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Regulatory Approaches to Cross-Border Data Transfers

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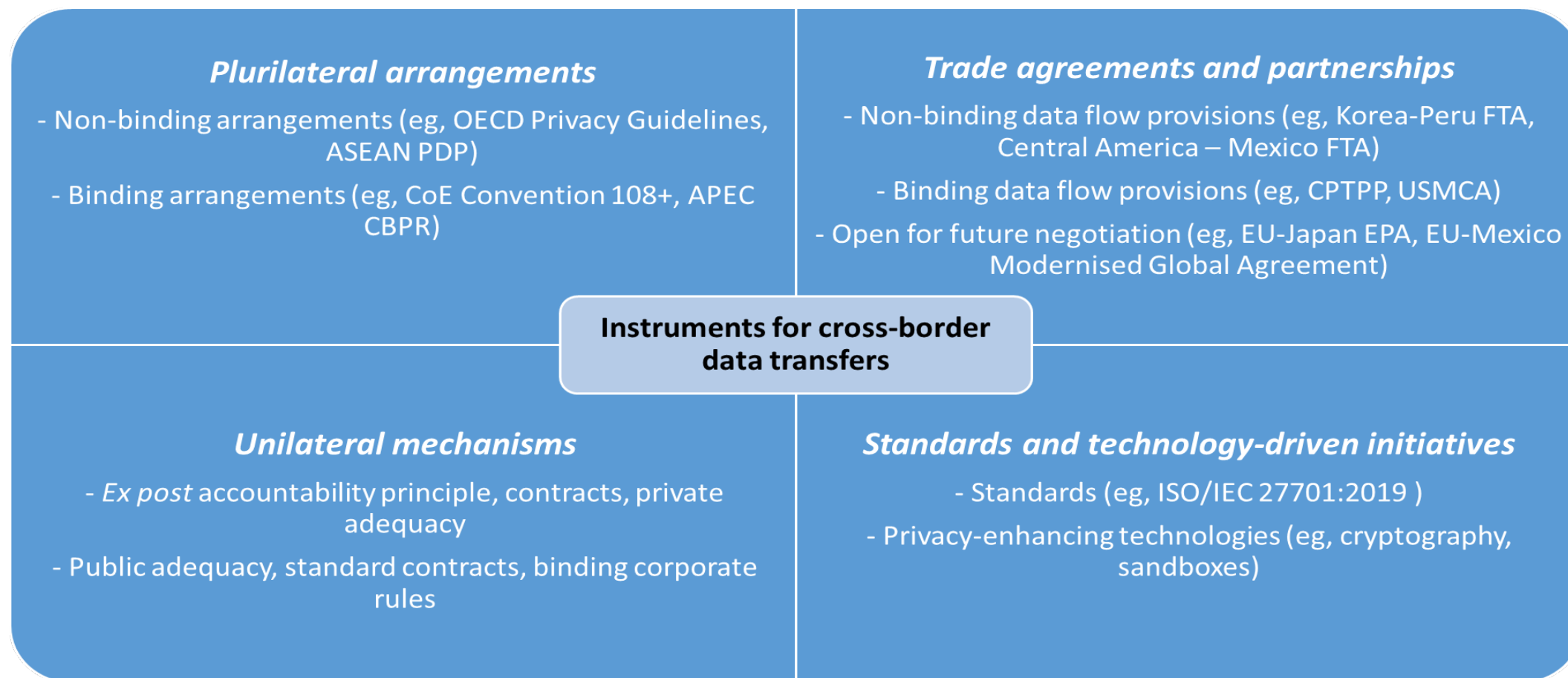


