



Operationalising the ASEAN Framework on Digital Data Governance

A Regulatory Pilot Space for
Cross-Border Data Flows

July 2019



About this document

In April 2019, the GSMA prepared a white paper proposal for a Regulatory Sandbox, now entitled the Regulatory Pilot Space (RPS), and circulated the paper to the Digital Data Governance Working Group and to TELSOM.

This summary document aims to complement the white paper by addressing some of the main concerns in a question and answer format.

The GSMA would like to receive comments in order to refine the proposal, in conjunction with the ASEAN Member States, in the period leading up to December 2019.

Relevance to the ASEAN Framework on Digital Data Governance

At the ASEAN TELMIN meeting in December 2018, the Ministers endorsed the ASEAN Framework on Digital Data Governance (DDG). The Ministers tasked the Senior Officials to further develop and implement the four strategic priorities under the Framework to enhance digital capability and cooperation among ASEAN Member States.

Specifically, these strategic priorities are:

- I. The ASEAN Data Classification Framework (initiative led by Indonesia)
- II. The ASEAN Cross-Border Data Flows Mechanism (Singapore)
- III. The ASEAN Digital Innovation Forum (Vietnam)
- IV. The ASEAN Data Protection and Privacy Forum (Philippines)

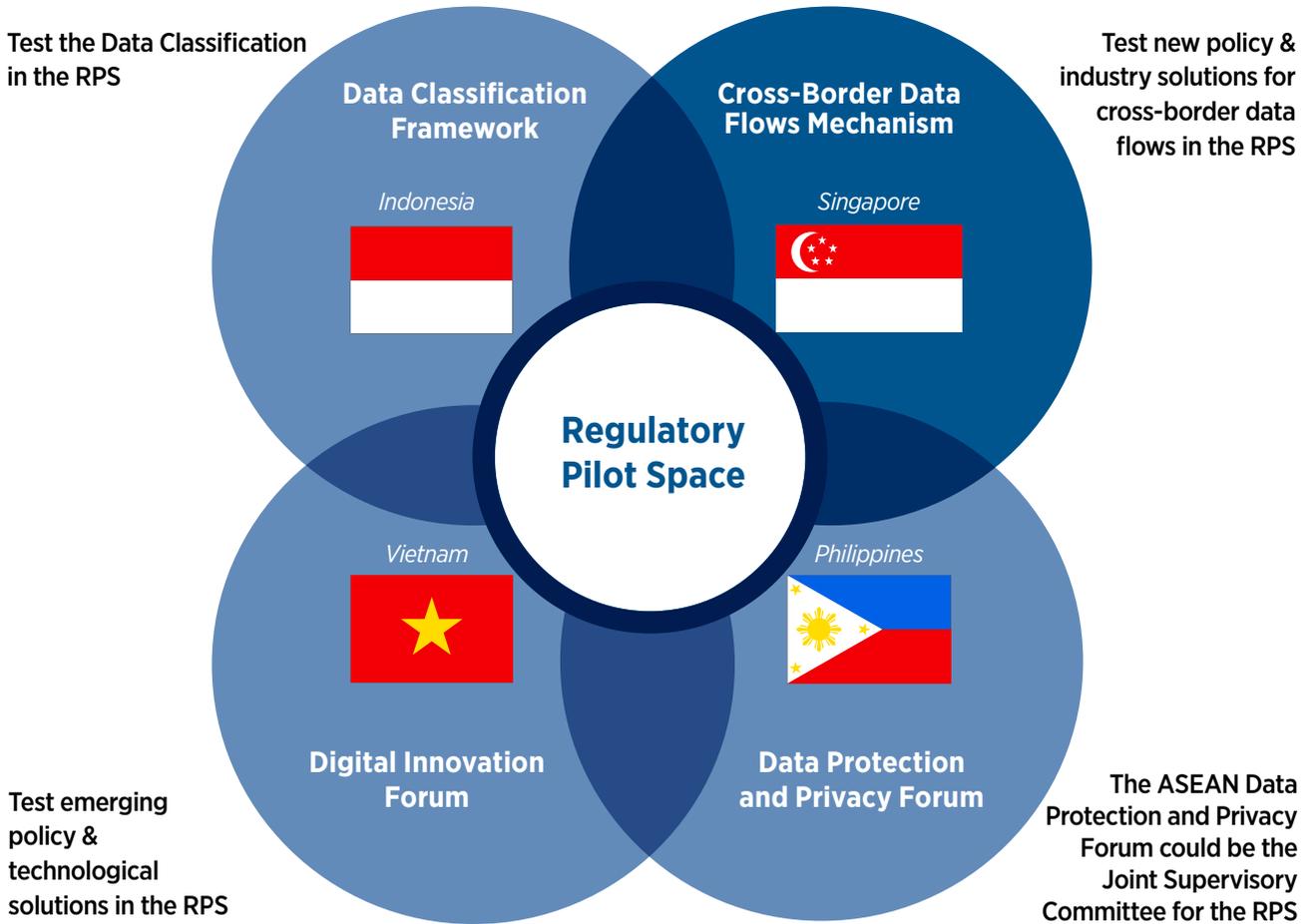
This proposal assists implementation of the strategic priorities by creating a safe space in which policymakers can understand and test possible policy solutions to facilitate cross-border data flows. By creating a

