journalistic activities is usually much wider. To restrict derogations for journalistic purposes only to the three listed options falls short of the protections required to protect freedom of expression, in particular journalistic freedom and human rights jurisprudence in this regard, and it will not lead to a uniform application of the GDPR at European level.

Consequently, given the RISE Project context, there are strong concerns as regards the independence of the National Supervisory Authority for Personal Data Processing (ANSPDCP or Romanian DPA). The actions of the Romanian DPA in the RISE Project case, seeking disclosure of the source of personal data that might reveal the journalists' sources, and also "access" to that data represent a threat to freedom of expression and information. GDPR should not be used as a tool to silence freedom of the press or as a way to block the publication of public interest information.

3. Another important aspect regarding the practical implementation of the GDPR relates to the lack of proper and effective enforcement in the public administration field. Romanian law no. 190/2018 allows for a discriminatory application regime in favour of public authorities and bodies which, in case of a data protection violation, will first receive a tailored remedy plan from the Data Protection Authority. Only in case of non-compliance, the public authority is susceptible of a fine, within the much lower limits created by the national derogation.

This creates considerable extra burden on the Data Protection Authority, and it involves significant resources, especially with trained personnel, that are not available to the Data Protection Authority. It is not the role of the authority to issue custom made consultancy for the public sector and it shifts the burden from the public authorities to an understaffed and under-resourced national Data Protection Authority. Consequently, this will lead to a lack of

enforcement in the public sector and a void of application of the GDPR, allowing for abuses and data protection violations in public matters.

All of the points raised above, together with the lack of transparency behind the reappointment of the President of the Data Protection Authority for a new 5 years mandate, raise serious questions as to whether Romania can ensure the independence and impartiality of the data protection authority as inscribed in Articles 52 and 53 of the GDPR.

2.2 Which is the **EU law** in question?

• Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

• EU Charter of Fundamental Rights

The Romanian law no. 190/2018 implementing the derogations allowed by the GDPR is available in Romanian on the Data Protection Authority's website here and an unofficial English translation can be found here.

2.3 Describe the problem, providing facts and reasons for your complaint* (max. 7000 characters):

Section I below systemizes the major concerns regarding the national implementation of the GDPR. Following, section II emphasizes aspects regarding the practical application of the GDPR in Romania. Based on the points discussed, section III raises important concerns as to Romania's ability to ensure the independence and impartiality of the national data protection authority.

I. Major concerns regarding the national implementation of the GDPR

1. Derogations for processing personal data from special categories

As mentioned above, one of the most problematic provisions offers the possibility for political parties, citizen organisations belonging to national minorities and non-governmental organisations to process personal data, as well as sensitive data without requiring explicit consent from the data subject.

As a general rule, Article 9 of the GDPR prohibits the processing of special categories of personal data. However, Article 9 (2) of the GDPR introduces certain situations when processing of sensitive information is permitted, such as when the data subject gives explicit consent or when the processing of sensitive information is "carried out in the course of its legitimate interests with appropriate safeguards" and is performed "on condition that the processing relates solely to the members or to former members of the body or to persons who have regular contact with it in connection with its purposes and that the personal data are not disclosed outside that body without the consent of the data subjects."

Therefore, the GDPR limits processing operations of sensitive data only to members that are close to an organization and does not allow for a broad exception of processing special categories of personal data by not-for-profit and political associations, as in the case of Article 9 of Romanian law no. 190/2018. Such a derogation could have very powerful negative consequences whereas not enough safeguards and explanations as to the necessity and

proportionality of this provision are provided. Moreover, simply informing the data subjects is not a "safeguard" for any sort of processing, even less so in the case of special categories of data.

Basically, the Romanian law no. 190/2018 makes legal any use of sensitive personal data for political purposes, including advertising, which could make the Cambridge Analytica case legal in the Romanian legislative context today. By introducing this derogation, Romania limits the rights to privacy and data protection and awards a much lower level of protection, even lower than inscribed in the previous national law no. 677/2001 transposing Directive 95/46/EC which specified that explicit consent was required for processing personal data from special categories.

Therefore, this provision infringes Articles 7 and 8 of the EU Charter of Fundamental Rights.

2. Derogations for journalistic purposes

The national implementation of Article 85 of the GDPR (see Article 7 described in section 2.1) raises questions because (i) it allows derogations for journalistic purposes only in one of these three alternative scenarios, which are extremely limited compared with the current jurisprudence of both the European Court of Justice and the European Court of Human Rights, which have several factors that need to be weigh in before an analysis, the most important one being the contribution to a debate of public interest, and (ii) it does not in fact perform a reconciliation between the right to the protection of personal data and the right to freedom of expression and information.

In what the first point is concerned, as we have witnessed in the RISE Project case mentioned above, there is significant room for concern regarding the potential misuse of the GDPR to silence journalist and to threaten freedom of the press.

As for the second point, a reconciliation between two rights does not mean simply excluding the GDPR from application in several limited cases. The reconciliation should be a balancing test, similar to that in the legitimate interest legal basis, and the law should provide for criteria for assessing whether an activity falls within "journalistic purposes". It should be noted that this notion in itself is unclear under Romanian law, where there is no press law and no definition of what a "journalist" is.

II. Lack of practical application of the GDPR in the public sector

One of the most worrying aspects regarding the practical application are Articles 13 and 14 of law no. 190/2018. The law mentions that in case of data protection violations, the Data Protection Authority will issue a warning and submit a remedy plan to the public authority, including a remedy deadline. Only after that deadline, in case the public authority does not comply with the remedy plan, after 10 days from the expiration deadline of the remedy plan, the Romanian DPA can issue a fine.

