

Secretary-General
Secrétaire général

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05 August 2021

Honourable colleagues,

I am writing to you with regard to an important issue concerning trust and the digital economy, and specifically the topic of data free flow with trust. As you know, these issues, are at the top of the agenda for OECD Member countries, as evidenced by their decision to undertake a third phase of the [Going Digital Horizontal Project](#), on Data Governance for Growth and Well-being, including cross-border data flows.

In this context, and in response to concerns about the erosion of trust at a time when the importance of cross-border data flows to our economies is growing, the OECD Secretariat responded to the Committee on Digital Economy Policy's (CDEP) [urgent call to action](#) to advance data free flow with trust among OECD democracies. In line with the call, the CDEP undertook the development of high-level principles for government access to personal data held by the private sector that reconcile law enforcement and national security needs with protection of individual rights. Conceived as complementing the [OECD Privacy Guidelines](#), where there are explicit exceptions for this type of access and for which no global standard or agreement exists, **this critical work would allow OECD democracies to present a united approach, raise the bar globally and restore trust in the very cross-border data flows that are essential to the global economy.** The importance of the work was further underscored in the [G7 Digital and Technology Ministerial Declaration](#) of April 2021, as well as by business stakeholder groups.¹

The work has taken a **practitioner-driven, evidence-based approach**. The CDEP assembled 54 representatives from 23 OECD Member governments and the European Union, including from privacy and law enforcement authorities and national security agencies, in a drafting group that provided a unique format for sharing experiences, practices and common safeguards. Through eleven in-depth meetings and drafting sessions over only five months, this group of experts successfully **identified and achieved broad agreement on seven draft principles with an unprecedented amount of supporting detail.**²

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Ms. Paola Vega Castillo
Minister of Science, Innovation, Technology and Telecommunications
Costa Rica

Ms. Fiorella Salazar Rojas
Minister of Justice and Peace
Costa Rica

Cc: H.E. Mr. Manuel Tovar, Ambassador, Permanent Representative of Costa Rica to the OECD

¹ https://internetassociation.org/files/ia_joint-business-oecd-statement-on-govt-access-to-private-sector-data_5-2021_trade-pdf/; https://biac.org/wp-content/uploads/2021/07/Final-6-July-2021-CDEP-Gov-Access-Workstream_BIAC-Statement-on-a-Two-Step-Approach-2.pdf

² The top line draft principles include the seven following areas: legal bases, pursuit of legitimate aims, requirements for approval, handling of personal data, transparency, oversight and redress.



Impressively, all drafting group participants agreed that as a global standard, these seven draft principles could apply to what the group termed “**obliged access**”: access compelled through lawful means (e.g., subpoenas) or through informal pressure (e.g., threats of sanctions in the absence of co-operation, even without a legal basis, as may happen in non-OECD countries). This is already recognised as a significant achievement, and the adoption of shared principles for obliged access would provide a common international understanding to bolster trust in private sector data flows. Nevertheless, participants expressed different views on whether the draft principles should also cover additional methods of access, including covert and clandestine methods related to national security. In this regard, many countries raised concerns and sensitivities about including these methods which may extend beyond OECD’s traditional mission and mandate.

In an attempt to reconcile these different views, the CDEP convened a special session on 8 July. **However, delegates were unable to reach consensus on the path forward in this session, and the work is thus suspended for the time being.** Subsequently, many delegations expressed disappointment at this result and a commitment to pursuing the work, a sentiment shared by the Secretariat.

I am therefore writing to call on you to consider the importance of the issue and to continue working toward a solution. It is in this spirit that I urge you to consider a compromise whereby the OECD would address both obliged and other methods of access, but in a sequenced approach. Specifically, **the existing consensus on principles for obliged access could be capitalised upon by embodying them in a legal instrument, while the OECD could publicly commit to working further on other methods, taking into account the sensitivities related to covert and clandestine data access noted above.** This would be in keeping with the OECD’s tried and tested approach of progressing in the areas where consensus exists while building further consensus through evidence based research and analysis and dialogue. Indeed, it is precisely in the implementation of this approach that the OECD is now working to move beyond the consensus embodied in the scope of the Privacy Guidelines to address the question of government access to personal data held by the private sector. I sincerely hope that such a compromise would bring us together around our shared values, demonstrate our unity, and be acceptable to all OECD Members.

The OECD has always prided itself on its reputation as a forum for overcoming differences through compromise and co-operation to emphasise our commonalities, and I trust this spirit will prevail.

I look forward to hearing from you, and I and my team stand ready to discuss further.

Yours sincerely,

A handwritten signature in blue ink, consisting of a large, stylized 'M' followed by a horizontal line and a vertical stroke.

Mathias Cormann