safe harbour for testing solutions over a set period, policymakers can work quickly towards setting the right policies to drive digital innovation while protecting consumers and allowing accountable industry players to continue to innovate.

Although the GSMA proposal focuses on the strategic priority that relates to cross-border data flows, it is worth considering whether the RPS could also be leveraged to assist the work of the three remaining priorities. For example: the RPS structure could be used to examine the potential impact of different data classification standards on real life use cases (Strategic Priority I: Data Classification Framework) and to understand the extent to which policy choices can support or hinder innovative uses of technology (Priority III: Digital Innovation Forum). The Joint Supervisory Committee could also provide a useful forum to discuss the alignment of data protection and privacy approaches across the region (Priority IV: Data Protection and Privacy Forum).

FIGURE 1

Operationalising the ASEAN Framework on Digital Data Governance: The Regulatory Pilot Space as an enabler



Proposal for a Regulatory Pilot Space

ASEAN Member States, regardless of their existing data privacy and cybersecurity laws, should be able to test the impact of different policy solutions on cross-border data flows **in a controlled environment and for a predefined amount of time**. We recommend that policymakers establish a Regulatory Pilot Space (RPS) that would allow data to flow freely between participating ASEAN countries. The RPS would ensure data relating to individuals is protected appropriately and that participating organisations commit to meeting predefined standards.

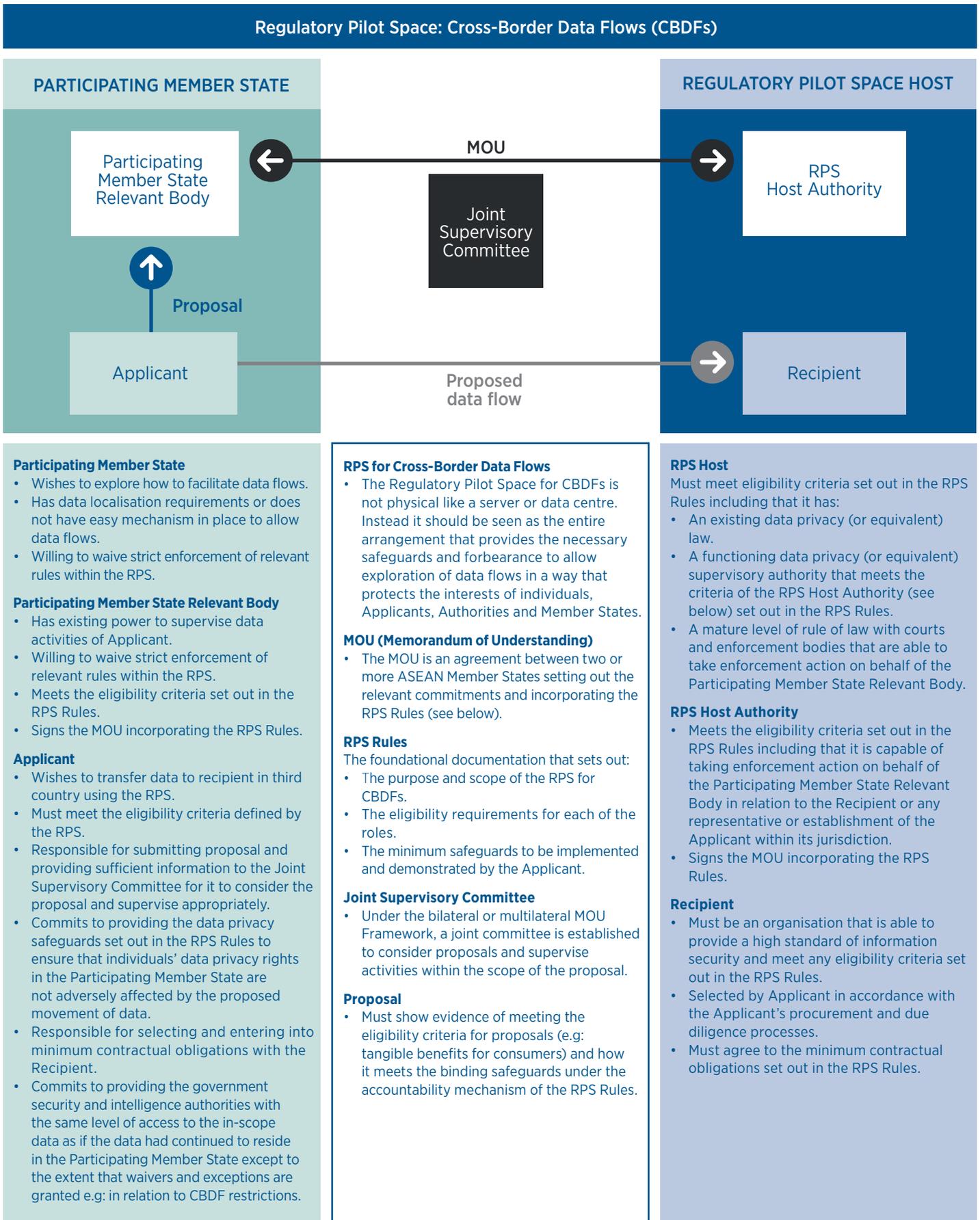
The RPS can be a stepping stone towards a formal mechanism in ASEAN for cross-border data flows which, as the World Economic Forum puts it, constitute

