



Dr Andrea Jelinek
Chair
European Data Protection Board

By email only

CC: Ms Anuța Gianina OPRE, President
The National Supervisory Authority for Personal Data Processing, Romania

Mr Emmanuel Crabit, Director of fundamental rights/rule of law
European Commission

19 November 2018

Dear Dr Jelinek,

Re: Misuse of GPDR threatens media freedom in Romania

The undersigned civil society organisations from across Europe are gravely concerned at reports that the investigative journalism outlet RISE Project has been sent a letter by the Romanian National Supervisory Authority for Personal Data Processing (ANSPDCP) seeking disclosure of the source of personal data that might reveal the journalists' sources, and also "access" to that data.

It is our strong view that such a request to public interest investigative journalists to disclose sources, under threat of fines, infringes primary and secondary data protection and human rights law of the European Union. The EU General Data Protection Regulation ("GDPR") is a legal framework for protecting, not undermining, fundamental human rights and freedoms enshrined in the EU Charter of Fundamental Rights and the European Convention on Human Rights.

Recitals 4 and 153 and Article 85 of the GDPR make clear that the right to protection of personal data must be considered in relation to its function in society and be reconciled with other fundamental rights, such as the right to freedom of expression and information. Article 85 of the GDPR obliges member states to provide derogations and exemptions to reconcile the right to the protection of personal data with the right to freedom of expression, including journalistic purposes. Furthermore, recital 153 stipulates that in order to take account of the importance of the right to freedom of expression in every democratic society, it is necessary to interpret notions relating to that freedom, such as journalism, broadly.

The importance of protecting debates on matters of public interest has been emphasised by both the Court of Justice of the European Union and the European Court of Human Rights, in numerous judgments concerning the right to protection of personal data, the right to privacy and the right to freedom of expression. The Courts have also emphasised that the protection of journalistic sources is one of the cornerstones of the freedom of the press.¹ The necessity of protection of journalistic sources has also been highlighted by the UN Special Rapporteur on the protection of the right to freedom of opinion and expression.²

Therefore, it is clear that to require an investigative journalism outlet to disclose sources of personal data under threat of regulatory action under the GDPR (including mention of a fine up to 20 million euros) is neither in compliance with the GDPR nor European human rights law.

We understand that the ANSPDCP's request was made based on a notice by a third party not related to the case.³ Nevertheless, it is a data protection authority's obligation to investigate "to the extent appropriate" any notice on possible breaches of the GDPR. Therefore, a thorough analysis needs to take place in each case, making sure to reconcile conflicts between fundamental rights. In particular, when conducting an investigation, a data protection authority has the obligation to apply the GDPR in a manner that is compliant with the EU Charter of Fundamental Rights and the European Convention of Human Rights.

Given this context and the necessity to ensure that the GDPR is applied consistently across Member States, particularly when the application affects the enjoyment of fundamental rights, we urge the European Data Protection Board to:

- 1) consider whether the ANSPDCP's request to RISE Project is in compliance with the GDPR, and the European Union Charter of Fundamental Rights;
- 2) consider whether Romanian law No. 190/2018 and its implementation in this case reconcile the right to the protection of personal data with the right to freedom of expression and information, in accordance with Article 85 of GDPR.

¹ See *Handyside vs. U.K.*, *Lingens vs. Austria*, *Oberschlick vs. Austria*, *Sunday Times vs. U.K.*, *Observer and Guardian vs. U.K.*, *Castells vs. Spain*, *Thorgeirson vs. Iceland*, *Jersild vs. Denmark*, *Goodwin vs. U.K.*, *De Haes and Gijels vs. Belgium*, *Dalban vs. Romania*.

² See http://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/361

³ See press release, Romanian Data Protection Authority, Clarifications regarding the notice received by ANSPDCP in the case of Rise Project, 11 November 2018, http://dataprotection.ro/index.jsp?page=Clarificari_referitoare_la_sesizarea_primita_de_ANSPDCP_in_cazul_Rise_Project&lang=en, as well as the press release from 13 November 2018, http://www.dataprotection.ro/index.jsp?page=Precizari_suplimentare_privind_cazul_Rise_Project&lang=en

As civil society organisations that fight to protect fundamental rights, including the rights to privacy and freedom of expression, we also call on the ANSPDCP, as an agency established to protect these rights, to cease this action against the RISE Project. We further ask the ANSPDCP to clarify its position regarding the implementation of Article 85 of the GDPR, in particular with regard to article 7 of the Romanian law No. 190/2018, which seeks to transpose the derogations for journalistic purposes, together with a motivated analysis as to whether the derogations apply in this case.

We, the undersigned, will be closely monitoring developments.

ApTI - Asociatia pentru Tehnologie si Internet, Romania
Bits of Freedom, the Netherlands
Chaos Computer Club (CCC e.V.), Germany
D3 - Defesa dos Direitos Digitais, Portugal
Dataskydd.net, Sweden
Digitalcourage, Germany
EDRi
Electronic Frontier Finland
Electronic Frontier Foundation (EFF)
Förderverein Informationstechnik und Gesellschaft (FITUG e.V.), Germany
Hermes Center, Italy
Homo Digitalis, Greece
IT-Political Association of Denmark
Open Rights Group, U.K.
Privacy International
Reporters without borders
Share Foundation, Serbia
XNet, Spain