

## **The UK-Japan trade agreement (CEPA)**

Submission of evidence to the International Trade Committee Inquiry  
from Keep Our NHS Public (KONP)  
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### **1. Introduction**

1.1 Keep Our NHS Public (KONP) is a civil society group concerned to restore and protect the NHS as a comprehensive, publicly provided and publicly accountable health service, funded from public taxation and free at the point of use. We are grateful for the opportunity to submit evidence to the Committee.

1.2 KONP's overall interest concerns the potential impact that free trade agreements (FTAs) can have on health and health services. Following the Health and Social Care Act (2012) and the opening up of the NHS to private companies (including multinationals), our health services have become vulnerable to inclusion in future trade deals. The government has given assurances that the NHS will be 'off the table' in negotiations, yet these promises remain vague on what it means by 'the NHS' and whether non-health services that are part and parcel of healthcare provision will be protected.

1.3 More specifically, digital trade has become a major component of trade deals. At the same time, many of the activities of the NHS have become heavily dependent on digital services, with our health data (owned by the NHS and including clinical data held in trust on behalf of patients) more and more accessible to global technology companies.

1.4 This submission therefore focuses for the most part on the potential implications of the digital chapter of the UK-Japan agreement (or CEPA) for the NHS. Our submission also comments on the scrutiny arrangements for this deal.

### **PART ONE: Digital trade and digital trade rules**

### **2. Background**

2.1 Digital trade (including but not only e-commerce) is becoming increasingly important in Free Trade Agreements (FTAs). This not only follows the rapid expansion of digital technologies over recent years. It also reflects the growing influence of multinational technology companies that consider trade deals, shaped by new digital trade rules, as a way of formalising and extending their reach while at the same time cutting regulation.<sup>1</sup>

2.2 These hugely powerful companies have heavily influenced the US's trade rules (the 'Digital 2 Dozen')<sup>2</sup> to ensure increasingly liberalised trade in digital goods and services, and are now attempting to shape the World Trade Organisation's rules for global digital trade.<sup>3</sup> The fact that the EU, Japan and most other developed countries are now proposing similar trade rules suggests a high degree of collaboration among these companies and their lobbyists.<sup>4</sup>

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<sup>1</sup> Shamel Azmeh, Christopher Foster, 2016, The TPP and the digital trade agenda: Digital industrial policy and Silicone Valley's influence on new trade agreements <https://www.lse.ac.uk/international-development/Assets/Documents/PDFs/Working-Papers/WP175.pdf>

<sup>2</sup> Office of the United States Trade Representative, *Digital 2 Dozen* <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-reports/digital-2-dozen>

<sup>3</sup> Shamel Azmeh, Christopher Foster, Jaime Echavarrri, 2019, The International Trade Regime and the Quest for Free Digital Trade <https://doi.org/10.1093/isr/viz033>

<sup>4</sup> Deborah James, *Digital Trade Rules: A disastrous new constitution for the global economy, by and for big tech*, Rosa

2.3 It has been argued that the agenda underpinning both the WTO negotiations and the Digital 2 Dozen is the same: the giant technology companies want to:

- a. use digital trade rules to gain rights to access markets globally;
- b. extract and control personal, social and business data around the world; and
- c. lock in deregulation and evade future regulation.<sup>5</sup>

2.4 The NHS is becoming increasingly dependent on digital technologies – for example for clinical decision-making, care-coordination; system planning; patient consultations; and the transfer, storage and analysis of patient records. In addition, the NHS holds one of the world's most valuable stores of data including, for example, the primary care records of around 55 million patients. Major technology companies are already gaining access to, and profiting from, this data.<sup>6</sup> Without significant exclusions, trade agreements, such as the UK-Japan deal, will give multinational technology companies freedoms to exploit the NHS, its data, and its need for support services, to the detriment of its patients.

