

CEPA and the UK's Approach to Digital Trade in International Law

1. It scarcely needs repeating that trade in digital products and services has become essential to the economy of both the UK and the world. The Covid-19 epidemic has accelerated this trend, with the result that rules governing this sphere of economic activity will only become more important over time. While it has lagged relative to other areas, international law governing digital trade is beginning to take shape and the UK quite rightly aims to be at the forefront of these developments. The new UK-Japan CEPA is a good start.
2. The UK has yet to set out its domestic legal framework covering digital trade in a comprehensive fashion, although its National Data Strategy, released in September 2020 indicates that digital trade liberalization with a view to maximizing connectivity and ensuing business opportunities will be a central goal. Still, it is not yet clear precisely how the UK intends to regard issues such as data protection and privacy after it fully departs from the EU and is no longer bound by the rather cumbersome General Data Protection Regulation (GDPR) which should be abandoned. Encouragingly and in line with the National Data Strategy, it would seem as though that the UK intends to provide a regulatory environment in which international delivery of digital services can flourish by eliminating as many barriers to the flow of data across borders as reasonably possible, subject to public interest concerns such as privacy and national security, however these may be assessed. This approach can be seen in the UK's new free trade agreement with Japan. Exceeding the EU's free trade agreement with Japan with respect to digital matters (and a handful of other things), the CEPA contains a commitment to uphold the principles of net neutrality as well as a ban on data localization, which would have required UK businesses to establish servers in Japan in order to do business there. It is unfortunate that the CEPA did not include comprehensive protections for investors, including investor-state dispute settlement, as these could help encourage Japanese businesses to establish in the UK and vice versa, secure in the knowledge that expert panels, costing less and taking less time to reach decisions are available for any disputes.
3. In addition to CEPA, as part of its newly independent trade strategy and its related objective for growth in digital trade, the UK seeks to accede to the Comprehensive Progressive Trans-Pacific Partnership (CPTPP), an 11-nation mega-regional

agreement comprising countries such as Japan, Canada, and Australia. Signed in 2016, the CPTPP covers roughly 13% of global GDP and is the third largest free trade area in the world by GDP after the United States Mexico Canada Agreement (USMCA) and the EU's Single Market. The CPTPP covers tariffs and non-tariff barriers on goods as well as liberalizing market access in various services sectors. Importantly, it also contains comprehensive commitments on digital trade, promoting tariff-free and non-discriminatory data flows and facilitating e-commerce, meaning commercial transactions concluded over the internet.

4. In some respects CEPA already goes beyond that of the now five year old CPTPP evincing progress in this sphere of international law. While e-commerce is a separate chapter in the CPTPP, it is integrated into the services chapter of CEPA, reflecting that e-commerce is conceptualized as fundamentally integrated into the delivery of services rather than something additional to them, like subsidies or technical barriers to trade. Some aspects of the text on digital trade are more sophisticated in the new CEPA, demonstrating an increased awareness of the key terminology central to the regulation of digital trade. For example, in provisions protecting source code, there are references to concepts such as algorithms and cryptography which are absent from CPTPP. On the other hand, the CPTPP goes further than CEPA in maintaining a legal framework for electronic transactions consistent with the UNCITRAL Model Law on Electronic Commerce 1996 and the United Nations Convention on the Use of Electronic Communications in International Contracts 2005, an inclusion likely due to the fact that three of the CPTPP signatories (Peru, Chile and Japan) have not formally adopted these regimes.
5. Strong commitments in the new CEPA suggest that the UK intends to adopt the Asian/American approach to digital trade, embracing the free flow of data, rather than one which is circumscribed by the European fixation on privacy. This is very much in keeping with the CPTPP, suggesting that, at least with respect to digital trade, the UK's conformity to the mega-regional will not be difficult should it accede at some point in the near future – if anything the UK's joining could deepen the CPTPP's coverage of digital trade.
6. At a more general level, multilateral rules on digital trade are still missing from the World Trade Organization (WTO), although a sub-set of member states led by Australia, Japan and Singapore (all three of which are CPTPP signatories) continue to work on a consolidated text covering matters such as spam, source code, open

government data, electronic signatures and authentication, as well as online consumer protection. As it stands, firms operating internationally are required to deal with a regulatory patchwork on digital matters contained variously in domestic laws, bilateral and regional free trade agreements as well as multilateral rules on services, notably the WTO's General Agreement on Trade in Services. This complicated legal landscape inevitably leads to higher compliance costs yet paradoxically does not necessarily achieve greater certainty in perhaps the only sphere of commercial activity where globalization is expected to expand in the next few years.

7. Were the US to contemplate joining CPTPP at some point in the future this would further clarify and help consolidate legal principles underpinning digital trade, for which, as with other matters, multilateral consensus at the WTO is difficult. It could also preclude the need for a potentially politically fraught UK-US bilateral free trade agreement. Most importantly, development of widely accepted rules for digital trade, such as those contained in the CEPA and the CPTPP, would offer much needed predictability and efficiency.

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