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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		SR
First name*		JORGE JOSE
Surname*		GARCIA HERRERO
Organisation:	FOUNDATION FOR THE DEFENSE OF PRIVACY AND DIGITAL RIGHTS	FOUNDATION FOR THE DEFENSE OF PRIVACY AND DIGITAL RIGHTS
Address*	C/CLAUDIO MOYANO 8, 1ºB	C/CLAUDIO MOYANO 8, 1ºB
Town/City*	VALLADOLID	VALLADOLID
Postcode*	47001	47001
Country*	SPAIN	SPAIN
Telephone		00346 39
E-mail		jgh@jorgegarciaherrero.com
Language*		Spanish
Should we send correspondence to you or your representative*:	<input type="checkbox"/>	<input checked="" type="checkbox"/>

2. How has EU law been infringed?*

	Authority or body you are complaining about:
Name*	CONGRESS OF DEPUTIES
Address	PLAZA DE LAS CORTES, Nº1
Town/City	MADRID
Postcode	28014
EU Country*	SPAIN
Telephone	0034 91 3906000
Mobile	
E-mail	webmaster@congreso.es

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

The third final disposition of the Spanish Data Protection Law implementing the GDPR into national law, in force since 7 December 2018, introduced a new art. 58 bis on the Spanish General Electoral System Law (LOREG). Art. 58 bus LOREG states:

"Article fifty-eight bis. Use of technological means and personal data in electoral activities.

1. The collection of personal data relating to the political opinions of individuals carried out by political parties in the performance of their electoral activities shall be deemed to be in the public interest only where adequate safeguards are provided.

2. Political parties, coalitions and electoral groupings may use personal data obtained from websites and other publicly accessible sources in the performance of political activities during the electoral period.

3. The sending of electoral propaganda by electronic means or messaging systems and the contracting of electoral propaganda in social networks or equivalent media shall not be considered a commercial activity or communication.

4. The above-mentioned dissemination activities will prominently identify their electoral nature.

5. The addressee shall be provided with a simple and free means of exercising the right of objection”.

Art. 58 bis LOREG was introduced in the last phase of legislative processing of the new Spanish Data Protection Law, without any public debate or mandatory report from relevant consultative bodies such as the Spanish Council of State.

In our opinion, very briefly:

1.- Article 58 bis.1 LOREG is allegedly based on Recital 56 GDPR, as expressed in earlier drafts of the contested article.

Recital 56 GDPR establishes that personal data consisting on people’s political opinions may be processed if the conditions expressed thereof are met, namely: (i) “the operation of the democratic system in a Member State requires that political parties compile” such personal data; and (ii) “provided that appropriate safeguards are established”.

The wording of the Spanish Law does not aim to identify why the democratic system would require such pervasive processing of personal data nor it provides for any safeguard, therefore, not meeting the requirements of recital 56 GDPR.

Therefore, the content of art. 58 bis 1 LOREG infringes the General Data Protection European Regulation 2016/679/EU (GDPR). In addition, this provision violates the Spanish 1978 Constitution, as it does not respect the essential content of the right to protection of personal data.

Art 58 bis LOREG enables the processing of ideological data -that is, special category of data- based on the public interest. The only provision under the GDPR allowing for processing of special categories of personal data on the public interest is art. 9.2.g) GDPR, which indeed requires a “substantial public interest”.

According to art. 9.2.g) GDPR, this "substantial public interest" requires the processing to be proportionate to the aim pursued, to respect the essence of the right to data protection and to provide for “suitable and specific measures" to safeguard the interests and fundamental rights of the data subject. These conditions are not met in the wording of art 58 bis LOREG, for the following reasons.

First, the contested national provision does not identify what substantial public interest exist that would serve as the lawful ground for the processing of data referred to people’s political opinions. Second, nor art. 58 bis LOREG or any other provision in the law establishes any adequate and specific measure to protect data subjects. Furthermore, in light of the Spanish constitutional law, these safeguard measures, could only be established by law. And there is no other applicable law establishing such imperativa nads indispensable safeguard measures.