### **3. The main digital trade provisions that pose risks for the NHS in treaties like the UK-Japan deal**

#### **3.1 The transfer of data across borders**

3.1.1 The big technology companies want to ensure the free flow of data and to ban governments from demanding that data is stored in its country of origin. These corporations want unrestricted rights to collect, transfer, store, process, sell and otherwise exploit data in any country they choose. Once data are held offshore, there are no guarantees that the protections enshrined in our national laws will be enforceable: **the data are governed by the rules of the country where it is held.** This rule has been seen as providing corporations with almost unlimited rights to prioritise their interests over consumer protections and the right to privacy.<sup>7</sup>

**3.1.2 Risk to the NHS:** The free flow of NHS data out of the UK may mean the loss of a valuable resource for domestic development, such as for research and planning purposes. Efforts to quantify the value of NHS data estimate its worth to be in the region of £9.8 billion per annum, including the value generated through operational savings for the NHS.<sup>8</sup> This resource should be held by the NHS and not become the property of multinational corporations. Once transferred across borders to the servers of big technology corporations, NHS data can be mined to develop new products created and copyrighted by these companies. In this scenario, the NHS could find itself buying back diagnostic tools, medical technologies and expertise from foreign-based companies at great expense, even when these technologies have been created from freely exported

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Luxemburg Stiftung, 2019. [www.rosalux.eu/digital-trade-rules](http://www.rosalux.eu/digital-trade-rules)

<sup>5</sup> Deborah James, *op cit*.

<sup>6</sup> For example, the Department of Health and Social Care in late 2019 allowed NHS data (excluding personalised patient information) to be handed over to Amazon so it could create new products and cloud-based services. It also allowed Amazon to pass on this data to third parties. Amazon was not charged for this access, even though – unlike the NHS – it will be able to profit from the arrangement. <https://www.independent.co.uk/news/health/amazon-nhs-data-access-uk-government-contract-a9237901.html>

<sup>7</sup> Deborah James, *op cit*.

<sup>8</sup> £9.8 billion covers the market value that the data represents to commercial organisations, and the potential operational savings, improved patient outcomes, and wider economic benefits that can be generated through 'big data', artificial intelligence and 'personalised medicine'. EY, 2019, **Realising the value of health care data: a framework for the future.** [https://assets.ey.com/content/dam/ey-sites/ey-com/en\\_gl/topics/life-sciences/life-sciences-pdfs/ey-value-of-health-care-data-v20-final.pdf](https://assets.ey.com/content/dam/ey-sites/ey-com/en_gl/topics/life-sciences/life-sciences-pdfs/ey-value-of-health-care-data-v20-final.pdf)

NHS data.

3.1.3 Although the proposed WTO rules suggest that a government will have the right to restrict cross-border flows of data when this is for a 'legitimate public policy objective', to do so will involve the government proving to the WTO that its actions are legitimate and do not constitute a 'disguised restriction on trade'. In this sense, a government's democratic right to determine policy could potentially be trumped by the WTO.

The UK Government must therefore call on the WTO – in the public interest - to reject the digital trade rules promoted by technology companies that serve to limit democratic oversight in the public interest.

### **3.2 The ban on 'localisation barriers'**

3.2.1. The big technology corporations want the right to access a country's market without having to maintain a local presence, such as a subsidiary. Without a local presence, multinationals are not subject to national requirements in the countries where their profits are generated, and cannot be sued for breaches of domestic regulations, such as labour laws or tax regulations.

**3.2.2 Risk to the NHS:** Without a local presence, wealthy technology companies can avoid paying tax. Resulting shortfalls in public revenue – especially when, as now, there are huge pressures on the NHS – are likely to mean significant cuts in services.<sup>9</sup>

The UK Government must reject draft proposals for WTO rules that prevent governments from insisting that transnational companies retain a local presence.

### **3.3 Promoting the participation of foreign technology companies in national policy**

3.3.1 Technology companies want any *future* digital services to be subject to existing regulations, even though the risks or issues that future services might pose will be unknown. Tech companies also want trade rules that allow them to influence governments' national policy-making processes. The so-called 'transparency for stakeholders' rule means that governments must inform foreign-based technology companies about – and then allow them to contribute to – the development of legislation, regulations and technical standards that might affect them.