the oxygen of a digital economy – for the Internet of Things, for start-ups and for the development of 5G.

The RPS will also allow Member States to evaluate different ways to address cybersecurity concerns, benefitting citizens and small and medium-size enterprises, in a way that will not delay the development of the digital society. If TELMIN approval for this proposal is secured in December 2019 and if Member States can work towards the completion of bilateral or multilateral memorandums of understanding (MOUs) or mutual recognition agreements (MRAs), an RPS could be operational early in 2020.

FIGURE 2

How does it work?



Questions and Answers

Why is a mechanism for regulatory experimentation needed?

In ASEAN, the requirements around the use of personal data vary greatly from country to country. Some countries already provide a range of lawful mechanisms to transfer personal data, but some do not, and others still impose localisation (or data sovereignty) measures specifically to force data to be kept in-country.

What is the Regulatory Pilot Space (RPS)?

In the context of information security, segregated environments are created to test new software or applications, with limited or no connection to the rest of a network. This mitigates security risks. In the same vein, activity within the RPS takes place within defined parameters with the full knowledge of the supervisory authorities and subject to agreed rules. The RPS therefore becomes a 'safe space' in which businesses can test innovative products, services, business models and delivery mechanisms without fear of harming consumers or facing regulatory sanctions.

Who would participate?

The RPS requires participation of at least two countries: one that allows the data to be transferred out of its jurisdiction and one that receives the data and guarantees relevant enforcement on behalf of the originating country.

What are the key benefits?

- Creating a safe space in which ASEAN Member States can test possible policy solutions to facilitate cross-border data flows and drive digital innovation while still protecting consumers
- Providing industry with the option to modify their solutions before bringing them to market if they are deemed unacceptable by the regulator
- Enabling ASEAN Member States and the private sector, including SMEs, to improve their digital competitiveness
- Signalling to the rest of the world that ASEAN is open to innovation

Why does industry need a Regulatory Pilot Space?

- Laws are different from one ASEAN Member State to another
- Laws are fragmented and compliance is challenging, particularly for SMEs
- Laws are restrictive and could be disproportionate to their aims
- Sector-specific restrictions on regulated players distort the market and could harm the development of the digital economy

What is needed to ensure a company does not misuse the RPS to circumvent regulation?

Applications are evaluated on a case-by-case basis. It will be the responsibility of the Joint Supervisory Committee to consider all proposals and ensure the RPS is not being used to deviate from or circumvent existing laws. It is not the intention of the RPS to weaken the law.

What are the operational details?

1. Member State participation in the RPS is voluntary.
2. The Joint Supervisory Committee (Participating Member State & RPS Host) sets the rules.
3. The role of the Joint Supervisory Committee is that it serves as a one-stop shop that has the power to involve other authorities, as required.
4. The signatories to the Memorandum of Understanding may differ from Member State to Member State. It will depend upon the substance and the legal system.

What businesses will be able to propose projects?

Businesses engaged in ICT and in other non-regulated sectors who wish to send data across borders to other ASEAN Member States. Therefore, the RPS could apply generally to data flows between businesses in any sector of the economy, provided that they are not subject to economic regulation by a specific non-ICT industry regulator.



