

Mapping commonalities in regulatory approaches to cross-border data transfers

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- ▶ Data has become the lifeblood of our economic and social interactions. However, the pervasive exchange of data has raised concerns about misuse, especially when data crosses international borders. In response, governments are introducing a range of measures to condition the movement of data across borders.
- ▶ The resulting patchwork of approaches is generating challenges, not only for governments seeking to enforce public policy objectives such as privacy and data protection, but also for firms operating in global markets.
- ▶ This work maps the evolving regulatory landscape for cross-border data flows. It highlights that there is no one, single mechanism to enable what has come to be called 'data free flows with trust'. Governments pursue different, or even multiple and complementary, approaches which include unilateral mechanisms, plurilateral arrangements and trade agreements.
- ▶ While there are wide differences across instruments, this paper aims to support progress in international discussions by identifying a range of commonalities, elements of convergence and complementarities on ways to enable data to flow across borders with "trust".

What's the issue?

In today's digitised and globally interconnected world, data has become the lifeblood of economic and social interactions. However, the pervasive exchange of data, including across borders, has fuelled concerns about the use and, especially the misuse, of data, amplifying concerns about privacy protection, digital security, intellectual property protection, regulatory reach, competition policy and industrial policy. This is especially the case in the context of data crossing different jurisdictions.

As a result, countries have been adopting and adapting regulations addressing the movement of data, often introducing measures that condition the movement of data across borders or, in some cases, measures that mandate that data is stored or processed in specific locations. The resulting patchwork of rules and regulations is making it difficult not only to effectively enforce public policy goals such as privacy and data protection across different jurisdictions, but also for firms to operate across markets, affecting their ability to internationalise and benefit from operating on a global scale.

It is increasingly clear that the benefits of digital trade for both businesses and consumers depend strongly on the degree of "trust" in the digital environment. Individuals will not engage with businesses they do not "trust" and businesses will struggle to reap the benefits of scale unless they can operate with "trust" globally. Although different countries have different understanding of what consumer and business "trust" means, the concept of *data free flow with trust*, championed by Japan under the G20 'Osaka Track', encapsulates the policy impetus to find a balanced solution to these challenges.

In an effort to enable continued discussions in this area, this note discusses the outcomes of a longer exercise that maps existing instruments that countries use to facilitate the movement of data across borders with "trust". By identifying areas of similarity or convergence, rather than of difference, this exercise aims to contribute to ongoing efforts to promote further dialogue on this sensitive issue at the intersection of different policy domains.