**3.3.2 Risk to the NHS:** The nature and role of digital services within the NHS is changing at pace. New developments in progress (such as 'personalised medicine' based on an individual patient's longitudinal data set and information from genetic profiling) will hold significant value for technology companies and others if made commercially available. Clearly these kinds of developments potentially raise important issues around ethics and privacy.

The UK Government must therefore ensure that digital trade rules allow them and their successors space to introduce any new standards or protective legislation that might be needed.

### **3.4 The ban on open source codes and algorithms**

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<sup>9</sup> Deborah James, op cit.

3.4.1 Digital trade rules want source code<sup>10</sup> and algorithms to be treated as trade secrets. Source code is generally protected under copyright laws. However there are many important reasons why a company should share its source code, for example, to allow checks for bias, to be able to deal with software viruses and to ensure that systems function as designed.<sup>11</sup> In contrast, source code secrecy can impair reusability and interoperability.<sup>12</sup>

3.4.2 Although generally thought of as neutral tools, source code and algorithms are human creations and so inevitably will share some of their designers' assumptions and prejudices.

**3.4.3 Risks to the NHS:** Source code is a crucial part of medical equipment such as MRI scanners or syringe pumps. Banning the disclosure of source code means that the composition of medicines or the software for medical devices cannot be checked, even though a flaw in the source code could have fatal consequences for patients. Lack of access to source codes also ensures that the NHS remains dependent on multinational companies rather than in-house experts or local independent businesses for diagnosing and remedying faults within products.

3.4.4 Algorithms play fast-growing roles in clinical decision-making. Without open access there is no peer review or independent scientific process to check for algorithm bias that could impact on patient care. Closed-source clinical software is fundamentally unethical in that it "subverts the duty to share medical knowledge, and protects intellectual property to the detriment of patients".<sup>13</sup>

The UK Government must therefore reject trade deal provisions that do not allow open access to source code and algorithms.

#### **4. The UK-Japan Comprehensive Economic Partnership Agreement (CEPA)**

4.1 The Comprehensive Economic Partnership Agreement (CEPA) is the first new deal signed by the UK post-Brexit. It replicates most of the existing agreement between the EU and Japan that the UK was party to before Brexit, but goes further in important areas, such as the inclusion of digital services. As the Department for International Trade notes, "the EU takes a more protectionist stance on data so does not have these provisions in its agreement with Japan."<sup>14</sup>

4.2 Technology giants, such as Sony, have welcomed CEPA's digital trade chapter.<sup>15</sup> This includes provisions to allow cross border data flows, Open Government Data,<sup>16</sup> and the prohibition of data localisation. In addition, there are provisions that go beyond closed access to source codes and ban governments from compelling companies to hand over encryption keys used to guard proprietary technology and information.<sup>17</sup>

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<sup>10</sup> Source code is the set of instructions that control a computer programme.

<sup>11</sup> [https://www.globaljustice.org.uk/sites/default/files/files/resources/e-pocalypse\\_now\\_briefing.pdf](https://www.globaljustice.org.uk/sites/default/files/files/resources/e-pocalypse_now_briefing.pdf)

<sup>12</sup> Sonia Katyal *The paradox of source code secrecy*. 2019, <https://www.lawschool.cornell.edu/research/cornell-law-review/upload/Katyal-final.pdf>

<sup>13</sup> Marcus Baw *Open source is the only way for medicine*. 2018, [https://medium.com/@marcus\\_baw/open-source-is-the-only-way-for-medicine-9e698de0447e](https://medium.com/@marcus_baw/open-source-is-the-only-way-for-medicine-9e698de0447e)

<sup>14</sup> <https://www.gaganmohindra.org.uk/sites/www.gaganmohindra.org.uk/files/2020-09/10%20benefits%20of%20UK%20-%20Japan%20Comprehensive%20Economic%20Partnership%20Agreement%20%28CEPA%29.pdf>

<sup>15</sup> <https://www.techuk.org/insights/news/item/18452-techuk-welcomes-the-conclusion-of-uk-japan-epa>

<sup>16</sup> Open Government Data (OGD) is a philosophy and set of policies promoting accountability and value creation by making government data available to all.