What are the eligibility criteria for companies to participate in the RPS?

RPS participants will need to provide qualitative and, if possible, quantitative evidence that they meet the eligibility criteria. The eligibility criteria could include the following:

- **Tangible benefits:** The proposed product, service or business model should deliver better consumer choice and service innovation, economic and/or social benefits and digital capability and cooperation among ASEAN Member States.
- **Data innovation:** The proposed product, service or business model should address a data innovation challenge that will improve product/service quality or enhance process effectiveness.
- **Ready to test:** Participants have the resources to understand the applicable regulations and mitigate the risks, have a defined exit strategy and have a clear approach to how they will protect data subjects' rights.
- **Accountability mechanism:** Participants should be able to implement binding safeguards on all entities and personnel involved and be able to demonstrate that such safeguards have been implemented and followed.

Why should ASEAN Member States participate?

Malaysia, Philippines and Singapore have established laws and wish to explore mutual recognition. Thailand and Laos want to test an authority enforcement system. Brunei Darussalam, Cambodia and Myanmar can use a test bed approach to address concerns over e.g. lack of transparency or licence obligations of regulated industries that hinder development. Indonesia and Vietnam have restrictions stopping data flows, but are willing to waive strict enforcement of relevant rules within the pilot space to test if legitimate concerns are met.

How will countries with no enforcement authority participate effectively in the RPS?

The RPS Host must have an enforcement authority (likely the data protection authority) to provide the necessary reassurance that the interests of Participating Member States and the rights and interests of individuals will not be undermined. This means the RPS Host must be either Malaysia, the Philippines or Singapore.

Other countries may participate in the RPS (as Participating Member States) in order to explore the opportunities and challenges of cross-border data flows by allowing data to be transferred from their country to the RPS Host country. These countries do not need to have an enforcement authority, as it is the responsibility of the RPS Host's enforcement authority to take enforcement action on their behalf. However, there will usually be an authority that has an interest in how data is used when it is transferred abroad.

For example, if the participating country's finance ministry, central bank or financial regulator has rules prohibiting the transfer of banking data abroad, it may want to be the authority that sits on the Joint Supervisory Committee with the host country. Additionally, it may need to provide reassurance to the companies using the RPS that no enforcement action will be taken against them for breach of the transfer prohibition, provided that the companies comply with the rules of the RPS and the binding rules they have signed up to. If a company breaches the RPS rules or the binding rules and enforcement action is needed, the Participating Member State and its authorities can rely on the enforcement authority in the host country to enforce these rules.

How will the RPS operate in countries with sector-specific data protection laws?

If the country concerned is participating as the RPS Host, the country should be able to show that the data protection authority has sufficient powers to take enforcement action against the RPS companies if they infringe. If the country concerned is a Participating Member State, it can rely on the RPS host to enforce its data protection laws regardless of whether they are sectoral or horizontal.

Besides categorising RPS participants according to the level of maturity of their data protection laws, how about categorising them according to types of data?

We would caution against such categorisation. It would be very difficult, if not impossible, to define whole countries as being, for example, a 'health data country' or a 'financial data country'. It would also artificially constrain the system and the ability of participating countries to use the RPS in different ways, for different sectors.

Who will be party to the MOUs?

Each MOU would be signed by the RPS Host (i.e., the data protection authority in Malaysia, the Philippines or Singapore) and a relevant body from the Participating Member State. If, for some reason, an MOU is not regarded as appropriate, alternatives could be explored. For example, perhaps an ASEAN Member State would regard it as sufficient to rely on each other's political declarations. However, in order for the system to be trusted by all participating countries, it would be preferable for there to be a legal basis that guarantees that the enforcement authority in the RPS Host country will enforce against infringing companies on the Participating Member State's behalf.

Is this a permanent solution?

The RPS for ASEAN is not a permanent solution, but a bridging solution while ASEAN Member States develop their data privacy frameworks and interoperable mechanisms for cross-border data flows.

Where can I find out more information?

Contact Jeanette Whyte (Jeanette.Whyte@gsm.com) for more information or consult the GSMA white paper submitted to the DDG Working Group and to TELSOM in April 2019 titled: *Proposal for TELSOM/ ATRC: Advancing the ASEAN-GSMA Policy Dialogue on Cross-Border Data Flows*.



The Regulatory Pilot Space can be a stepping stone towards a formal mechanism for cross-border data flows in ASEAN, enabling the digital economy.



GSMA HEAD OFFICE

Floor 2
The Walbrook Building
25 Walbrook
London EC4N 8AF
United Kingdom
Tel: +44 (0)20 7356 0600
Fax: +44 (0)20 7356 0601