

1 March 2021

## Digital Coffee Meeting

Memo by Francisco De Abreu Duarte

### Assessing restrictions on cross-border data flows in trade policy

Speaker: Martina Ferracane (EUI – RSC)

*This event has been organised by the Technological Change and Society Interdisciplinary Research Cluster*

Martina Ferracane focused her presentation on three main topics:

1. Taxonomy of restrictions of data flows – *what do we mean by cross-border restrictions of data flows?*
2. Costs of restrictions of data flows – *what are the impacts of such measures?*
3. Data flows in trade policy – *how are those measures assessed in both WTO and FTA Agreements*

#### 1. Taxonomies of restrictions of data flows – what do we mean by cross-border restrictions of data flows?

Restrictions are increasing on cross border data flows, especially on the last decade<sup>1</sup>. Why is that? Many concerns are explaining this trend: privacy, national security, cybersecurity, data sovereignty, industrial policy or protectionism.

There have been different ways to classify restrictions of data flows, but Martina proposed her own taxonomy:

- ✓ No restrictions at all for cross-border data flows;
- ✓ Obligation of local storage of a copy of the data – *meaning a copy of the data must be stored in country X but might be processed and transferred elsewhere;*
- ✓ Obligation of local processing – *meaning the data must be stored and processed in country X but a copy of it might be transferred elsewhere;*
- ✓ Total ban on data flows – *no transfer of copy of data abroad;*
- ✓ Conditional flow regime – by which country X imposes some conditions which must be fulfilled by the recipient country or the company processing the data in order to allow flows of data to occur.

One could also think of new taxonomies limited to personal data. Martina suggests the following:

- Open model: the US approach
- Conditional model: the EU approach
- Controlled model: the Chinese approach

## **2. Costs of data flows restrictions – what are the (economic) impacts of such measures?**

Martina asks whether there is any correlation between data restrictions and the impact on economic factors such as productivity or imports. Her research concludes that this is the case: if countries lifted bans, they could both improve productivity and services imports.

Martina then presented the results of a recent working paper which concludes that the open transfers model is always associated with more trade while the regulatory safeguards model is associated to more or less trade depending on the sector. The model of “controlled transfers” seems to always affect trade negatively.

## **3. Data flows in trade policy – how are those measures assessed in both WTO and FTA Agreements**

Under WTO rules, deviations from trade commitments are only lawful if two criteria are met: the measure is i) necessary and ii) not trade restrictive.

There is no dispute on the precise case of cross border data flows, but the literature and jurisprudence discuss what necessity might mean. The most interesting policy action right now is a [joint statement on electronic commerce](#) which aims at negotiating a multilateral commitment on electronic commerce under the WTO, including potentially on data flows.

Free Trade Agreements are now considering a variety of models taking inspiration from the [CPTPP](#) (former TTP). While the CPTPP imposes a prohibition on the ban of data flows (with the exceptions of legitimate public policy objectives), other FTAs are more cautious (EU-Japan allows for commitments to be reconsidered after three years).

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<sup>1</sup>Ferracane, M. (2017), Restrictions on Cross-Border Data Flows: A Taxonomy, *ECIPE Working Paper No. 1/2017*, Ferracane, Martina, Restrictions on Cross-Border Data Flows: A Taxonomy (November 18, 2017). ECIPE Working Paper No. 1/2017, <http://dx.doi.org/10.2139/ssrn.3089956>

#### 4. Conclusions

Countries have been moderating their policies (those who had bans are opening a bit more and those which did not impose any restriction on data flows are considering imposing some limitations). The real question then is: is the way we are restricting flows information really necessary? Or are there any other ways to protect policy objectives without fragmenting the internet and creating barriers at the border?

##### Further contributions from the chat/questions:

**Q** (EUI Professor): How do cross-border bans apply to AI technology? Is the target only the raw data or also the AI output (processed data)?

**Martina:** If there is a ban, then the data has to be processed in the country and therefore it cannot be merged with data collected in other countries, potentially limiting the power of the AI model.

**Q** (EUI Professor): What is the actual role of protectionism? Are governments aware of the relevance of data?

**Martina:** For many years, the main reason for these bans was political protectionism, nothing else. Then the reasoning evolved, and countries became more aware of the possible bad effects on privacy and security and has become more nuanced.

