



**Asia-Pacific  
Economic Cooperation**

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## **Mapping Commonalities in Regulatory Approaches to Cross-Border Data Transfers**

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# MAPPING COMMONALITIES IN REGULATORY APPROACHES TO CROSS-BORDER DATA TRANSFERS

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## » What is the issue?

- Today's digitised and globally interconnected world is underpinned by the **movement of data across borders**.
- However, the growing **patchwork of rules and regulations** on cross-border data flows is making it difficult to
  - effectively **enforce public policy goals** such as privacy and data protection across different jurisdictions; and
  - for firms to operate across markets, **affecting their ability to internationalise** and benefit from operating on a global scale.
- Differences are now well understood. Useful to focus on mapping commonalities in regulatory approaches to cross-border data transfers to identifying common elements that may serve as building blocks in bridging different approaches.

# How are economies approaching cross-border data transfers?

## *Plurilateral arrangements*

- Non-binding arrangements (eg, OECD Privacy Guidelines, ASEAN PDP)
- Binding arrangements (eg, CoE Convention 108+, APEC CBPR)

## *Trade agreements and partnerships*

- Non-binding data flow provisions (eg, Korea-Peru FTA, Central America – Mexico FTA)
- Binding data flow provisions (eg, CPTPP, USMCA)
- Open for future negotiation (eg, EU-Japan EPA, EU-Mexico Modernised Global Agreement)

### **Instruments for cross-border data transfers**

## *Unilateral mechanisms*

- *Ex post* accountability principle, contracts, private adequacy
- Public adequacy, standard contracts, binding corporate rules

## *Standards and technology-driven initiatives*

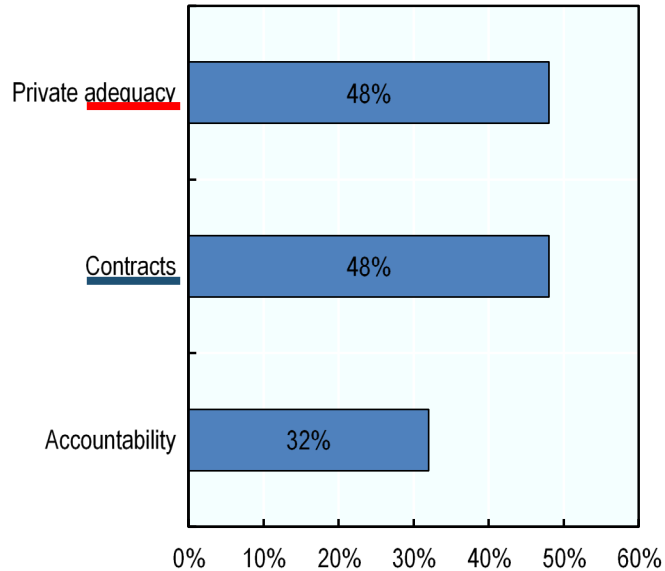
- Standards (eg, ISO/IEC 27701:2019 )
- Privacy-enhancing technologies (eg, cryptography, sandboxes)

## » Unilateral mechanisms: many different approaches that can be grouped into two categories

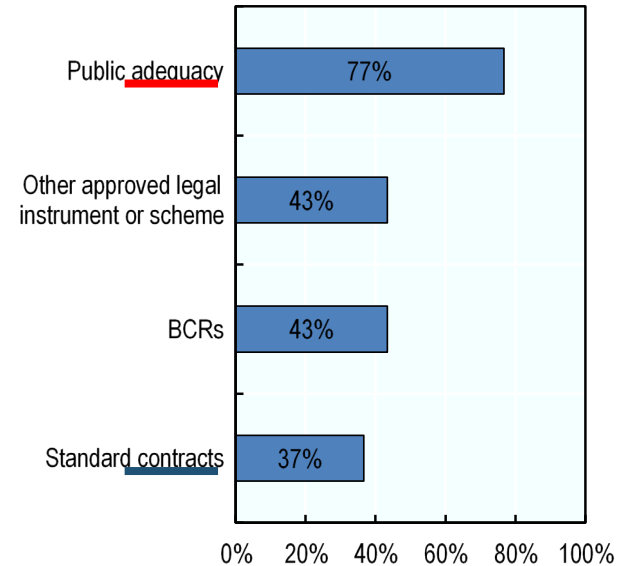
- **Domestic mechanisms** that enable the transfer of certain types of data abroad under certain conditions (largely in context of transfers of personal data).
  - **‘Open safeguards’** leave discretion as to how to safeguard transfers to the private sector and include approaches such as such as ex-post accountability principles, contracts and private sector adequacy.
  - **‘Pre-authorised safeguards’** require public sector approval before transfer and include public adequacy decisions, standard or pre-approved contractual clauses and binding corporate rules.

