DIGITAL TRADE UNDER CPTPP AND IMPLICATIONS FOR THE UNITED KINGDOM

International Economics Consulting UK (IEC UK) welcomes the opportunity granted to provide evidence to the International Trade Select Committee on the UK's accession to the CPTPP.

About International Economics Consulting

International Economics Consulting (IEC) is an independent management consultancy firm, with offices in Vietnam, London, and Mauritius, specialised in providing strategic advisory services in the field of trade, investment, and public policy. It regularly provides advisory services to DIT, DG trade, UNCTAD, World Bank and UNESCAP. It completed a review this year on the CPTPP for Global Affairs Canada, and regularly produces work on digital trade and e-commerce.

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Summary

This submission focuses on Digital Trade, an area of increasing importance for UK companies, but most critically for UK SMEs, who might be best placed to benefit from a strong digital trade framework with the CPTPP Parties, particularly in the large emerging markets of CPTPP. By joining the CPTPP, as with any agreement, the UK would face some policy trade-offs. While the CPTPP is narrower than the UK's stated digital policy aims, it is expected to provide the country with an opportunity to push forward innovation, as well as to promote standards on ethics and good governance in the digital arena.

A. The CPTPP and the UK

1. The UK 's application to join CPTPP was approved by the CPTPP commission in June 2021. Among current CPTPP parties,[1] the UK already has existing FTAs with Australia (pending ratification), Canada, Chile (association agreement), Japan, Singapore, and Vietnam. On February 25, 2022, the UK and Singapore also signed a Digital Economy Agreement (DEA) which lays out digital trade rules in seven key areas[2] for the benefit of goods and services exporters in both countries. In terms of trade in goods, the current CPTPP markets only account for approximately 7% of the UK's total trade (imports and exports) in 2021, whereas the CPTPP accounts for 15% of world trade. The significance of the CPTPP is small in comparison to the UK's trade with the EU (44%), the US (10%), or China (10%). In this light, the UK's access to the CPTPP reflect trade and non-trade objectives, such as the UK's geopolitical strategy in the Indo-Pacific region.[3] Nevertheless, the benefits of access to the CPTPP's larger and emerging markets (such as Indonesia and Malaysia) are extremely attractive for UK businesses, especially in terms of access to service markets in a booming regional digital market.

[1] Parties include Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam.

[2] Seven key areas include: (1) Open and inclusive digital market; (2) Data flows; (3) Consumer and business safeguards; (4) Digital trading systems; (5) Financial Services; (6) Tech partnerships; and (7) Additional provisions on information sharing; security, prudential carve-outs and general exceptions; and sub-marine cable landing systems.

[3] Morita-Jaeger, M. (2021). Accessing CPTPP without a national digital regulatory strategy? Hard policy challenges for the UK. UK Traded Policy Observatory.

B. General digital trade rules under the CPTPP vs. existing UK FTAs

2. In the UK National Data Strategy, the UK Government set out five missions, including 'championing the international flow of data.' FTAs, especially e-commerce provisions, can therefore be a major policy tool to support this mission. This is illustrated in the departure from the light-touched approach by the EU in their e-commerce chapter[4] by adding more binding and non-binding commitments approximating the market-driven approach. Many CPTPP parties - including Singapore, Australia, New Zealand, and Japan - have been actively negotiating digital trade chapters or digital economy agreements[5] over the last few years with a market-driven approach. In accessing the CPTPP, the UK will need to find a balancing act between the current approach to digital trade governance, which is still incomplete since Brexit, and accepting the approaches from other parties.

3. E-commerce chapters in FTAs may cover a broad range of provisions. The most common provisions are adopting a moratorium of duties on electronic transmission, e-signature and e-authorisation, online consumer protection, personal data protection, freedom of cross-border data flows, location of computing facilities, no requirement on transfer of source code, and cooperation frameworks. Additionally, there are also less frequently included provisions, such as those requiring open government data, commercial ICT products that use cryptography, cyber security, law tech, and other digital innovation. The UK-Singapore DEA is among the most broad-scoped agreements governing digital trade signed by the UK,[6] covering most if not all provisions related to e-commerce and the digital economy.

