

DECISION No GB/2023/5

of the European Cybersecurity Industrial, Technology and Research Competence Centre Governing Board

on internal rules concerning restrictions of certain rights of data subjects in relation to processing of personal data in the framework of the functioning of the ECCC

THE GOVERNING BOARD,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 2018/1725 of the European Parliament and of the Council, of 23 October 2018, on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC¹, and in particular Article 25 thereof,

Having regard to Regulation (EU) 2021/887 of the European Parliament and of the Council, of 20 May 2021, establishing the European Cybersecurity Industrial, Technology and Research Competence Centre and the Network of National Coordination Centres ('Regulation (EU) 2021/887'), and in particular Article 13 thereof,

Having consulted the European Data Protection Supervisor,

Whereas:

- 1) The ECCC is empowered to conduct administrative inquiries, pre-disciplinary, disciplinary and suspension proceedings, in accordance with the Staff Regulations of Officials of the European Union and the Conditions of Employment of Other Servants of the European Union, laid down in Council Regulation (EEC, Euratom, ECSC) No 259/68 ('Staff Regulations')², and with the ECCC Decision No GB/2022/18 adopting implementing provisions regarding the conduct of administrative inquiries and disciplinary proceedings. If required, it also notifies cases to OLAF.
- 2) ECCC staff members are under an obligation to report potentially illegal activities, including fraud and corruption, which are detrimental to the interests of the Union. Staff members are also obliged to report conduct relating to the discharge of professional duties which may constitute a serious failure to comply with the obligations of officials of the Union. This is regulated by the ECCC Decision No GB/2022/22 on internal rules concerning whistleblowing.

¹ OJ L 295, 21.11.2018, p. 39

² Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29 February 1968 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission (OJ L 56, 4.3.1968, p. 1)

- 3) The ECCC has put in place a policy to prevent and deal effectively with actual or potential cases of psychological or sexual harassment in the workplace, as provided for in the ECCC Decision No GB/2022/17 on adopting implementing measures pursuant to the Staff Regulations. The Decision shall establish an informal procedure whereby the alleged victim of the harassment can contact the ECCC's 'confidential' counsellors.
- 4) The ECCC can also conduct investigations into potential breaches of security rules for European Union classified information ('EUCI'), based on the relevant Decision adopting its security rules for protecting EUCI.
- 5) The ECCC is subject to both internal and external audits concerning its activities.
- 6) In the context of such administrative inquiries, audits and investigations, the ECCC cooperates with other Union institutions, bodies, offices and agencies.
- 7) The ECCC can cooperate with third countries' national authorities and international organisations, either at their request or on its own initiative.
- 8) The ECCC can also cooperate with EU Member States' public authorities, either at their request or on its own initiative.
- 9) The ECCC is involved in cases before the Court of Justice of the European Union when it either refers a matter to the Court, defends a decision it has taken and which has been challenged before the Court, or intervenes in cases relevant to its tasks. In this context, the ECCC might need to preserve the confidentiality of personal data contained in documents obtained by the parties or the interveners.
- 10) To fulfil its tasks, the ECCC collects and processes information and several categories of personal data, including identification data of natural persons, contact information, professional roles and tasks, information on private and professional conduct and performance, and financial data. The ECCC acts as data controller.
- 11) Under the Regulation, the ECCC is therefore obliged to provide information to data subjects on those processing activities and to respect their rights as data subjects.
- 12) The ECCC might be required to reconcile those rights with the objectives of administrative inquiries, audits, investigations and court proceedings. It might also be required to balance a data subject's rights against the fundamental rights and freedoms of other data subjects. To that end, Article 25 of the Regulation (EU) 2018/1725 ('the Regulation') gives the ECCC the possibility to restrict, under strict conditions, the application of Articles 14 to 22, 35 and 36 of the Regulation, as well as its Article 4 in so far as its provisions correspond to the rights and obligations provided for in Articles 14 to 20. Unless restrictions are provided for in a legal act adopted on the basis of the Treaties, it is necessary to adopt internal rules under which the ECCC is entitled to restrict those rights.
- 13) The ECCC might, for instance, need to restrict the information it provides to a data subject about the processing of his or her personal data during the preliminary assessment phase of

an administrative inquiry or during the inquiry itself, prior to a possible dismissal of case or at the pre-disciplinary stage. In certain circumstances, providing such information might seriously affect the ECCC's capacity to conduct the inquiry in an effective way, whenever, for example, there is a risk that the person concerned might destroy evidence or interfere with potential witnesses before they are interviewed. The ECCC might also need to protect the rights and freedoms of witnesses as well as those of other persons involved.