REGULATORY APPROACHES TO CROSS-BORDER DATA TRANSFERS

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APEC Digital Trade Dialogue
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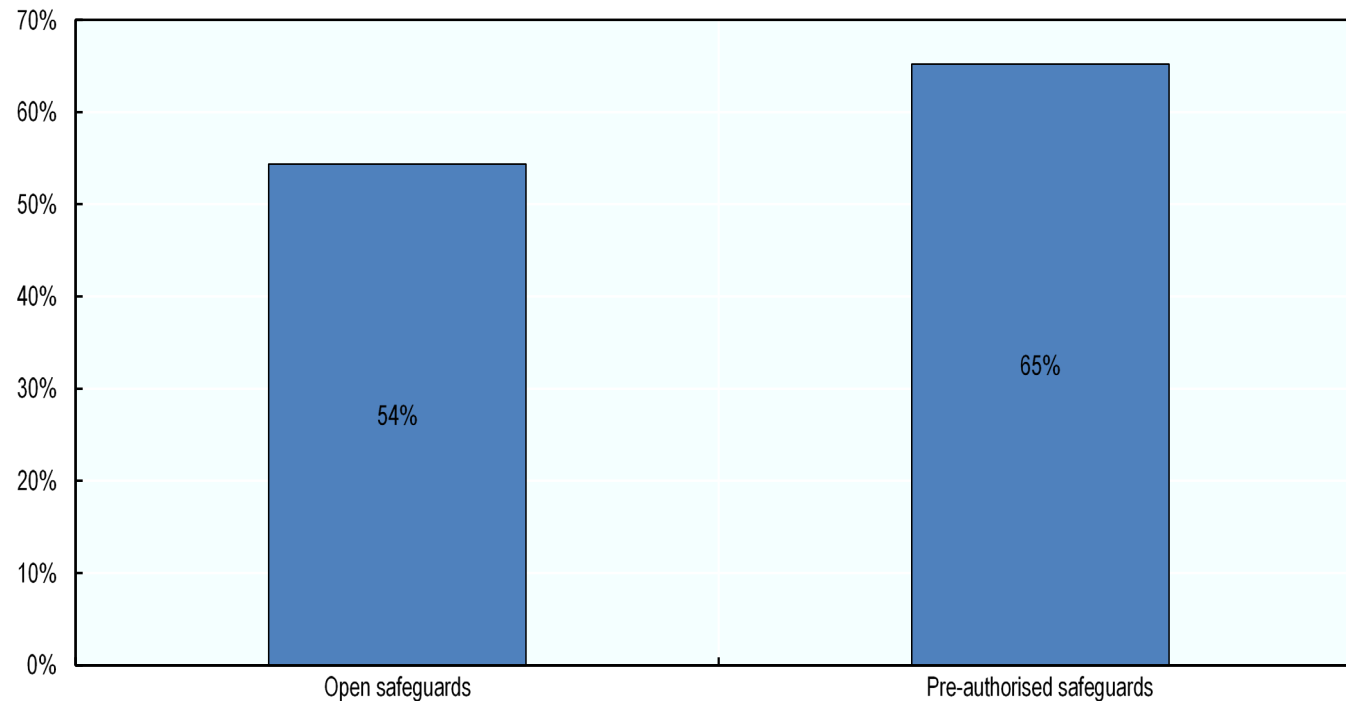
Four types of approaches to cross-border data transfers