## with some similarities

*a. Open safeguards*

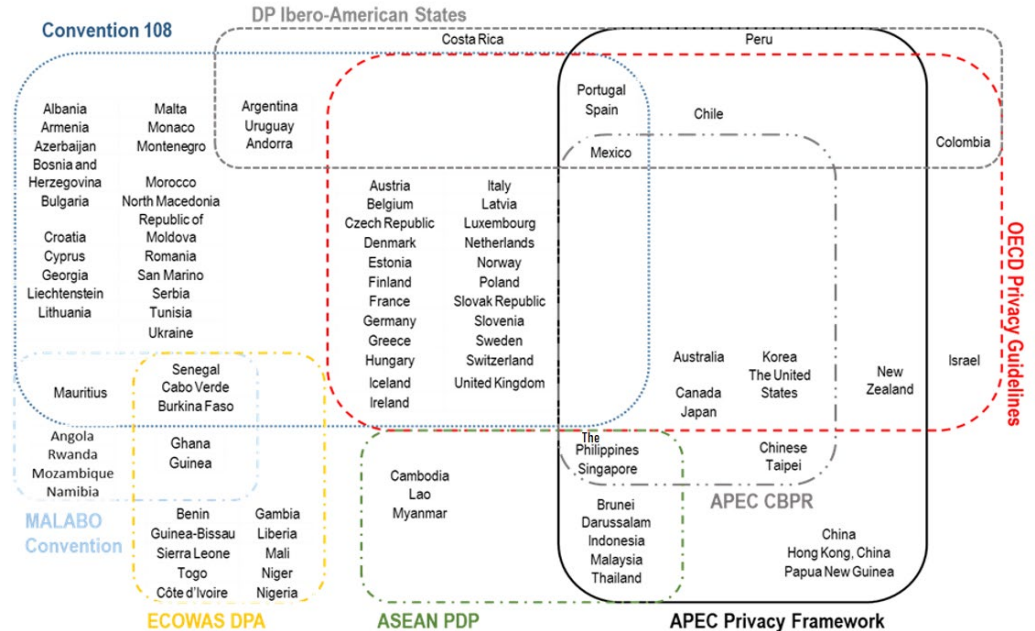


*b. Pre-authorized safeguards*



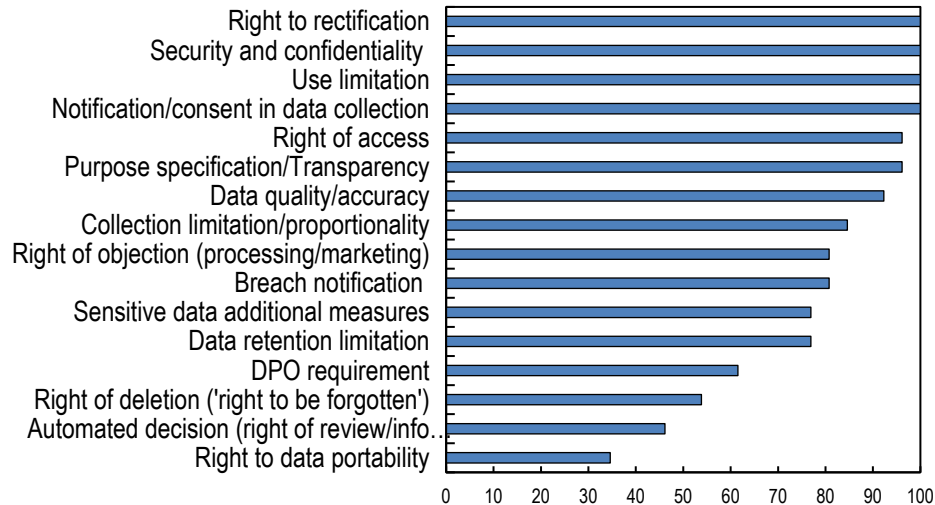
## Plurilateral arrangements: a complex landscape

