

Submission to scrutiny inquiry of the UK-Japan Comprehensive Economic Partnership Agreement (CEPA). International Trade Committee

1. I am writing on a personal capacity as an expert on digital rights and technology policy. I have worked on digital trade for several years from a civil society and human rights perspective. I am the former Policy Director of the UK advocacy organisation Open Rights Group and I currently work as an independent consultant. I have consulted for a variety of organisations, including Which?, New Economics Foundation, the Digital Trade Alliance, Ada Lovelace Institute and the Internet Society. I was the consumer representative at the Expert Trade Advisory Group on Digital and Telecoms at DiT until its dissolution. I have advisory roles with Camden Council, the Data Justice Lab at Cardiff University and the Spanish Government Digital Rights unit.
2. The UK Japan CEPA will provide necessary continuity to the trade between the parties after the withdrawal of the UK from the EU. As such it is a welcome development and the staff the various government departments involved must be congratulated in having achieved a deal in such a short time.
3. There are some concerns however in the digital trade / e-commerce provisions. The agreement has been concluded in an unprecedented short period for negotiations, and some of the more ambitious provisions may not have received the full consideration they require.
4. ***The provisions in Articles 8.73, 8.80, 8.84 and 8.86 should be suspended until proper scrutiny of the potential negative impacts can be carried out. This does not require delays to the entering into force of the agreement or renegotiating the full text.***
5. In one example, the CPTPP parties suspended the Intellectual Property chapter by attaching an Annex to the main treaty. These articles are not removed from the treaty, but simply put on hold so they do not enter into force. A similar arrangement can easily be made for the UK Japan CEPA so that Parliament, businesses and civil society can fully understand the implications of those commitments.
6. Below I set out why these provisions may not achieve some of the negotiating objectives set out in May 2020 and how they could be detrimental to UK consumers.
7. I am available for further questioning if required by the Committee.

8. **Overall objective: Throughout the agreement, ensure high standards and protections for UK consumers and workers and build on our existing international obligations. This will include not compromising on our high environmental protection, animal welfare and food standards, and ensure both parties meet their commitments on climate change.**
9. Creating a “free flow of data” arrangement with Japan could have negative impacts on data protection for UK consumers by enabling the onward transfers of data to the United States with limited controls.
10. In October 2019, the United States and Japan signed a Digital Trade Agreement that commits Japan not “to prohibit or restrict the cross-border transfer of information, including personal information” to the US.ⁱ This would include data that has been imported from the UK, and once that the data reaches the US, it would not be subjected to any major legal restrictions beyond any private undertakings that the organisations involved may have put in place. The Court of Justice of the EU has recently stopped the Privacy Shield mechanism for the transfer of personal data to the US in the Schrems II case.
11. The UK and US agreements with Japan use almost the same words to accept the validity of - and seek interoperability with - other data protection frameworks of lower standards than the UK’s. This multiple overlapping of regulatory regimes will leave the door open to international personal data transfers without adequate safeguards.
12. **Overall objective: Increase UK GDP and provide new opportunities for UK businesses, including small and medium-sized enterprises (SMEs) and investors, and facilitating greater choice and lower prices for UK producers and consumers.**
13. The CEPA with Japan could have a negative impact on UK GDP by jeopardising data flows with the European Union.
14. The case for why these specific data flows measures are necessary - how will they be used and by whom and which party of the treaty will benefit – has not been made. These far-reaching proposals have been introduced without a full assessment of the wider implications that these measures could have on UK GDP.
15. The impact assessment presented by government in order “to provide parliament and the public with a comprehensive assessment of the implementation of the UK-Japan CEPA in the long run prior to ratification” does not “attempt to model any specific provisions” and limits itself to apply a general coefficient based on general assumptions about the removal of “non-tariff measures (NTMs) and regulatory restrictions to services”.ⁱⁱ This is not surprising because the understanding of the economic impacts of liberalising or restricting data flows is very limited, but a wider consideration is merited.
16. Making these arrangements with Japan in the current context would appear to signal that the UK government will prioritise the Pacific area over Europe for

digital trade. The economic and regulatory implications of this shift have not been publicly discussed, particularly any potential effect in EU data adequacy.