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

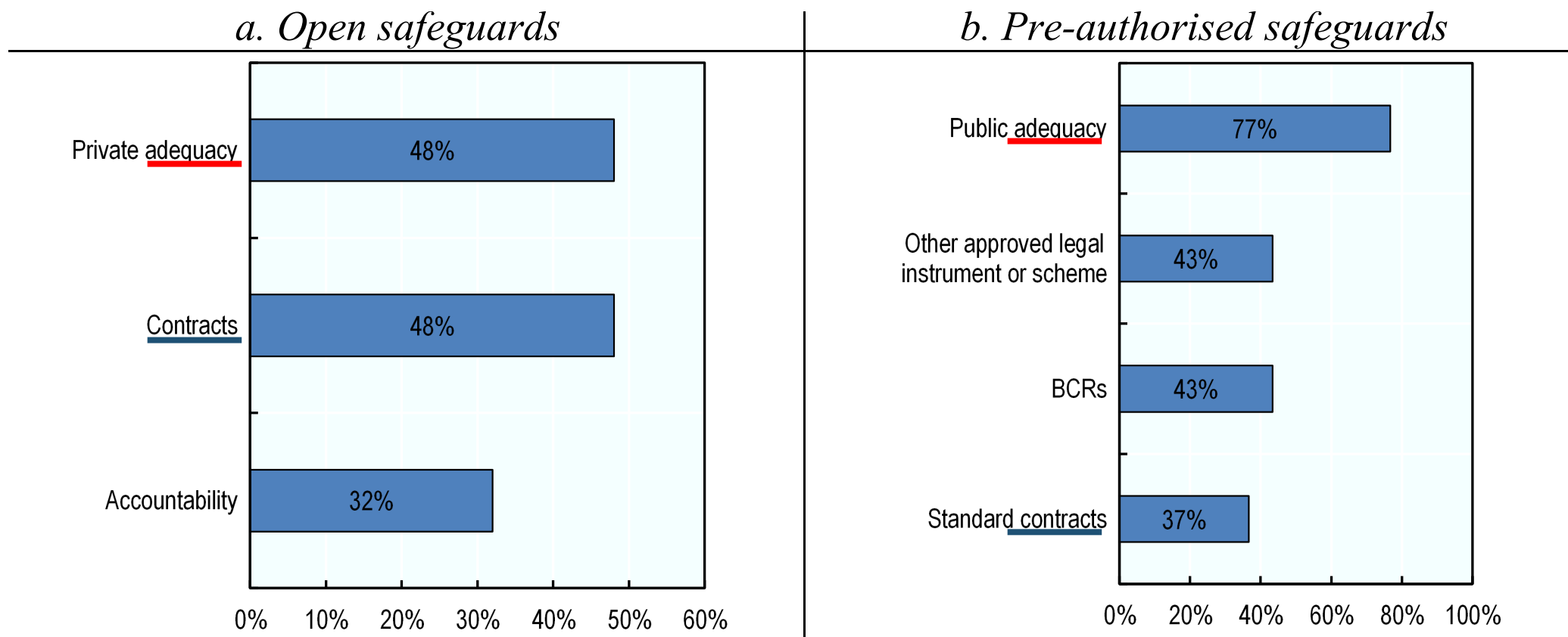


‘Pre-authorised safeguards’ require public sector approval before transfer

» Examples of unilateral mechanisms:

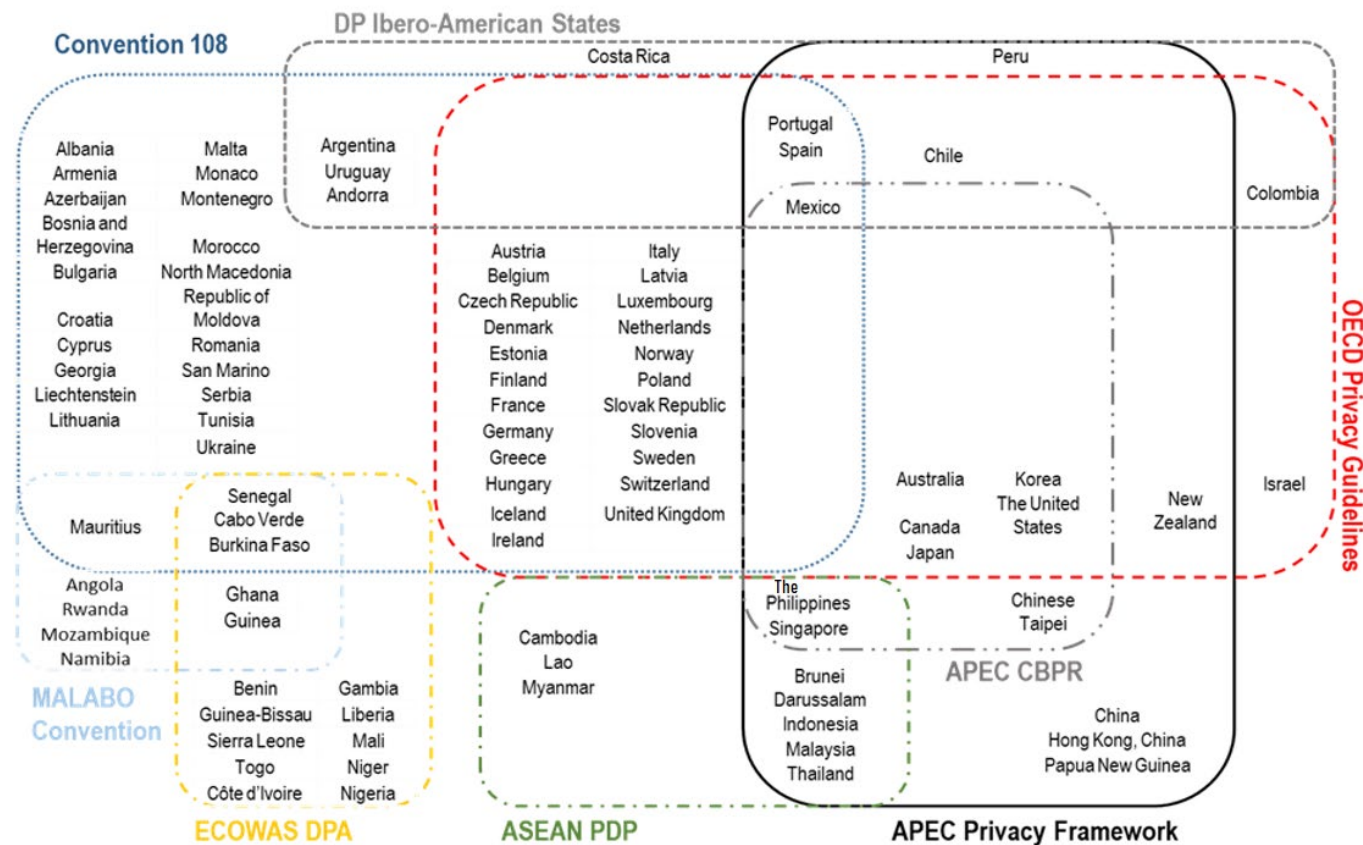
- **‘Open safeguards’**
 - Private sector adequacy: when data holder accountable of assessing adequacy of the transfer, often on the basis of principles indicated by the public sector (e.g. Australian Privacy Principles).
 - Contracts: transferring entities encouraged or required to develop own legal instruments to protect the data when it crosses borders.
 - Ex-post accountability: where cross-border transfers take place without specific requirements such as additional legal steps (e.g. US Privacy Act).
- **‘Pre-authorised safeguards’**
 - Public adequacy decisions: unilateral recognition by public body certifying that the personal data protection regime of another jurisdiction meets a certain level of privacy requirements (so personal data can be transferred unimpeded to that jurisdiction).
 - Ex-ante legal safeguards: create, ex-ante, legal guarantees with regard to the transferred data, aiming to ensure uniform levels of protection and enforcement in the jurisdiction of destination. Include *Standardised contracts* or *binding corporate rules*.