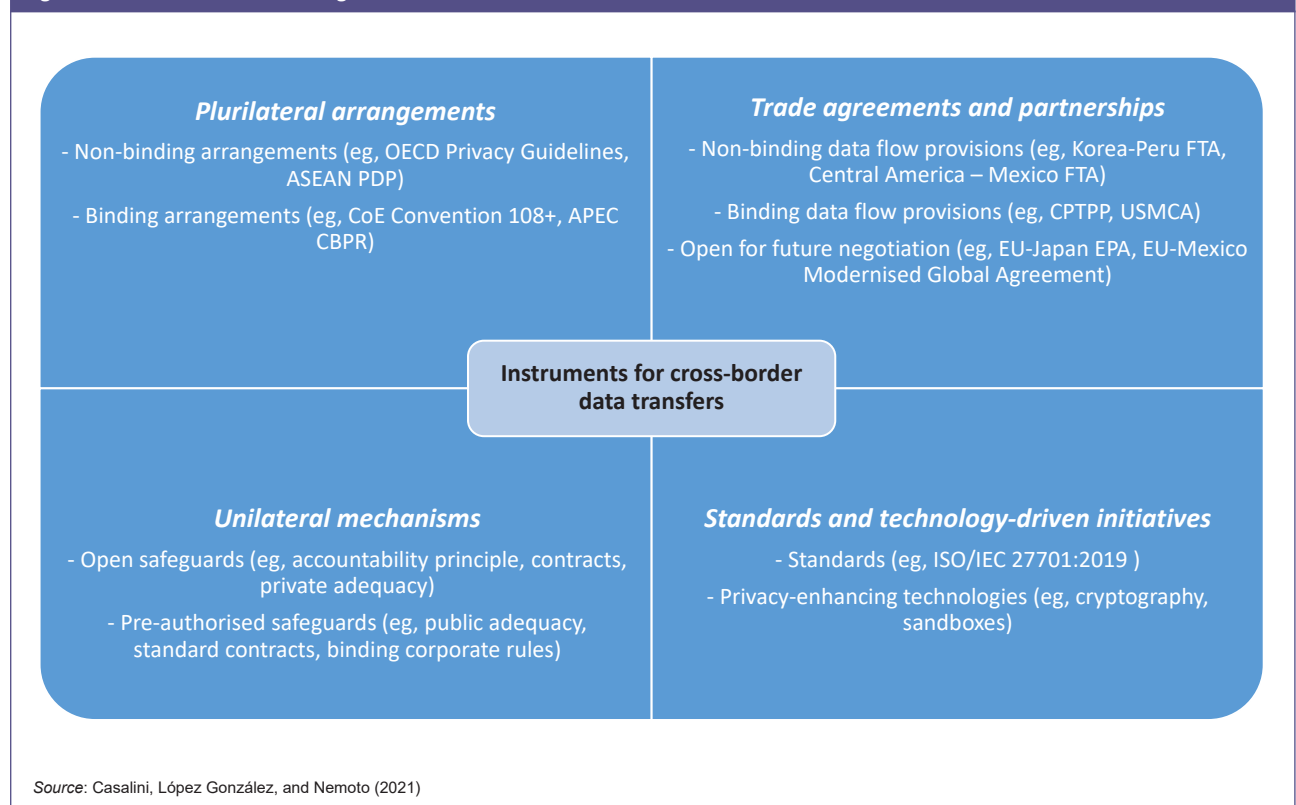
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There is no one, single mechanism to enable the free flow of data with “trust”

Governments have increasingly been using a range of instruments to enable businesses to transfer data across borders while ensuring that, upon crossing a border, data is granted the desired degree of protection or oversight. Many different instruments have been devised and implemented, a number of which relate to the transfer of personal data (Figure 1).

Each broad instrument tackles the issue of data transfers from a different perspective, but approaches are not mutually exclusive: countries can simultaneously use different approaches with respect to different purposes, partners, types of data and situations.

Figure 1. Instruments for facilitating cross-border data transfers



Unilateral mechanisms

Unilateral mechanisms enable the transfer of certain types of data to countries outside the domestic territory under certain conditions. These domestic mechanisms, which are largely developed in the context of transfers of personal data, include the use of (1) ‘open safeguards’ such as ex-post accountability principles, contracts and private sector adequacy; and (2) ‘pre-authorised safeguards’ such as public adequacy decisions, standard or pre-approved contractual clauses and binding corporate rules. The difference between these two is that pre-authorised safeguards generally require some form of public sector approval before the data transfer, while open safeguards leave more discretion to the private sector as to how to safeguard the data being transferred, but make the private sector transferer accountable for any misuse.

Analysis across OECD countries and selected economies (76 economies in total) shows that most countries incorporate some form of safeguard in their data transfer mechanisms, but they differ in the way they go about it, with more or less involvement by the public sector. In particular, ‘pre-authorised safeguards’, feature in 65% of economies and ‘open safeguards’ in 54% of economies (79% and 33% respectively when countries subject to the General Data Protection Regulation (GDPR) are counted individually).

