Center for AI and
Digital Policy

[By email to AI@OECD.ORG]

30 June 2021

To The OECD

We submit this brief statement to make the simple and straightforward recommendation that, in the classification of AI systems, the OECD should draw a sharp distinction between those AI systems that involve the processing of personal data and those AI systems that do not.[1] We believe there will be multiple benefits in this approach as described below.

We recognize that the OECD is already considering a more elaborate classification scheme that considers such factors as "core" and "non-core" criteria, characteristics, consistency and reliability, and industry and application specific classifications .[2] And we respect the fact that the OECD has undertaken an extensive public consultation on the proposed classification scheme.[3] We further appreciate that the OECD has provided concrete examples of the application of the proposed classification scheme to such systems as credit scoring, game programs (Alpha Zero Go), and machine-generated text (GPT-3).[4] And we acknowledge the extensive articulation of human rights, fundamental values, and well-being factors that are discussed in the proposed classification scheme, developed by the OECD.

Nonetheless, we strongly recommend that the primary determination for the classification of an AI system is simply whether or not the system involves the processing of personal data. The reasons are as follows:

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[1] This recommendation follows from an earlier article in Scientific American. Marc Rotenberg, *Let's Use Government Data to Make Better Policy: It's a no-brainer, as long as privacy concerns are taken seriously*, Scientific American, Oct. 4, 2017, https://blogs.scientificamerican.com/observations/let-rsquo-s-use-government-data-to-make-better-policy/
[2] Katrine Perset, Dewey Murdock, Jack Clark, Marko Grobelnik, *A first look at the OECD's Framework for the Classification of AI Systems, designed to give policymakers clarity* (Nov. 24, 2020), https://oecd.ai/wonk/a-first-look-at-the-oecds-framework-for-the-classification-of-ai-systems-for-policymakers
[3] OECD, *Public consultation on the OECD Framework for Classifying AI Systems,* https://oecd.ai/classification
[4] *OECD Framework for the Classification of AI Systems – Public Consultation on Preliminary* Findings 33-42 (2021)

1) This recommendation reflects the OECD's leading role in the data protection field

Ever since the OECD issued the Privacy Guidelines of 1980, the organization has played a leading role in establishing standards for the digital age that safeguard privacy and enable the free flow of information. The OECD's further work on Data Free Flows with Trust – which also draws a sharp distinction between personal data and industrial data – has carried forward this work and helped countries in the present day understand the heightened responsibilities for the collection and use of personal data.[5]

The OECD's development of the AI Principles is also historic. Almost immediately, G20 nations endorsed a similar set of AI Guidelines. More than 50 countries have now endorsed either the OECD AI Principles or the G20 AI Guidelines.[6]

It is vitally important now for the OECD to make clear the essential relationship between data protection and AI systems. This will be achieved simply and directly if the OECD states that there is a sharp distinction in the classification of AI systems that involve the processing of personal data and those that do not.

2) The processing of personal data necessarily implicates legal obligations and fundamental rights

Organizations that choose to build AI systems with personal data should recognize at the outset that this will necessarily implicate national law, international agreements, professional obligations, and the interests of others who do not typically participate in the design or development of such systems.

As currently conceived, the OECD classification scheme fails to give significant attention to this threshold question. This is an additional reason to make clear to AI system developers that they should treat differently, i.e. "classify", systems processing personal data.

3) This "bright line rule" is technology neutral and easy to implement

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[5] *Prime Minister Abe's AI Policy and Data Governance Legacy*, CAIDP Update 1.7 (Sept. 1, 2020), https://dukakis.org/center-for-ai-and-digital-policy/caidp-update-prime-minister-abes-ai-and-data-governance-legacy/; G-20 Declaration - Osaka (2019), https://www.mofa.go.jp/policy/economy/g20_summit/osaka19/en/documents/final_g20_osaka_leaders_declaration.html

[6] Marc Rotenberg, ed., *Artificial Intelligence and Democratic Values* 330-31 (CAIDP 2020), https://www.caidp.org/aisci-2020/

The classification of AI systems is a complex task, made all the more difficult because techniques are rapidly evolving. Systems of classification that are tethered to particular technologies (or industry sectors, as the current classification scheme proposes) necessarily run the risk that they will be outdated as new technologies emerge,

As the OECD's experience in the development of policy frameworks demonstrates, the most successful technology policies are technology neutral. They focus on the specific rights and responsibilities of individuals and organizations in both the public and private sector. The OECD AI Principles have, for the most part, carried forward this tradition. It would be sensible in the classification scheme to begin with a categorization – personal data systems and non-personal data systems – that is itself technology neutral.

We recognize that there is a lively debate about what constitutes "personal data," whether personal data can be extracted from aggregate data, and how to prove that data is truly anonymized. We recommend that the OECD adopt its own widely recognized definition of personal data from the 2013 Guidelines. "Personal data' means any information relating to an identified or identifiable individual (data subject."[7] This is also the essence of the GDPR definition of personal data.[8]

As new techniques make it possible to extract personal data from data sets that were previously considered non-identifiable, the responsibilities associated with the processing of personal data. The desire to avoid the additional responsibilities associated with the use of personal should improve the security and reliability of these techniques.

4) The OECD's extensive works demonstrates the value of systems without personal data

The OECD itself has pioneered the development of detailed statistical reports that make possible comparative studies and help countries pursue economic development. The OECD Economic Outlook 2021, for example, provides a detailed assessment of economies in transition, showing increased growth but also significant divergence across countries.[9] The

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[7] OECD, Guidelines Governing the Protection of privacy and transborder flows of personal data 13 (2013) (Annex), https://www.oecd.org/sti/ieconomy/oecd_privacy_framework.pdf

[8] The GDPR defines personal data as "any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person;" GDPR, Art. 4(1).

[9] OECD Economic Outlook (May 2021), https://www.oecd.org/economic-outlook/

OECD gathers data from other sources and makes concrete recommendations for government without the collection and use of personal data.

The OECD should encourage this approach to policy making in the AI realm by encouraging the development of AI systems that do not require the collection and use of personal data

5) This rule will favor the development of AI systems that are more transparent

One of the central paradoxes of privacy is that effective enforcement produces greater transparency. That will also be a beneficial outcome of the proposed rule for classification. The proposed classification scheme will require organizations to consider at the outset whether the systems involves the processing of personal data. This is also a necessary step in the Algorithmic Impact Assessments that are required for many systems.

6) This recommendation is consistent with the OECD's initial .review of its classification scheme

It is notable that in the review of the classification scheme of AI systems, the OECD recognizes that credit determinations are far more problematic than the moves that AlphaZero proposes in a game of Go. The case studies examined by the OECD underscore the key point in our recommendation – AI systems that rely on the processing of personal data will necessarily implicate rights, values, and well-being in ways that systems that do not process personal data will not. The point should be made explicit and established as the top level factor in the classification of AI systems.

Thank you for your consideration of our views.

Sincerely,

Marc Rotenberg, President
Center for AI and Digital Policy