**Q** (Cluster member): Can you give some examples of necessity and how states could use such exception? What did you have in mind?

**Martina:** Under GATS rules, one can deviate from free flow if this deviation is necessary, meaning if the country does not see any other less restrictive way of protecting a certain policy objective (let's say privacy) other than through that restriction. In short, the necessity test requires the weighting and balancing of three factors: the importance of the interests or values at stake; the extent to which the challenged measure contributes to the realization of the end pursued by that measure; and the restrictive effects of the measure on international trade.

**Q** (Visiting Fellow): Now that countries are considering and discussing new models, don't you think that countries at this stage are already aware of the economic tradeoffs? Would this normative conclusion (more bans mean less trade and productivity) be surprising at all? Have they not weighted this already? It was just a choice.

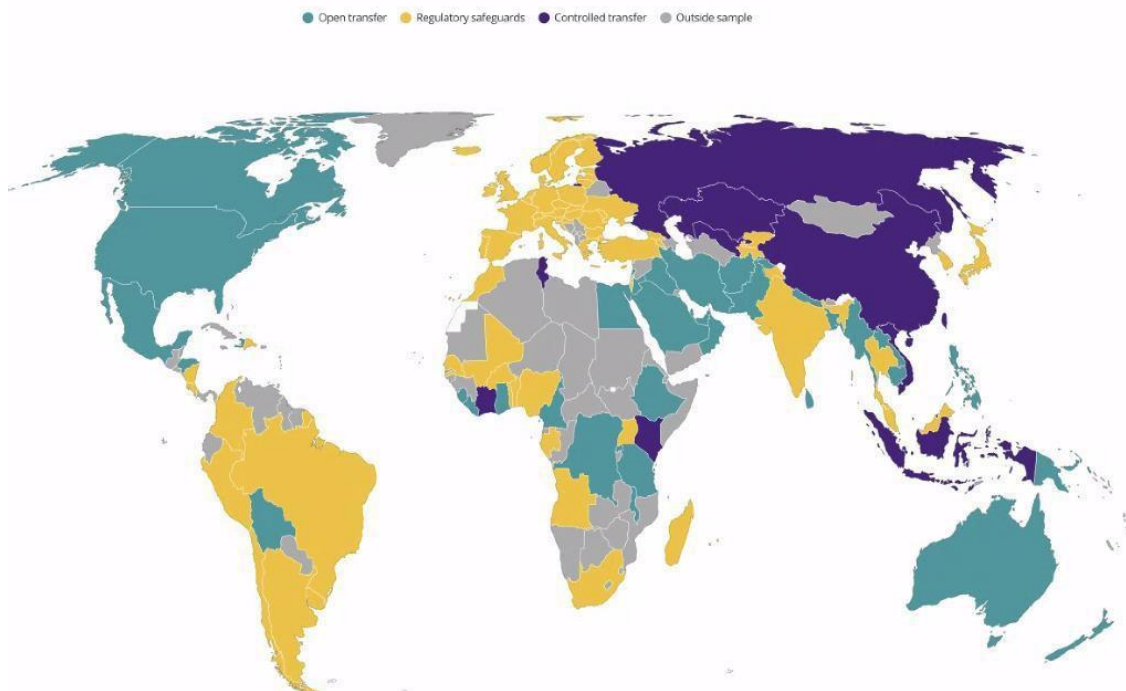
**Martina:** Absolutely. Well in the beginning this was really not clear. In the beginning

some countries thought that the Chinese model really did not create costs and was good for productivity. Now it has become clear that this is not the case anymore. I would argue that there are alternatives to these restrictions and some of them not even necessarily increase privacy by themselves. One must look specifically at the policy priorities of the country.

Still today it is not very clear on the impacts of data flows in all of these many policy objectives like security or privacy.

**Q** (PhD researcher): Is there a parallel with the discussions on IP in trade agreements?

**Martina:** There are often parallels made between negotiations on IP and data flows. This is mainly because developing countries see these commitments as an offensive interest of developed economies that want to gain access to new markets. There is a geopolitical discussion behind it. However, the discussion is somehow different because the free flow of data has an impact on other topics such as surveillance and freedom of expression.



Source: Ferracane and Van der Marel (forthcoming)