C. Non-discriminatory treatment of digital products under the CPTPP

4. Non-discrimination is at the heart of the world trade system, as strongly advocated by the WTO, and further adapted in most FTAs. In many e-commerce chapters, the non-discriminatory rule is incorporated in the exceptions to provisions on Cross-border Transfer of Information by Electronic Means,[7] Location of Computing Facilities,[8] and to a lesser extent, Personal Information Protection.[9] In other words, the non-discriminatory rule is used in these provisions to balance the public policy space in these areas to ensure fair trade rules. However, compared to the CPTPP, neither of the

[4] For example, the E-Commerce Section under Chapter 8 () of the EU-Singapore FTA only has provisions on Customs Duties, Electronic Supply of Services, Electronic Signatures, and Regulatory Cooperation on Electronic Commerce. The same section in the EU-Vietnam FTA only covers Customs Duties and Regulatory Cooperation on Electronic Commerce.

[5] Such as the Digital Economy Partnership Agreement (DEPA) (Chile, New Zealand, and Singapore); Australia-Singapore Digital Economy Agreement (DEA).

[6] See footnote 5.

[7] For example, Article 8.61-F (Cross-Border Transfer of Information by Electronic Means) of the Singapore-UK DEA states that: "Nothing in this Article shall prevent a Party from adopting or maintaining a measure inconsistent with paragraph 2 to achieve a legitimate public policy objective, provided that the measure: (a) is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and (b) does not impose restrictions on transfers of information greater than are required to achieve the objective."

[8] For example, Article 8.85 (Location of Computing Facilities) of the Japan-UK FTA states that: "Nothing in this Article shall prevent a Party from adopting or maintaining measures inconsistent with paragraph 1 that are necessary to achieve a legitimate public policy objective, provided that the measure is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade."

[9] For example, Article 8.61-E (Personal Information Protection) of the Singapore-UK DEA states that: "*Each Party shall adopt non-discriminatory practices in protecting natural persons who are involved in digital trade, including electronic transactions, from personal information protection violations occurring within its territory*".

UK's agreements with Singapore and Japan covers a provision on "Non-Discriminatory Treatment of Digital Products".

5. For accession to the CPTPP, the UK may have to accept all existing rules,[10] including the rule on Non-Discriminatory Treatment of Digital Products**.** Therefore, it might be beneficiary for the UK to get insights into this rule before its CPTPP accession. Specifically, Article 14.4 of the CPTPP on Non-Discriminatory Treatment of Digital Products states that:

> *No Party shall accord less favourable treatment to digital products created, produced, published, contracted for, commissioned, or first made available on commercial terms in the territory of another Party, or to digital products of which the author, performer, producer, developer, or owner is a person of another Party,* ***than it accords to other like digital products****. [Footnote 4 to Article 14.4, paragraph 1: For greater certainty, to the extent that a digital product of a non-Party is a "like digital product", it will qualify as an "other like digital product" for the purposes of this paragraph.]*

6. This language differs from the typical non-discriminatory language of WTO agreements. For example, the Most Favoured Nation (MFN) provision of the General Agreement on Trade in Services (GATS) states that "With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers **of any other country**." For National Treatment (NT), GATS requires that "[…] each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to **its own** like services and service suppliers." It is clearer in the GATS example that the nationality criterion of the services and service providers (and similarly in the GATT, of goods) is used to identify whether discrimination exists. In other words, the assessment of a discriminatory situation is done by comparing the treatment of imported products to the treatment of domestic products. Meanwhile, the language of the CPTPP Article 14.4 remains vague, referring to "**other like digital products**" only, without stating whether the nationality of the digital products shall be taken into consideration. Footnote 4 of Article 14.4 uses the nationality criterion when considering the digital product of a non-Party in the likeness assessment, which can be understood for the assessment of MFN treatment. However, the vagueness in whether to use the nationality criterion in assessing the origin of "like digital products" in the main text shall remain a point for CPTPP Parties to clarify, as this would be interpreted in a very broad way. For example, if a CPTPP Party issues a regulation or applies a practice under which Google Chrome, Mozilla Firefox, and Microsoft Edge were treated differently, could a Party bring a complaint on the basis that the first country treated the two companies' digital products, both from the US, on a discriminatory basis?[11]