This creates a discriminatory application regime in favour of public authorities, reducing the fines threshold for public authorities between 10.000 and up to 200.000 RON (approximately between 2.173 EUR and 43.478 EUR). Although Member States are allowed by Art. 83 (7) of the GDPR to introduce special rules for public bodies, such a provision cannot be considered an appropriate safeguard for individual protection.

Such a derogation leads to lack of practical application of the GDPR in the public sector as it represents a "blank cheque" for public institutions, which have no real incentive for the

implementation of GDPR.

In conclusion, even if the biggest data breach will appear, the public authority will need first to get a remedy plan from the DPA, which will include a deadline of minimum 11 days to implement it. In other words, the institution is bare of responsibility in the first place and it doesn't even need to worry about the remediation measures, as they will be provided by the DPA. This task proves many times to be incredibly difficult, and it should not fall in the attributions of the DPA, especially because it infringes on their independence regarding ulterior verifications.

Sadly, the lack of application of the law can already be seen in practice today, as most public institutions are lacking any real measures to protect personal data, and most have not appointed DPOs. The current implementation of the GDPR in Article 13 and 14 will not create additional incentives for public authorities to apply the Regulation. On the contrary, the provisions encourage the public authorities to continue "business as usual" without awarding more attention to individual protection.

III. Concerns regarding the independence and impartiality of the National Data Protection Authority

All the aspects presented above raise serious concerns as to Romania's ability to ensure the independence and impartiality of the national data protection authority as inscribed in Articles 52 and 53 of the GDPR. These concerns were specifically triggered by the RISE Project case which presented an indication that the Romanian DPA might have acted as a result of a political order rather than as a result of a thorough analysis and proper assessment of a potential data protection violation. The DPA's actions were quickly followed by a non-transparent, one candidate procedure for the reappointment of the President of the Data Protection Authority for a new 5 years mandate. Without a real independence of the DPA, de facto - not just de iure - there is a high risk that all derogations mentioned above will have a damaging effect on an effective data protection regime in Romania.

In conclusion, these are just some of the elements that raise questions as to the protection of fundamental rights which amount to a very loose and inconsistent application of the GDPR and a lack of proper enforcement of the Regulation. Given the space constraints, other problematic provisions could not be raised here, however a full investigation of law no. 190/2018 is urgently needed and the issue of independence of the national DPA needs to be examined.

2.4 Does the Country concerned receive (or could it receive in future) EU funding relating to the subject of your complaint?

○ Yes, please specify below ○ No ⊗ I don't know

2.5 Does your complaint relate to a breach of the EU Charter of Fundamental Rights?
The Commission can only investigate such cases if the breach is due to national implementation of EU law.
⊗ Yes, please specify below ○ No ○ I don't know

As detailed above, the derogations allowed by law no. 190/2018 implementing the GDPR are potentially in breach of Article 7 and 8 of the EU Charter of Fundamental Rights.

3. Previous action taken to solve the problem*

Have you already taken any action in the Country in question to solve the problem?*

IF YES, was it: ○ Administrative ○ Legal ?

3.1 Please describe: (a) the body/authority/court that was involved and the type of decision that resulted; (b) any other action you are aware of.

3.2 Was your complaint settled by the body/authority/court or is it still pending? If pending, when can a decision be expected?*

IF NOT please specify below as appropriate

○ Another case on the same issue is pending before a national or EU Court
⊗ No remedy is available for the problem
○ A remedy exists, but is too costly
○ Time limit for action has expired
○ No legal standing (not legally entitled to bring an action before the Court) please indicate why:

○ No legal aid/no lawyer
○ I do not know which remedies are available for the problem
○ Other – specify

Since law no. 190/2018 has already been adopted, there is no effective possibility to complain about the derogations to a body at national level that is competent to assess its alignment to EU law.

4. If you have already contacted any of the EU institutions dealing with problems of this type, please give the reference for your file/correspondence:

○ Petition to the European Parliament – Ref:……………………………………
○ European Commission – Ref:………………………………………
○ European Ombudsman – Ref:…………………………………………….
○ Other – name the institution or body you contacted and the reference for your complaint (e.g. SOLVIT, FIN-Net, European Consumer Centres)

On 19 November, the Association for Technology and Internet, Privacy International, European Digital Rights, together with 15 other digital rights NGOs sent a letter to the European Data Protection Board, with the Romanian Data Protection Authority (ANSPDCP) and the European Commission in copy, asking for the GDPR not to be misused in order to threaten media freedom in Romania. This letter only focuses on the implementation of Article 85 and it does not address the rest of the concerns raised above.

5. List any supporting documents/evidence which you could – if requested – send to the Commission.

Don't enclose any documents at this stage.

ANSPDCP letter to RISE Project (Romanian here – 8 November 2018, unofficial English translation here – 9 November 2018) ANSPDCP clarifications regarding the notice received by ANSPDCP in the RISE Project case – 9 November 2018 ANSPDCP additional statements regarding the RISE Project case – 13 November 2018 Letter from ApTI and other Romanian civil rights organizations on the RISE Project case – 13 November 2018 Letter from Privacy International, European Digital Rights, ApTI and other civil rights organizations to the European Data Protection Board (European Commission and ANSPDCP in copy) - 19 November 2018 Article connected to ANSPDCP independence – 23 November 2018 EDPB reply to civil society organizations letter – 23 January 2019

6. Personal data*

Do you authorise the Commission to disclose your identity in its contacts with the authorities you are lodging a complaint against?

⊗ Yes ○ No

In some cases, disclosing your identity may make it easier for us to deal with your complaint.