- International instruments that create rules or generate consensus around transfers of specific types of data (largely in the context of privacy and data protection).
- Can be **binding or non binding** and often developed in context of regional organisations.



## Plurilateral arrangements: a high degree of overlap in principles covered

### Issues covered in privacy and personal data protection regulation

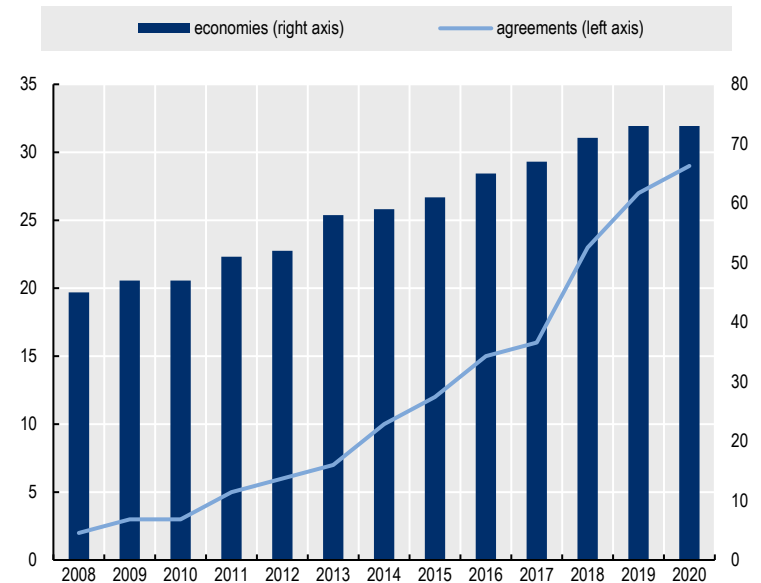


- Overall, 68% of the elements covered in existing domestic privacy and data protection regulations overlap.
- Overlaps generally larger among economies party to the same arrangement.