Emerging commonalities in unilateral mechanisms



» Plurilateral arrangements: a complex landscape

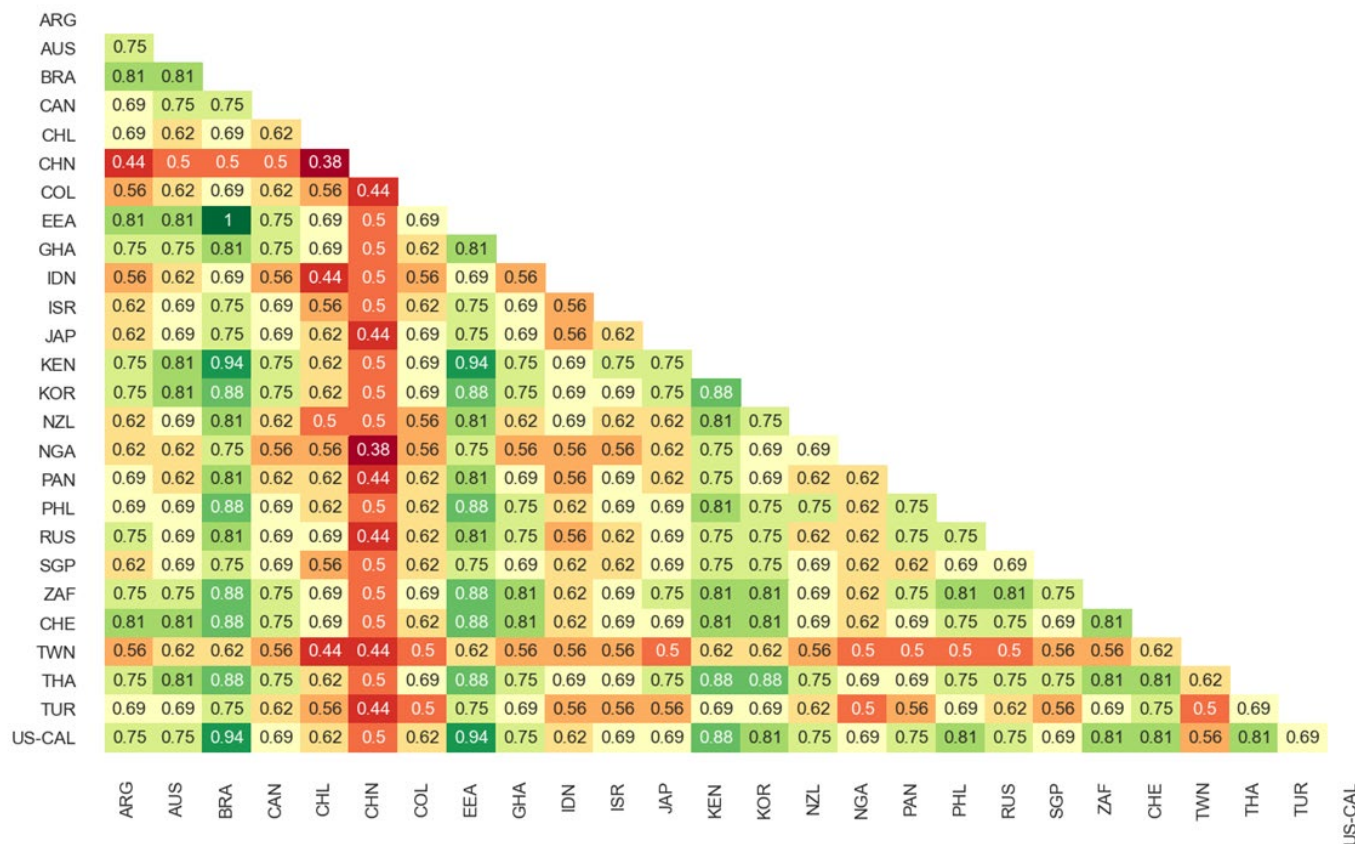
- International instruments that create **rules or generate consensus around transfers of specific types of data** (largely in the context of privacy and data protection).
- Can be **binding or non binding** and often developed in context of regional organisations.