7. Where some of the UK's roll-over FTAs do not contain non-discrimination provisions, it can be argued that such principle was already covered by the standard most-favoured nation and national treatment rules in the Trade in Goods and Services chapters,[12] or by specific provisions on issues such as cross-border data flows and location of computing facilities as stated above. However, with the automated acceptance of all existing CPTPP rules, there is a need to consider

[10] See paragraph a, Section 5.1 of the Annex to Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) Accession Process (CPTPP/COM/2019/D002)
[11] Lester, S. (2021, Mar 16). Is Non-Discrimination in U.S. Digital Trade Agreements Nationality-Based?
[12] Lester, S. (2022, July 10). Non-Discriminatory Treatment of Digital Trade Products in the EU-NZ FTA

the implication of the CPTPP's explicit non-discriminatory provision of digital products to ensure there are no violations of this rule, *de jure* or *de facto*.

D. Data Protection and Cross-border data flows

8. Most FTAs with an e-commerce chapter promote Parties' adoption and maintenance of a legal framework for personal information protection, considering the principles and guidelines of relevant international bodies. Most FTAs also prohibit the restriction of cross-border transfer of information by electronic means, including personal information, for the conduct of the business. Restriction measures, if any, should be based on legitimate public policy objectives, so long as such measures do not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction to trade. Finally, such measures should not be more restrictive than required to achieve the objectives.

9. Some FTAs, such as the US-Mexico-Canada FTA (USMCA), specifically name examples of such principles and guidelines, i.e., the APEC Privacy Framework and the OECD recommendation of the Council concerning Guidelines governing the Protection of Privacy and Transborder Flows of Personal Data (2013), as well as the APEC Cross-Border Privacy Rules (ABPRs) as a mechanism for global interoperability of privacy regimes. The CPTPP makes no such reference; however, all current 11 CPTPP Parties are also APEC Member Economies, among which five are participating in the CBPR system.[13] As such, the APEC Privacy Framework has set the minimum level of protection for personal information protection among the participating countries. The APEC Privacy Framework operates as a certification scheme, under which participating businesses are assessed against the minimum program requirements of the APEC CBPR system by an independent APEC recognised private sector entity, which is considered providing lower data protection threshold than the EU GDPR.[14]

10. The UK's data protection law is currently aligned with that of the EU's General Data Protection Regulation (GDPR) 2016/679. Accordingly, restricted transfers[15] are subject to 'appropriate safeguards' in order to avoid breach of the UK's GDPR.[16] Moreover, the European Union (Withdrawal Agreement) Act 2020 (the EUWA) also provides that case law decided by the Court of Justice of the EU (CJEU) before the end of the transition period will be binding on UK courts (other than the Supreme Court and Court of Appeal) where relevant.[17] As such, following the *Data Protection Commissioner v. Facebook Ireland Limited, Maximilian Schrems* case (Schrems II), companies are still required to conduct a transfer impact assessment to consider whether the destination countries' local legal framework is sufficient for the protection standards of the GDPR, and whether appropriate safeguards measures (such as Standard Contractual Clauses (SCCs) and Binding Corporate Rules (BCRs))) are needed.[18]

11. Generally digital law experts consider the GDPR imposes a higher threshold of private data protection than under the self-regulatory regime, such as APEC Cross-Border Privacy Rules.[19]

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[13] Those are Australia, Canada, Japan, Mexico, Singapore. See APEC ABPRs at http://cbprs.org/about-cbprs/

[14] Wall, A. (2020). GDPR matchup: The APEC Privacy Framework and Cross-Border Privacy Rules.

