

Protecting the NHS in UK Trade Policy

May 2020



Background

The impact of post-Brexit trade deals on the NHS has been the subject of public debate and media scrutiny, particularly during the 2019 General Election. While the Government has repeatedly pledged that the NHS is “not on the table” in trade negotiations, leaked documents detailing conversations between UK and US negotiators revealed that health services had been discussed, including US “probing” on the UK’s “health insurance’ system”¹ and the US has made clear its desire for the UK to change its drugs pricing mechanism.

This briefing sets out some of the ways post-Brexit trade deals can affect the NHS and public health, and proposes four ways the UK can ensure that the NHS is truly protected in trade deals. As the UK adopts an independent trade policy for the first time in over forty years, it is essential that new trade deals are designed in the interests of public health, and that policymakers understand the various and complex ways in which trade can affect health.

Health services in trade deals

Civil society organisations, particularly [trade unions](#) and [health organisations](#), have long warned of the inclusion of public services - including health - in trade agreements.

Services chapters in trade agreements include provisions which ‘lock in’ liberalisation measures, such as privatisation. These include:

- Negative lists: these clauses require that all industries are liberalised in trade agreements unless there are specific carve-outs. It is not always easy to define what services count as health services: for instance, digital services may seem irrelevant to health, but NHS data management is increasingly digitised and apps for things like GP appointments are increasingly prevalent. Negative lists have a very broad scope, covering both existing and future services, and therefore make it harder for governments to regulate and provide health services.
- Standstill clauses: this means that, after the trade deal has been signed, parties are not allowed to reduce the level of liberalisation beyond what it was at the point of signature.
- Ratchet clauses: this means that parties are not allowed to reverse liberalisation measures brought in after the point of signature: i.e. liberalisation can only happen in one direction.²
- Failure to abide by these clauses can result in legal challenge from the trade partner, or if there is a separate ISDS clause, challenge from private investors (see ISDS section below).

Digital trade

NHS data, including patient data, is valuable. There is a risk that trade agreements make it easier for this value to be captured and for data to be bought and sold by private interests. In recent years, digital trade has been a high priority at the WTO, and the UK has cited it as a key priority for trade negotiations. It is therefore important to understand how this could affect patient data, privacy and health outcomes.

There are particular concerns around:

¹ See full leaked documents hosted on [Global Justice Now's website](#)

² See TJM's report '[Trading Up for Health](#)', January 2019

- Cross-border data flows: digital trade rules aim to limit the ability of governments to introduce localisation measures or stop data from leaving the country. This has potential privacy and security implications; e.g. if sensitive NHS patient data is held by private firms outside the UK.
- Technology transfer: digital trade rules aim to protect companies from having to disclose data or algorithms. This potentially poses problems for governments wishing to access and understand patient and other data related to public health.
- Monetisation of patient data: digital trade rules make it easier for private firms to buy and sell sensitive patient data.

Investor-State Dispute Settlement (ISDS)

ISDS clauses allow investors to sue governments for changes in policy which damage their profits. ISDS has been used to challenge health policy, including nationalisation of health services (*Achmea v Slovakia*), cigarette packaging laws (*Philip Morris v Australia*) and taxes on energy drinks (*Cargill v Mexico*). Often these cases are successful, but even when they are not, they can cost governments millions in legal fees, and lead to ‘regulatory chill’, where governments are incentivised not to introduce new regulations for fear of facing a legal challenge.

If ISDS is included in a UK-US or other post-Brexit agreement, there is a very real challenge that investors will challenge regulatory decisions relating to the NHS. For instance, if a future government attempted to favour a public provider over a private one, or nationalise parts of the health service which are currently privatised, this could be challenged by ISDS.

US demands on health services

President Trump previously stated that the NHS would be “on the table” in trade talks during his state visit to the UK in June. He later appeared to backtrack, though he said that “everything’s up for negotiation.”³

Although Trump’s comments raised fears among the general public and in the media, the move is unsurprising: the Trump administration has [made clear its disapproval](#) of European nationalised healthcare systems, which he believes have created [unfair pricing](#) for US drugs.

In leaked documents detailing discussions between UK and US negotiators, it was revealed that drugs pricing and other health-relevant sectors were on the table. This became an important topic in the 2019 General Election, and led to the Conservative Party pledging that the NHS would be off the table in any trade agreement.

However, the pledge did not specifically cover any of the aspects listed above, including negative listing, standstill and ratchet clauses, digital trade and ISDS.

How to stop the NHS being included in FTAs

1. NHS protection amendment in primary legislation

It is important that the Government’s pledge on the NHS is enshrined in law. This means that it would be illegal to put the NHS at risk in trade deals. This must include a ban on negative listing and standstill and ratchet clauses which are applied to health.

Legislation should also be introduced to protecting public health in other health relevant sectors

³ House of Lords Library, [‘NHS and Future Trade Deals’](#), June 2019

which are threatened by trade agreements. Patents for medicines, intellectual property provisions, food regulations and medical qualifications are increasingly marketised and covered by in trade agreements. These provisions can make it harder for people to access medicines and good-quality health services, and for governments to regulate to improve health outcomes.

An NHS protection amendment to the Trade Bill, or similar provision in primary legislation, should include these aspects and be supported by the Government.

2. Exclude ISDS

As outlined above, ISDS poses a specific risk to health provision as well as to Government regulation in general. The Government should have a clear red line against the inclusion of ISDS clauses in all post-Brexit trade agreements, and review existing agreements with a view to removing ISDS provisions.

3. High health standards

High standards keep people safe and healthy and reduce pressure on the NHS. Trade agreements can put deregulatory pressure on food and health standards in general, for example through regulatory cooperation provisions. The UK should commit in primary legislation to non-regression on standards, and establish a means of assessing whether new imports resulting from trade deals are produced using production methods that are equivalent to the UK's. It should also exclude regulatory cooperation provisions, particularly in agreements with countries which have lower standards.

4. Adequate data protection

The UK's ambitions on digital trade must be assessed in relation to their impact on patient data and public health. The Government must retain the right to regulate digital service providers. The UK Government should not tie its hands when it comes to digital services regulation.

5. Democratic scrutiny of trade agreements

It is essential that Parliament has the ability to scrutinise and vote on trade agreements. This is not provided for in the Constitutional Reform and Governance (CRAG) Act, the current system of treaty scrutiny. The CRAG processes have been criticised by four Parliamentary committees.⁴

Without adequate scrutiny of trade agreements, it is difficult for Parliament to hold the Government to account on its commitment to not include the NHS in a future trade agreement.

The Government must establish a trade deal scrutiny framework which gives MPs a vote on negotiating objectives, ensures transparency throughout negotiations and a vote on the final deal. There should be public consultation and meaningful engagement with civil society.

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⁴ See respective reports from the [International Trade Committee](#), the [Constitution Committee](#), [Lords EU Committee](#) and the [Joint Committee on Human Rights](#)