» Examples of plurilateral arrangements

- Non-binding:
 - **OECD Privacy Guidelines**: which set out guiding principles to ensure the protection of privacy while avoiding restrictions on data flows that are disproportionate to the risks presented.
- Binding:
 - **Convention 108 of the Council of Europe**: a binding treaty protecting the right to privacy of individuals with respect to personal data which is automatically processed.
 - **APEC Cross-Border Privacy Rules (CBPR) System**: once organisation has been certified for participation requires businesses to implement data privacy policies consistent with the APEC Privacy Framework.

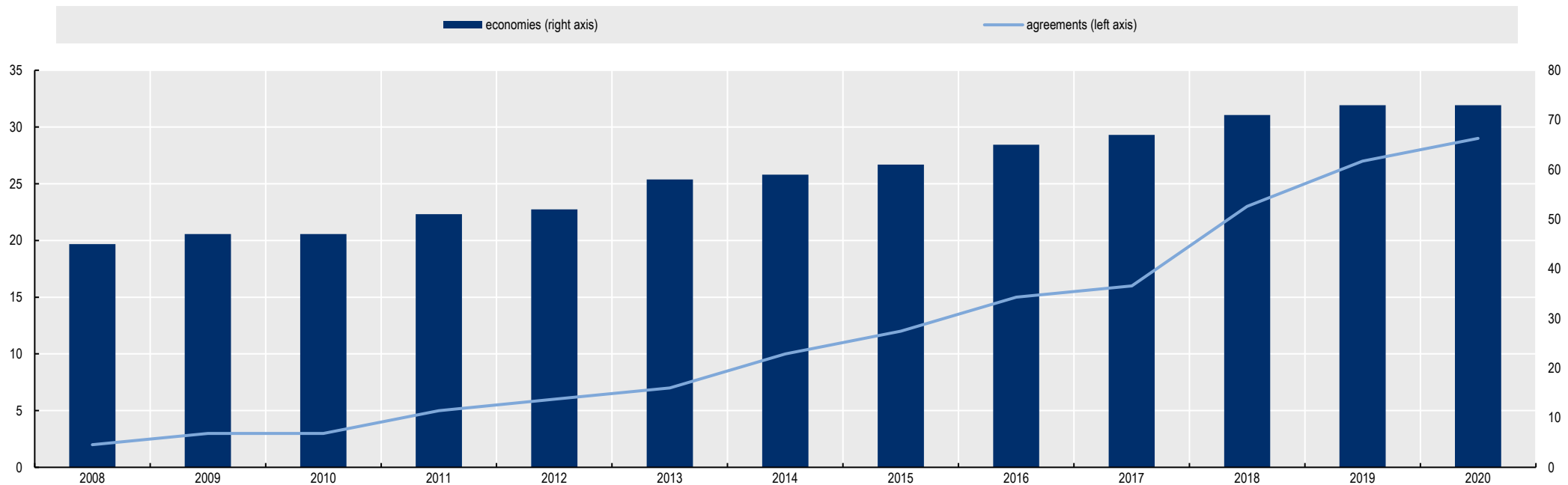
Emerging commonalities in plurilateral arrangements