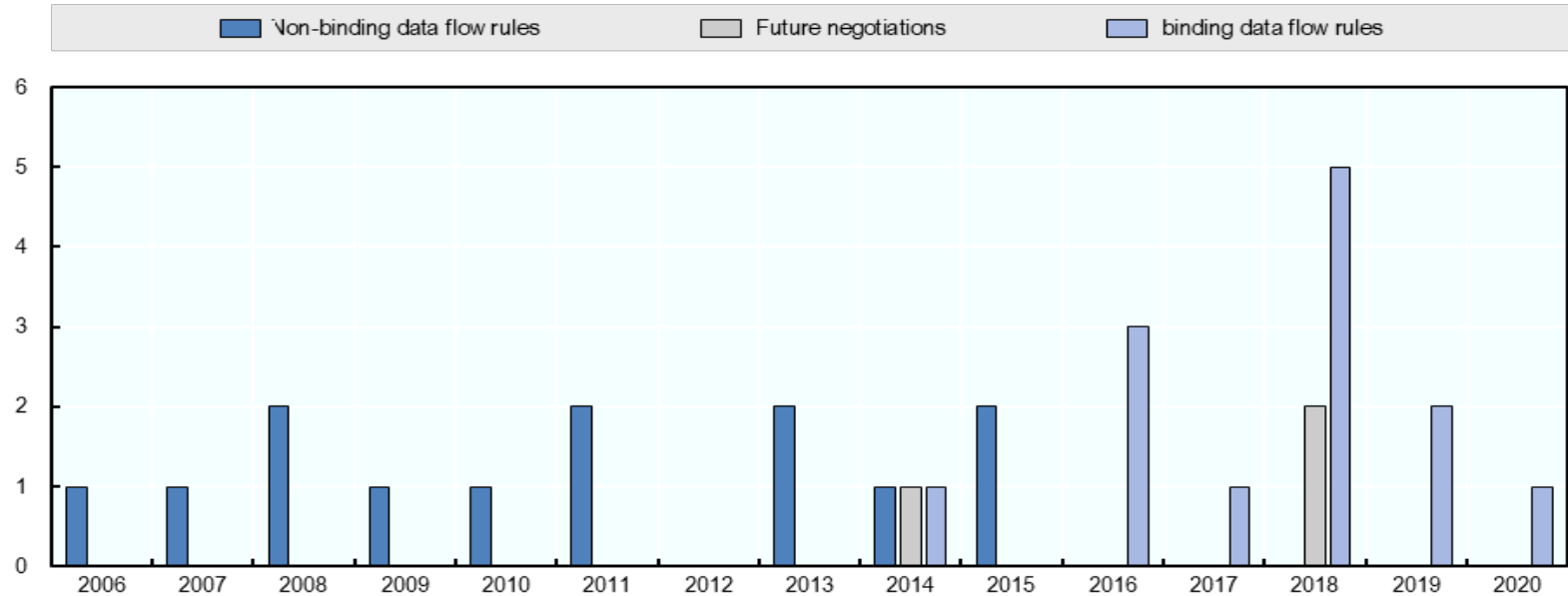


## Trade Agreements: increasingly incorporating data flow provisions

- Growing number of economies introducing data flows (personal and non-personal data) into trade agreements:
  - **Non-binding guidance** (including broad provisions affirming importance of data flows). (45%)
  - **Reassessment of data flow provisions.** (10%)
  - **Binding rules** (45%)
- All agreements with binding provisions also require or promote the adoption of domestic privacy and data protection legislation



# Which are increasingly binding and contain exceptions for legitimate public policy objectives



## Other stakeholder and technology driven initiatives

- Non regulatory instruments and tools developed by non-governmental organisations to better handle issues around cross-border data flows.
  - **Standards** referring to standards and principles providing guidance on how organisations might manage cross-border transfers in the context of privacy and security risks; and
  - **Technology-driven initiatives**, referring to the use of privacy enhancing technologies (PETs) that enable organisations to meet privacy and digital security objectives when transferring data abroad.

## » What do we learn from this analysis?

- **Commonalities** are found between and within instruments:
  - The dual goals of safeguarding data and enabling its flow across borders is common across all instruments.
- There is growing evidence of **convergence**:
  - Trade agreements increasingly combine data flow provisions with requirements for privacy
  - The principles that underpin domestic privacy and personal data protection have a high degree of overlap
- There is a high degree of **complementarity** between instruments:
  - Unilateral mechanisms draw from, and contribute to, plurilateral arrangements
  - Trade agreements increasingly reference plurilateral arrangements.



## Contact us

We look forward to hearing from you!