- 14) It might be necessary to protect the anonymity of a witness or whistle-blower who has asked not to be identified. In such a case, the ECCC might decide to restrict access to the identity, statements and other personal data of such persons, in order to protect their rights and freedoms.
- 15) It might be necessary to protect confidential information concerning a staff member who has contacted the ECCC confidential counsellors in the context of a harassment procedure. In such cases, the ECCC might need to restrict access to the identity, statements and other personal data of the alleged victim, the alleged harasser and other persons involved, in order to protect the rights and freedoms of all concerned.
- 16) The ECCC should apply restrictions only when they respect the essence of fundamental rights and freedoms, are strictly necessary and are a proportionate measure in a democratic society. The ECCC should give reasons explaining the justification for those restrictions.
- 17) In application of the principle of accountability, the ECCC should keep a record of its application of restrictions.
- 18) When processing personal data exchanged with other organisations in the context of its tasks, the ECCC and those organisations should consult each other on potential grounds for imposing restrictions and the necessity and proportionality of those restrictions, unless this would jeopardise the activities of the ECCC.
- 19) Article 25(6) of the Regulation obliges the controller to inform data subjects of the principal reasons on which the application of the restriction is based and of their right to lodge a complaint with the EDPS.
- 20) Pursuant to Article 25(8) of the Regulation, the ECCC is entitled to defer, omit or deny the provision of information on the reasons for the application of a restriction to the data subject if this would in any way cancel the effect of the restriction. The ECCC should assess on a case-by-case basis whether the communication of the restriction would cancel its effect.
- 21) The ECCC should lift the restriction as soon as the conditions that justify the restriction no longer apply, and assess those conditions on a regular basis.
- 22) To guarantee utmost protection of the rights and freedoms of data subjects and in accordance with Article 44(1) of the Regulation, the DPO should be consulted in due time of any restrictions that may be applied and verify their compliance with this Decision.

23) Articles 16(5) and 17(4) of the Regulation provide for exceptions to data subjects' right to information and right of access. If these exceptions apply, the ECCC does not need to apply a restriction under this Decision.

HAS DECIDED AS FOLLOWS:

Article 1: Subject-matter and scope

1. This Decision lays down rules relating to the conditions under which the ECCC may restrict the application of Articles 4, 14 to 22, 35 and 36, pursuant to Article 25 of the Regulation.
2. The ECCC, as the controller, is represented by its Executive Director (ED).

Article 2: Restrictions

1. The ECCC may restrict the application of Articles 14 to 22, 35 and 36, and Article 4 thereof in so far as its provisions correspond to the rights and obligations provided for in Articles 14 to 20:
 - (a) pursuant to Article 25(1) (b), (c), (f), (g) and (h) of the Regulation, when conducting administrative inquiries, pre-disciplinary, disciplinary or suspension proceedings under Article 86 and Annex IX of the Staff Regulations and the ECCC Decision No GB/2022/18 and when notifying cases to OLAF;
 - (b) pursuant to Article 25(1)(h) of the Regulation, when ensuring that the ECCC staff members may report facts confidentially where they believe there are serious irregularities, as set out in the ECCC Decision No GB/2022/22 on internal rules concerning whistleblowing;
 - (c) pursuant to Article 25(1)(h) of the Regulation, when ensuring that the ECCC staff members are able to report to confidential counsellors in the context of a harassment procedure, as defined by the ECCC Decision No GB/2022/17;
 - (d) pursuant to Article 25(1)(c), (g) and (h) of the Regulation, when conducting internal audits in relation to activities or departments of the ECCC;
 - (e) pursuant to Article 25(1)(c), (d), (g) and (h) of the Regulation, when providing or receiving assistance to or from other Union institutions, bodies, offices and agencies or cooperating with them in the context of activities under points (a) to (d) of this paragraph and pursuant to relevant service level agreements, memoranda of understanding and cooperation agreements;
 - (f) pursuant to Article 25(1)(c), (g) and (h) of the Regulation, when providing or receiving assistance to or from third countries national authorities and international organisations or cooperating with such authorities and organisations, either at their request or on its own initiative;

- (g) pursuant to Article 25(1)(c), (g) and (h) of the Regulation, when providing or receiving assistance and cooperation to and from EU Member States' public authorities, either at their request or on its own initiative;
- (h) pursuant to Article 25(1)(e) of the Regulation, when processing personal data in documents obtained by the parties or interveners in the context of proceedings before the Court of Justice of the European Union;
- 2. Any restriction shall respect the essence of fundamental rights and freedoms and be necessary and proportionate in a democratic society.
- 3. A necessity and proportionality test shall be carried out on a case-by-case basis before restrictions are applied. Restrictions shall be limited to what is strictly necessary to achieve their objective.
- 4. For accountability purposes, the ECCC shall draw up a record describing the reasons for restrictions that are applied, which grounds among those listed in paragraph 1 apply and the outcome of the necessity and proportionality test. Those records shall be part of a register, which shall be made available on request to the EDPS. The ECCC shall prepare periodic reports on the application of Article 25 of the Regulation.
- 5. When processing personal data received from other organisations in the context of its tasks, the ECCC shall consult those organisations on potential grounds for imposing restrictions and the necessity and proportionality of the restrictions concerned, unless this would jeopardise the activities of the ECCC.