- 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.
 - C108 – 76%
 - OECD – 71%
 - APEC – 68%

Trade Agreements: increasingly incorporating data flow provisions

- Growing number of economies introducing data flows (personal and non-personal data) into trade agreements:

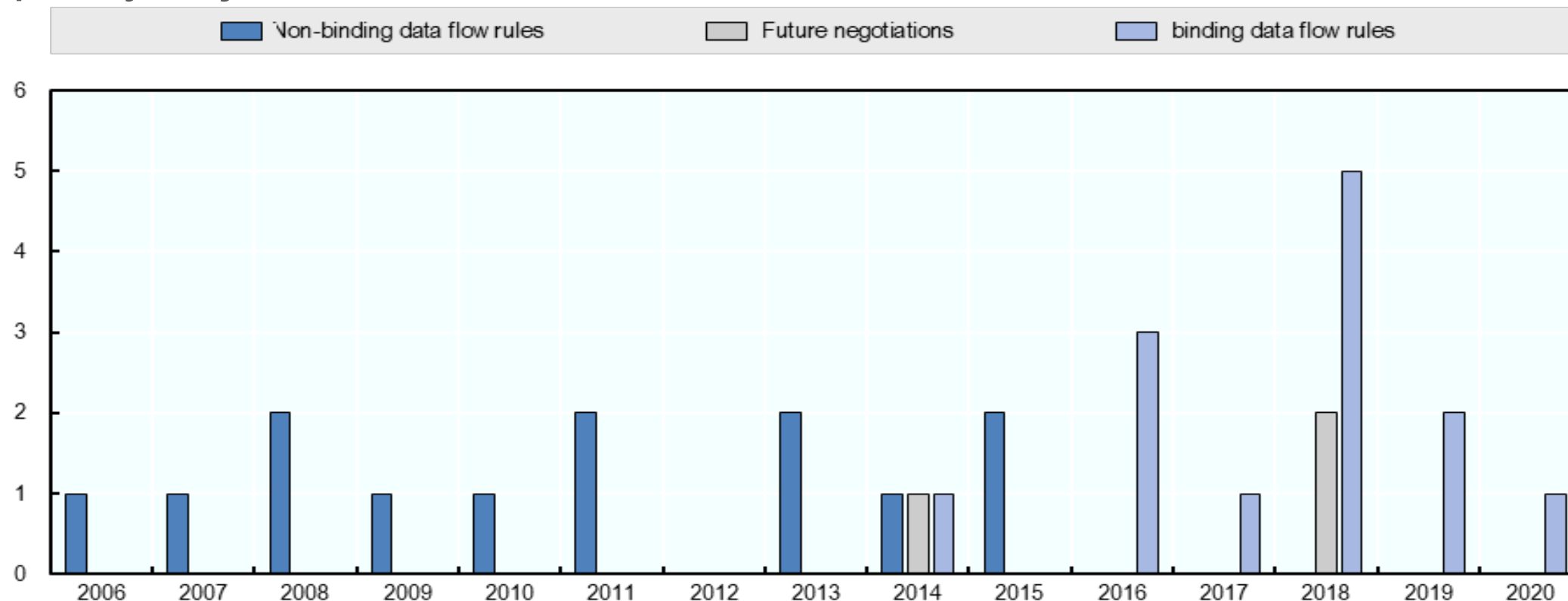


» Examples of types of **trade agreements**:

- **Non-binding guidance:** including broad provisions affirming importance of data flows (e.g. Korea-Peru FTA and Central America-Mexico FTA). (45%)
- **Reassessment of data flow provisions** (e.g. EU-Japan and EU-Mexico). (10%)
- **Binding rules** relating to transfers of all types of data, often with enforcement mechanisms and exceptions for public policy objectives (e.g. CPTPP and USMCA). (45%)

» Emerging commonalities in trade agreements

increasingly binding and contain exceptions for legitimate public policy objectives



» What do we learn from this analysis?

- There is **no single mechanism** to enable the free flow of data with “trust”. Governments pursue different, or even multiple and complementary, approaches.
- **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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We look forward to hearing from you!



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