4.3 CEPA's significance is also as a possible stepping-stone to the UK joining the 11-nation trading bloc, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)<sup>18</sup> of which Japan is a member: the UK's membership could potentially increase the economic and political relevance of the UK in the Pacific region.<sup>19</sup> This suggests that CEPA's approach to digital trade has been modelled on that of the CPTPP, which - in addition to CEPA's provisions on cross-border data flow and data localisation - is known to prohibit access to the source code of software.<sup>20</sup>

## **PART 2: Scrutiny arrangements for CEPA**

5.1 The Constitutional Reform and Governance Act of 2010 (CRAg) requires that a treaty, once laid before Parliament, can be ratified if there is no resolution to reject it. There is no *requirement* for Parliament to debate and vote on such treaties. Further, there is no clarity about how a debate or vote to ratify a treaty can be triggered, only that "it would be left to the "usual channels" and for "people to make a noise"."<sup>21</sup>

5.2 The Secretary of State for International Trade has put forward new 'transparency and scrutiny arrangements' for international trade agreements,<sup>22</sup> starting with the UK-Japan deal (CEPA). At first glance, these measures appear to give Parliament a more substantive role. However, a closer look reveals that the measures relate almost entirely to scrutiny, do not address the shortcomings of CRAg, do not give Parliament more power but give the main responsibility to Parliamentary committees charged with scrutinising trade deals.

5.3 It therefore comes as a surprise that the UK-Japan Trade deal was laid before Parliament the moment the agreement was signed, so kick starting the statutory 21 sitting days for parliamentary scrutiny, debate and ratification. This puts the International Trade Committee and the International Agreements Sub-Committee in the invidious position of calling for evidence and producing a report within the 21 sitting days, allowing Parliament scant time to process and debate any report's findings. Compared to the way that parliaments of other countries like Japan, the US and those of the EU scrutinise and ratify trade agreements, the UK Parliament's process has to be seen as shamefully undemocratic.

## **6. Conclusion**

6.1 Digital trade is becoming central to new trade agreements. The digital chapters of these treaties are significantly shaped by trade rules drawn up in the interests of major technology corporations. At the same time, digital technologies play a rapidly developing role in the work of the NHS. The Government has made assurances that the NHS is not 'on the table' in current trade deal negotiations. However the NHS is not a discrete entity but incorporates and depends on many other services, not least digital. This means that to comprehensively exclude the NHS from post-Brexit trade deals, such

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<sup>17</sup> <https://tech.newstatesman.com/business/new-japan-uk-trade-deal-protect-business-encryption-keys>

<sup>18</sup> The CPTPP has been salvaged from the Trans-Pacific Partnership following the withdrawal of the US. The TPP was one of the first trade agreements to deal specifically with digital trade and to be shaped by the aims of the US Digital 2 Dozen.

<sup>19</sup> <https://policyexchange.org.uk/what-the-uk-japan-trade-deal-signifies/>

<sup>20</sup> <https://www.whitecase.com/publications/alert/cptpp-enters-force-what-does-it-mean-global-trade>

<sup>21</sup> <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06688>

<sup>22</sup> Transparency and scrutiny arrangements with the International Trade Committee and the International Agreements Sub-Committee for the UK-Japan Comprehensive Economic Partnership Agreement. Statement by Secretary of State for International Trade <https://questions-statements.parliament.uk/written-statements/detail/2020-10-12/hcws499>

as the deal with Japan, the Government's exclusions must extend to exclusion from any trade deal's digital chapter.

6.2 Finally, in terms of scrutiny, the hastily introduced ratification process for CEPA illustrates the need for a thorough revision of Parliament's ability to properly scrutinise and influence trade agreements. This should include

- a. ensuring that Members of Parliament have a voice, including a vote, on the creation of the mandate for a trade deal.
- b. reforming the Constitutional Reform and Governance Act (2010) to ensure greater time for Parliamentary scrutiny and debate once a treaty has been formally laid before Parliament.
- c. introducing constitutional change to give Parliament a greater role in scrutinising, debating and shaping trade agreements both during and after the completion of negotiations. Changes should include the right for Parliamentarians to have a decisive vote on ratification.