Article 3: Risks to the rights and freedoms of data subjects

- 1. Assessments of the risks to the rights and freedoms of data subjects of imposing restrictions and details of the period of application of those restrictions shall be registered in the record of processing activities maintained by the ECCC under Article 31 of the Regulation. They shall also be recorded in any data protection impact assessments regarding those restrictions conducted under Article 39 of the Regulation.
- 2. Whenever the ECCC assesses the necessity and proportionality of a restriction it shall consider the potential risks to the rights and freedoms of the data subject.

Article 4: Safeguards and storage periods

- 1. The ECCC shall implement safeguards to prevent abuse and unlawful access or transfer of the personal data in respect of which restrictions apply or could be applied. Such safeguards shall include technical and organisational measures and be detailed as necessary in ECCC internal decisions, procedures and implementing rules. The safeguards shall include:
 - (a) a clear definition of roles, responsibilities and procedural steps;
 - (b) if appropriate, a secure electronic environment which prevents unlawful and accidental access or transfer of electronic data to unauthorised persons;

- (c) if appropriate, secure storage and processing of paper-based documents;
 - (d) due monitoring of restrictions and a periodic review of their application.
 - (e) The reviews referred to in point (d) shall be conducted at least every six months.
2. Restrictions shall be lifted as soon as the circumstances that justify them no longer apply.
 3. The personal data shall be retained in accordance with the applicable ECCC retention rules, to be defined in the data protection records maintained under Article 31 of the Regulation. At the end of the retention period, the personal data shall be deleted, anonymised or transferred to archives in accordance with Article 13 of the Regulation.

Article 5: Involvement of the Data Protection Officer

1. The ECCC DPO shall be informed without undue delay whenever data subject rights are restricted in accordance with this Decision. He or she shall be given access to the associated records and any documents concerning the factual or legal context.
2. The ECCC DPO may request a review of the application of a restriction. The ECCC shall inform its DPO in writing of the outcome of the review.
3. The ECCC shall document the involvement of the DPO in the application of restrictions, including what information is shared with him or her.

Article 6: Information to data subjects on restrictions of their rights

1. The ECCC shall include a section in the data protection notices published on its website providing general information to data subjects on the potential for restriction of data subjects' rights pursuant to Article 2(1). The information shall cover which rights may be restricted, the grounds on which restrictions may be applied and their potential duration.
2. The ECCC shall inform data subjects individually, in writing and without undue delay of ongoing or future restrictions of their rights. The ECCC shall inform the data subject of the principal reasons on which the application of the restriction is based, of their right to consult the DPO with a view to challenging the restriction and of their rights to lodge a complaint with the EDPS.
3. The ECCC may defer, omit or deny the provision of information concerning the reasons for a restriction and the right to lodge a complaint with the EDPS for as long as it would cancel the effect of the restriction. Assessment of whether this would be justified shall take place on a case-by-case basis. As soon as it would no longer cancel the effect of the restriction, the ECCC shall provide the information to the data subject.

Article 7: Communication of a personal data breach to the data subject

1. Where the ECCC is under an obligation to communicate a data breach under Article 35(1) of the Regulation, it may, in exceptional circumstances, restrict such communication wholly or partly. It shall document in a note the reasons for the restriction, the legal ground for it under Article 2 and an assessment of its necessity and proportionality. The note shall be communicated to the EDPS at the time of the notification of the personal data breach.
2. Where the reasons for the restriction no longer apply, the ECCC shall communicate the personal data breach to the data subject concerned and inform him or her of the principal reasons for the restriction and of his or her right to lodge a complaint with the EDPS.

Article 8: Confidentiality of electronic communications

1. In exceptional circumstances, the ECCC may restrict the right to confidentiality of electronic communications under Article 36 of the Regulation. Such restrictions shall comply with Directive 2002/58/EC of the European Parliament and of the Council.
2. Where the ECCC restricts the right to confidentiality of electronic communications, it shall inform the data subject concerned, in its reply to any request from the data subject, of the principal reasons on which the application of the restriction is based and of his or her right to lodge a complaint with the EDPS.
3. The ECCC may defer, omit or deny the provision of information concerning the reasons for a restriction and the right to lodge a complaint with the EDPS for as long as it would cancel the effect of the restriction. Assessment of whether this would be justified shall take place on a case-by-case basis.

Article 9: Entry into force

1. This Decision shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

Done at Bucharest, on 8 August 2023

For the European Cybersecurity Industrial,
Technology and Research Competence
Centre

(e-signed)

Pascal Steichen
Chairperson of the Governing Board