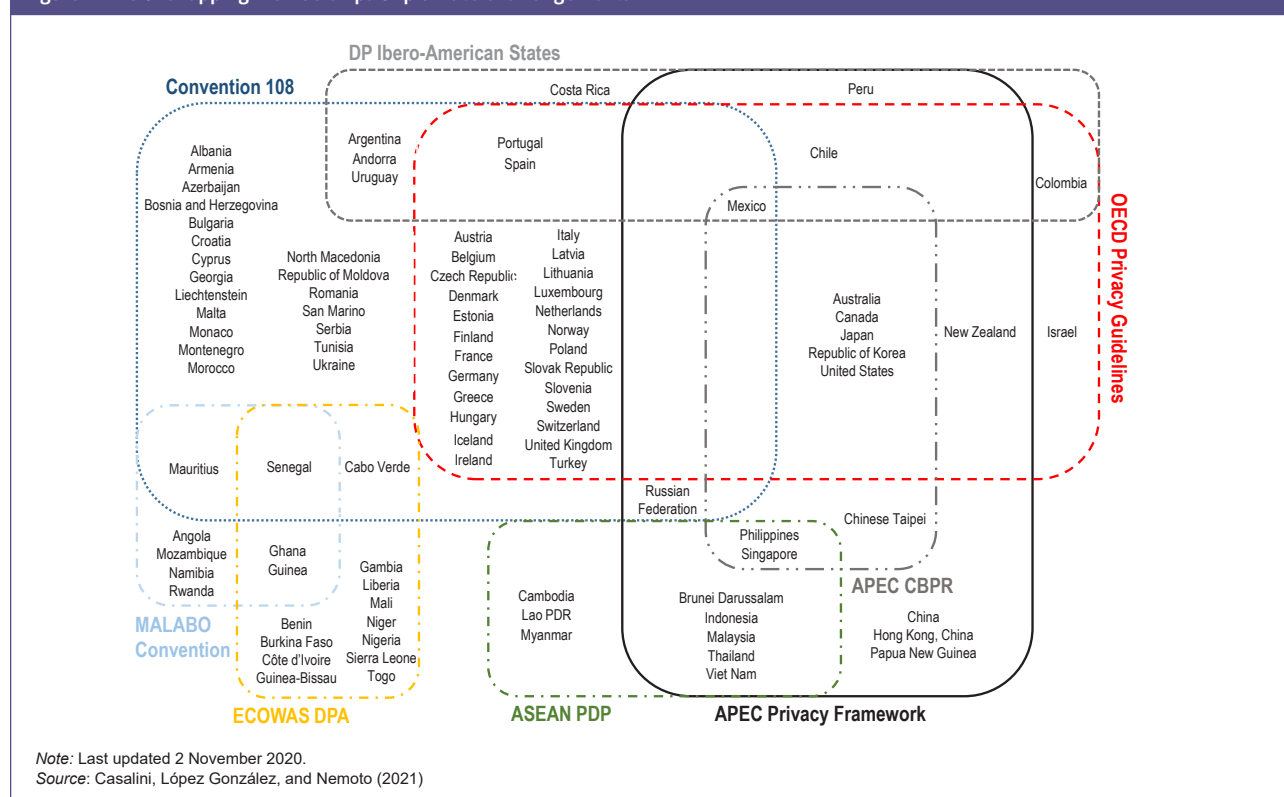


Plurilateral arrangements

Plurilateral arrangements aim to generate consensus around the transfer of specific types of data. The most well-known examples are in the field of privacy and personal data protection. They include, among others, the OECD Privacy Guidelines, the APEC Cross Border Privacy Rules (CBPR) System and the Council of Europe Convention 108 and related instruments. To date, these plurilateral arrangements involve at least 97 economies, some of which are party to several arrangements (Figure 2).

Although the emerging landscape appears complex, it is underpinned by a number of common elements, both in terms of the principles that underlie different arrangements and in terms of the privacy and data protection regulations of participating countries. Indeed, overall, 68% of the elements covered in existing domestic privacy and data protection regulations (across a sample of OECD countries and emerging economies) overlap, with overlaps generally larger among countries that are party to the same specific arrangements. This suggests the presence of some common ground on which to explore building mechanisms to enable data transfers.

Figure 2. The overlapping memberships of plurilateral arrangements



Trade agreements

Trade agreements are increasingly addressing issues around data flows (in the context of both personal and non-personal data). Since 2008, 29 agreements involving 72 economies have introduced some form of data flow provisions. However, the depth of provisions varies among agreements. Around 45% of agreements include non-binding guidance on data flows, with broad provisions affirming the importance of working to maintain cross border data flows (e.g. Korea-Peru FTA and Central America-Mexico FTA). However, another 45% of agreements, most of which were signed in the last five years, contain binding commitments on data flows (of all types of data) – e.g. CPTPP and USMCA. Almost all of these also include exceptions allowing parties to restrict data flows to meet “legitimate public policy

objectives” and all include provisions on the need for domestic privacy legislation (including references to the plurilateral arrangements outlined above).