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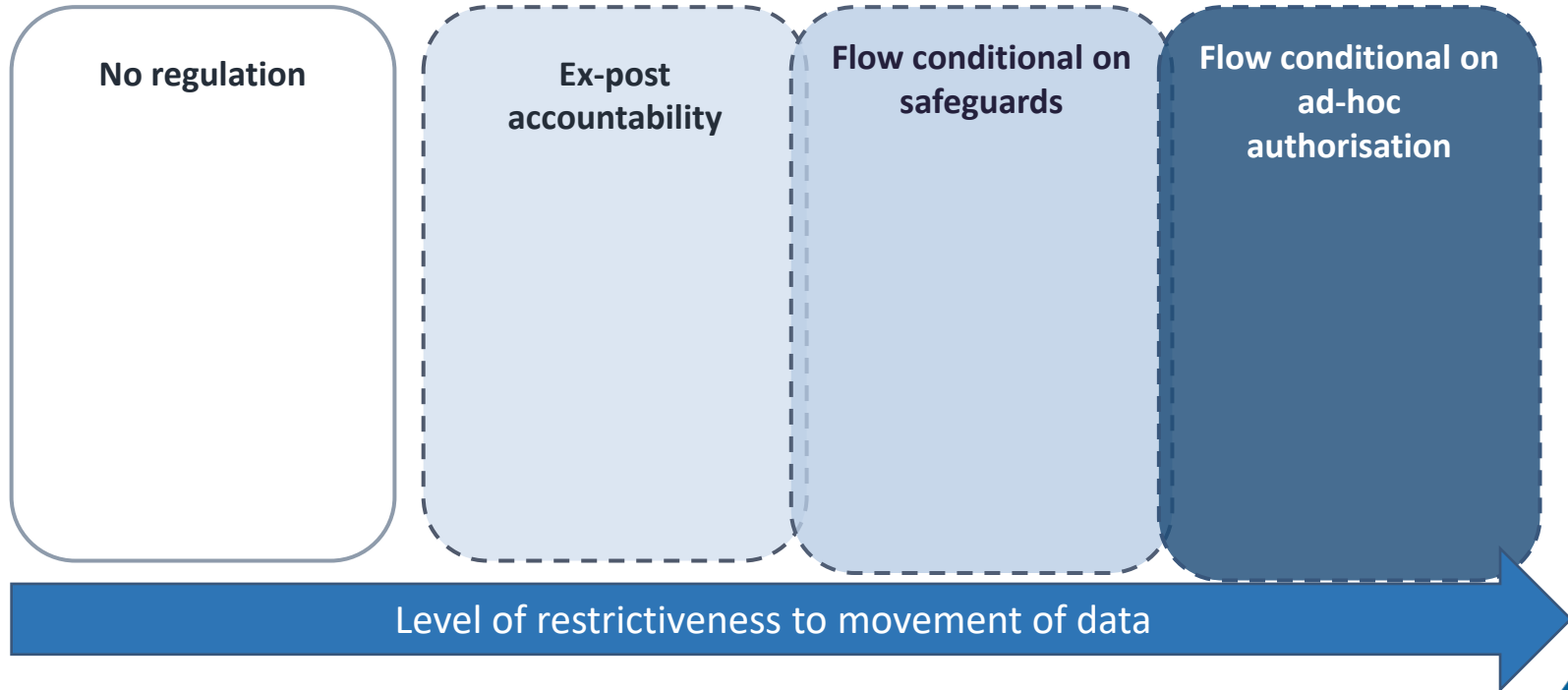
You can reach us via e-mail by sending your message to the following address:

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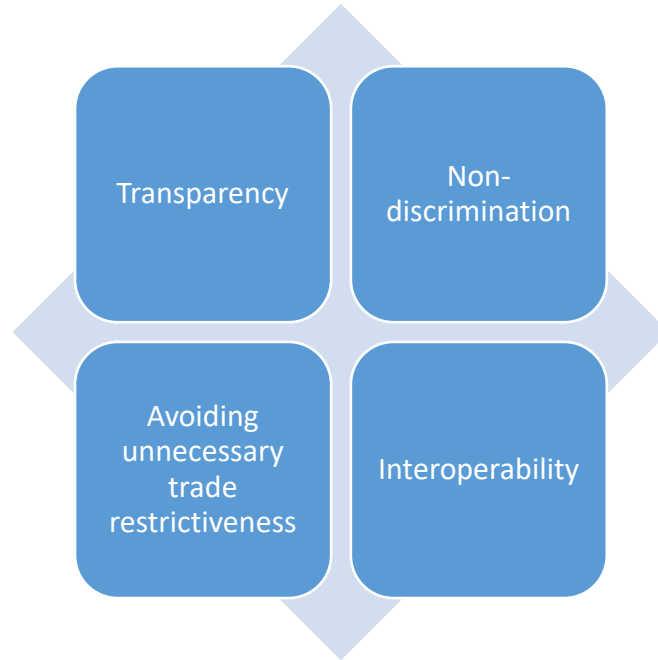
## Four broad approaches to cross-border data flows have emerged



Source: Casalini and Lopez-Gonzalez (2019)



# In facing new challenges, old principles of market openness can help



Source: Casalini et al (2018) Principles for Market Openness in the Digital Age