Mapping Commonalities in Regulatory Approaches to Cross-Border Data Transfers

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MAPPING COMMONALITIES IN REGULATORY APPROACHES TO CROSS-BORDER DATA TRANSFERS

Javier Lopez-Gonzalez
OECD, Trade and Agriculture Directorate

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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 (e.g., OECD Privacy Guidelines, ASEAN PDP)
- Binding arrangements (e.g., CoE Convention 108+, APEC CBPR)

**Trade agreements and partnerships**
- Non-binding data flow provisions (e.g., Korea-Peru FTA, Central America – Mexico FTA)
- Binding data flow provisions (e.g., CPTPP, USMCA)
- Open for future negotiation (e.g., EU-Japan EPA, EU-Mexico Modernised Global Agreement)

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

**Standards and technology-driven initiatives**
- Standards (e.g., ISO/IEC 27701:2019)
- Privacy-enhancing technologies (e.g., 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**

- Private adequacy: 48%
- Contracts: 48%
- Accountability: 32%

**b. Pre-authorised safeguards**

- Public adequacy: 77%
- Other approved legal instrument or scheme: 43%
- BCRs: 43%
- Standard contracts: 37%
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.
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Four broad approaches to cross-border data flows have emerged

- **No regulation**
- **Ex-post accountability**
- **Flow conditional on safeguards**
- **Flow conditional on ad-hoc authorisation**

Source: Casalini and Lopez-Gonzalez (2019)
In facing new challenges, old principles of market openness can help

- Transparency
- Non-discrimination
- Avoiding unnecessary trade restrictiveness
- Interoperability