Consequently, the shortcomings of the challenged national provision leave the only feasible interpretation that the public interest in fact invoked is not the “substantial” public interest set out in art. 9.2.g) GDPR but the general public interest provided for in art. 6.1.e) GDPR, which is clearly insufficient to justify the processing of special categories of data.

In short, art. 58 bis LOREG does not leave up the burden of either recital 56 nor art. 9 GDPR.

Moreover, art. 58 bis will be in force -and will undoubtedly be decisive- in the national elections to be held on 28 April 2019, and in the local, regional and European elections to be held on 26 May 2019.

Ironically enough, the rationale for the introduction of Article 58 bis was "*to adapt the Regulation to national specificities and to establish safeguards to prevent cases such as the one linking 'Cambridge Analytica' to the unlawful use of data of 50 million Facebook users for electoral marketing*". However, a Cambridge Analytica-like situation would now find legal basis in Spain.

2.2 Which is the EU law in question?

The following precepts:

- Articles 7 and 8 of the Charter of Fundamental Rights of the European Union
- Articles 6(1)(e), 9(1) and 9(2)(g) of European Data Protection Regulation 2016/679/EU

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

There was no concern among the political, administrative or judicial institutions of the Spanish State, or any alarm in society about a malfunctioning in the democratic system requiring the introduction of art. 58 bis LOREG.

No problem has been solved with its introduction. On the contrary, we fear that quite the opposite has happened.

The Spanish legislator has proceeded by (poorly) copy-pasting (the wrong) part of the GDPR, namely, recital 56, as if this would deem the provision legal and compliant with the GDPR.

On the contrary: by not specifying adequate and specific safeguard measures, the legislator has "resigned" from his responsibility and left citizens right to data protection in political parties' hands. Again, ironically, the wording of an earlier draft of the challenged provision did specify specific protection measures. These measures were later eliminated.

Citizens' rights are not respected when the boundaries between lawful processing and unlawful interference are not defined. This is even more true when it comes to special categories of data, the processing of which must be particularly restricted both in interpretations and execution.

From the Spanish citizens' point of view, the feeling is strong: political parties have attributed themselves (in a flagrant conflict of interests) new capacities in terms of processing people's data for electoral purposes. They have omitted the regulation of guarantees in benefit of citizen privacy, of transparent and adequate functioning of political pluralism and of the free formation of public opinion in the political sphere.

Such measures would obviously limit the new scope of action available to political parties.

Unsurprisingly, art. 58 bis LOREG was approved unanimously by all parties throughout the legislative processing in the Congress (something unprecedented in the last years in the political life in Spain). The final approval voting was not unanimous. However, this was only due to the controversy aroused around the subject in the public opinion.

In this moment, one political party voted against the provision and made a public statement that they would challenge the article and present a draft appeal to the Spanish Ombudsman. This never happened.

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

Yes, as all political parties that obtain parliamentary representation receive community funds for the development of their activities.

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

Yes, Articles 7 and 8 of the Charter of Fundamental Rights of the European Union

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.

1.- A group of Spanish jurists (including the promoters of this Foundation) drafted an appeal of unconstitutionality against article 58 bis LOREG.

This draft appeal of unconstitutionality was submitted to the Spanish Ombudsman on 22 February 2019.

On March 4, 2019, the Ombudsman filed its appeal of unconstitutionality against art. 58 bis before the Constitutional Court.

On March 12, 2019, the Constitutional Court admitted the appeal.

2.- This Foundation has devised, financed and implemented www.listaviernes.es, an electoral advertising exclusion system, alike "Robinson List", and has made it available for free to Spanish citizens and political parties.

During this month of April, the Foundation will release the software code so that any organization can promote the same project for free in their country.

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

It is still pending.

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

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)

No.

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

1. Draft appeal of unconstitutionality against article 58 bis LOREG submitted to the Spanish Ombudsman (Spanish).
2. Appeal of unconstitutionality definitively filed by the Ombudsman before the Constitutional Court (Spanish).

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