17. Besides risking the rights and freedoms of individuals based in the UK, onward transfers UK-Japan-US would also jeopardise the continuation of personal data transfers from the European Union. The European Data Protection Board has stated that onwards transfers of EU data in UK trade agreements will be part of the assessment of the adequacy of the UK for data protection purposes.ⁱⁱⁱ
18. Although the EU has given Japan an adequacy decision, the country had to give extra commitments to restrict onward transfers of EU data to third countries. It is unclear whether these restrictions will be extended to UK data, and would be their legal status against the requirements in the US Japan agreement.
19. The full impact of the deal and any fallout with the EU on data flows - both positive and negative and on all sides - are impossible to predict and disentangle from other factors, but there is a different order of magnitude in any potential gains from a Japan deal and losses from jeopardising EU trade. The Government has stated that in 2018 personal data-enabled service exports from the UK to the EU were worth £85bn (€96bn)^{iv}, while similar data-enabled UK exports to Japan would amount to roughly £5.6bn^v.
20. The Committee should ask ministers to include wider economic impacts in trade with the EU in the modelling of the expected benefits of the deal. Ministers should make the case for each specific commitment using the best data available.
- 21. Objective: Secure an agreement which works for the whole of the UK and takes appropriate consideration of the UK's constitutional arrangements and obligations.**
22. There is a similar lack of evidence and debate about the necessity to include commitments restricting the disclosure of source code and algorithms in the UK Japan deal. There are complaints in the trade literature that companies doing business in China have their technology stolen but it is not clear whether this is an issue in the UK Japan context.
23. These provisions contain some limited exceptions for courts and regulators, but these do not amount to full exceptions for public interest regulations, including those required for compliance with other legal obligations. Given the importance of the car industry in the UK Japan context, there is particular concern about maintain regulatory capacity to require disclosure of emissions-related software embedded in vehicles.
24. The Clean Air Strategy 2019 explains that the UK “has already adopted ambitious, legally-binding international targets to reduce emissions of five of the most damaging air pollutants (fine particulate matter, ammonia, nitrogen oxides, sulphur dioxide, non-methane volatile organic compounds) by 2020 and 2030.”^{vi} Achieving these goals may require regulatory intervention and the restrictions in the Japan deal could make this more difficult or impossible.

25. These provisions in the UK Japan context could set a negative example for other trade agreements and hamper legitimate technology transfer more broadly. This could undermine the international obligations of the UK on fighting climate change.
26. The United Nations Framework Convention on Climate Change (UNFCCC) notes that “all Parties shall promote and cooperate in the development and transfer of technologies that reduce emissions” of greenhouse gases. Developed countries are also required to take all practicable steps to “promote, facilitate and finance the transfer of, or access to, climate technologies” to developing countries.
27. Chinese practices of obtaining technology through abusive administrative demands are likely unlawful under WTO rules to which China is signatory.^{vii} The priority should not be creating new rules out of context, but the enforcement of existing restrictions on forced technology transfer under World Trade Organisation rules and the agreement on trade secrets at the Trade-Related Aspects of Intellectual Property Rights (TRIPS).
28. The inclusion of “algorithms” in addition to source code creates additional issues, as the intellectual property of algorithms is very limited, mainly being protected as trade secrets. The deal would create a new layer of protection for algorithms, and the interaction with existing IP regulations is not clear, including any public interest exceptions under copyright law that are required under international IP treaties to which the UK is a party.
29. The provisions on restricting encryption are unprecedented in other similar trade agreements and their wider impacts are not understood. There is a fundamental difference between requiring the disclosure of encryption keys or the “underlying technology or production process” in order to establish whether a system is safe.
30. Japan has complained at the WTO about mandatory requirements on encryption technologies by countries such as Viet Nam but is unclear why this is necessary in a treaty with the UK.^{viii}
31. Besides introducing a new issue in scope of trade deals, the restrictions on encryption go further than any similar clauses in any other similar treaty. In particular, the clauses ban forced joint ventures, which are not prohibited under international law. Joint ventures are a core element of the legitimate technology transfer required for less developed countries to raise their standards of living. For decades the Japanese government limited the equity share of foreign investors and required joint venture companies.¹

¹ <https://globalbusiness.blog/2018/10/21/does-china-systematically-force-us-companies-to-reveal-their-secrets/>

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https://ustr.gov/sites/default/files/files/agreements/japan/Agreement_between_the_United_States_and_Japan_concerning_Digital_Trade.pdf

ii

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/929059/final-impact-assessment-UK-Japan-comprehensive-economic-partnership.pdf

iii https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_letter_out_2020-0054-uk-usagreement.pdf

iv

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/872228/A_-_Cover_Note.pdf

v £14.8 trade with Japan x 0.52 services x 0.73 on the basis of £85bn of EU service exports deemed to be “data enabled” over a total of £120bn of EU service export

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/770715/clean-air-strategy-2019.pdf

vii Qin, Julia Ya, Forced Technology Transfer and the US-China Trade War: Implications for International Economic Law (September 29, 2019). Wayne State University Law School Research Paper No. 2019-61, Available at SSRN: <https://ssrn.com/abstract=3436974> or <http://dx.doi.org/10.2139/ssrn.3436974>

viii https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-HTML.aspx?Id=244471&BoxNumber=3&DocumentPartNumber=1&Language=E&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True&Window=L&PreviewContext=DP&FullTextHash=371857150%22%20%5C%20%22KV_GENERATED_FILE_000014.htm