Overall, the analysis suggests that binding data flow provisions go hand in hand with exceptions for legitimate public policy objectives and/or provisions on privacy (and consumer protection). Governments are increasingly using trade agreements to underpin both the need to enable data flows as essential to trade in the digital era, and the recognition that data flows need to be accompanied by safeguards for personal data protection, including via reference to plurilateral arrangements.



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Standards and technology-driven initiatives

Standards and technology-driven initiatives refer to non-regulatory instruments developed by non-governmental and private sector organisations with a view to better handling issues around cross border data transfers, often in the context of privacy and security protection. This includes the use of ISO standards which provide guidance when establishing, implementing, maintaining and improving Privacy Information Management Systems (PIMS). They also include technology-driven initiatives such as privacy-enhancing technologies (PETs) which include cryptography and sandboxes. These approaches could also provide insights into organisational and technological options to build greater “trust” in cross-border data flows.

Finding common ground

Although the emerging policy landscape appears to be fragmented, this mapping exercise shows that there are areas of overlap.

First, a range of **commonalities** between and within instruments emerge. For instance, whether through unilateral mechanisms, trade agreements or plurilateral arrangements, there appears to be consensus on the dual goal of safeguarding data and enabling its flow across borders, although differences arise in how these goals may best be achieved. Indeed, plurilateral arrangements tend to promote coordination on personal data protection with a view to facilitating cross-border data flows between participating countries. At the same time, domestic frameworks tend to provide unilateral mechanisms to transfer data with safeguards (albeit with differences related to how and by whom the safeguarding is done). Commonalities are also found within instruments, as is the case of contracts or adequacy decisions as unilateral mechanisms foreseen in domestic frameworks (despite differences in whether these are applied ex-ante or ex-post and the extent of government involvement).

Second, there is also growing evidence of **convergence**, often on the basis of the aforementioned commonalities. For instance, there are signs of growing overlaps in the principles that underscore privacy and personal data protection frameworks, including in the context of plurilateral arrangements. Trade agreements are also showing signs of convergence in increasingly including provisions on unrestricted data flows coupled with exceptions to achieve legitimate public policy objective and/or provisions on privacy and consumer protection frameworks.

Finally, there is a high degree of **complementarity** between instruments. Unilateral instruments draw from, and contribute to, plurilateral arrangements, and trade agreements are increasingly referencing plurilateral arrangements on data protection as part of their binding data flow provisions.

Together, this indicates the emergence of an international architecture, or a web of architectures, seeking to find ways to combine the benefits of data flows and achievement of legitimate public policy objectives. The internet is global and borderless but regulations are not. Ensuring the free flow of data with “trust” has been a challenge for policy-makers for many years. Different solutions to this complex challenge have emerged, albeit mostly in the context of domestic approaches. By focusing on areas where commonalities exist and highlighting complementarities and elements of convergence between existing approaches, this paper aims to support continued discussions in this area to help identify where efforts to find a way forward might be most fruitful. It is hoped that this will facilitate international cooperation and dialogue on more predictable and transparent combinations of data flows and “trust” that enable governments, firms and consumers to benefit from continued growth, wellbeing and inclusion.



Further reading

- Casalini, F, Lopez-Gonzalez, J. and Nemoto, T. (2021) “Mapping Commonalities in Regulatory Approaches to Cross-border data transfers”, *OECD Trade Policy Papers* (forthcoming), OECD, Publishing, Paris.
- Casalini, F. and J. López González (2019), “Trade and Cross-Border Data Flows”, *OECD Trade Policy Papers*, No. 220, OECD Publishing, Paris. <http://dx.doi.org/10.1787/b2023a47-en>
- OECD (2020), “Mapping Approaches to data and data flows”, Report for the G20 Digital Economy Task Force, <http://www.oecd.org/trade/documents/mapping-approaches-to-data-and-data-flows.pdf>