[15] I.e., transfers of personal data to third countries (i.e., countries not in the UK, EU, EEA) or those not covered by UK "adequacy regulations".

[16] ICO (2022, Jul 25). International transfers after the UK exit from the EU Implementation Period.

[17] Allen & Overy (2021). Data Protection Post-Brexit Where are we now and what happens next?

[18] OneTrust (2022). UK: Requirements for international data transfers under UK and EU data protection regimes.

[19] House of Commons, International Trade Committee (2021, Jan 27). Oral evidence: Digital trade and data, HC 1096. Also Morita-Jaeger, M. (2021).

Among the CPTPP Parties, the UK only has full 'adequacy regulations' with New Zealand, and partial findings of adequacy with Japan and Canada. The CPTPP encourages Parties to develop mechanisms to promote compatibility between different regimes. These include recognition of regulatory outcomes that is accorded autonomously in addition to mutual arrangements or broader international frameworks. In this context, as UK businesses are expanding their reach to the CPTPP markets, both the UK Government and UK businesses will need to ensure compliance with the data privacy requirements by countries, while meeting the expectations from partners in ensuring the compatibility between different regimes. This can be costly and difficult to meet, especially for SMEs.

E. How the Government can make the most of the opportunities offered by CPTPP membership, and how the UK can address any related challenges

12. The signing of an FTAs is only the starting point that might entail certain regulatory changes and implementation. By joining the CPTPP, as in any other international legal instruments, the UK would face some policy trade-offs. While the CPTPP will narrow the UK's policy space in digital trade, on the other hand it will provide the country with an opportunity to push forward innovation, as well as to promote standards on ethics and good governance in the digital arena. Additionally, as UK businesses are expanding operations to the CPTPP markets, there is a need to ensure that there is a predictable framework to promote rather than mute the digital trade flows.

13. How can the UK enable the cross-border flow of data while maintaining a high standard of cyber security and personal data protection? How can the UK ensure regulatory interoperability among FTA partners with different data protection regimes, given the discrepancy in the regulatory framework on the subject matter? The currently adopted data protection framework, which embeds a similar approach to the largely considered too restrictive EU GDPR, might cause additional costs for UK businesses establishing abroad in proving adequacy. The Government should therefore accelerate the issuance of adequacy decisions and promote recognition of alternative mechanisms, such as the APEC Privacy Framework and APEC Cross-Border Privacy Rules.

14. While non-discrimination is the pillar supporting the multilateral trade system, the non-discriminatory rule for digital products still receives mixed views. Under a typical UK FTA, such a provision is not incorporated. Given the still ambiguous coverage of the provision, many regulations and practices might fall under its scrutiny. For example, there have been questions raised against the recently adopted Digital Market Act of the EU, as it was seen to "unfairly target U.S. tech companies".20 For accessing the CPTPP, the UK shall have to accept the non-discrimination principle for digital products. This will entail some assessment of policy measures which support UK tech firms to avoid any alleged discrimination, while at the same time ensuring a competitive market for digital businesses to strive.

15. With the negative approach adopted in its service schedules, the CPTPP is supposed to give better market access to services, including digital services, in the CPTPP emerging markets. For businesses as the ultimate beneficiaries of the agreement, there is a need for guidance and support to businesses to navigate the market requirements and explore opportunities offered in the fast-growing digital economies in the CPTPP Parties, based on the extensive understanding and experience of trading and investing in the region.

[20] Feiner. L. (2022, 23 Feb). Bipartisan lawmakers want Biden to tell Europe to stop 'unfairly' targeting U.S. tech companies. CNBC.

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