

Written Evidence from
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This submission responds to the call for evidence by House of Commons International Trade Committee in regard to its inquiry into UK digital trade. It provides evidence in regard to **Questions 4, 5, 6 and 7**.

Key Points:

- A. The UK's approach towards negotiating digital and data provisions in its future trade agreements needs to find the right balance between economic gains from free data flows and public policy objectives, supported by appropriate societal consultation.
- B. It also entails the need to find solutions for "regulatory interoperability" of digital and data provisions as the UK will negotiate trade agreements with countries (or blocs) that follow different regulatory approaches.
- C. Cross-border data flows are subject to unilateral instruments outside trade agreements (adequacy decisions), which affect the effectiveness of digital and data provisions.
- D. The UK-Japan Agreement (CEPA) indicates a departure by the UK from the EU's approach to digital governance. Although the UK Government intends to use CEPA as a stepping stone for negotiating future trade negotiations, the requirements of "regulatory interoperability" need to be considered.
- E. Full compliance with existing CPTPP rules is a precondition for the UK's accession to this plurilateral agreement; however, certain provisions present challenges to the UK.
- F. We support the UK Government's position to renew, or make permanent, the moratorium on customs duties for electronic transmissions.

G. About UKTPO

- H. The UK Trade Policy Observatory (UKTPO), a partnership between the University of Sussex and Chatham House, is an independent expert group that: 1) initiates, comments on and analyses trade policy proposals for the UK; and 2) trains British policy-makers, negotiators and other interested parties through tailored training packages.
- I. The UKTPO is committed to engaging with a wide variety of stakeholders to ensure that the UK's international trading environment is reconstructed in a manner that benefits all in Britain and is fair to Britain, the EU and the world. The University of Sussex has the largest collection of academic expertise on the world trading system in the UK, with specialists on trade policy, trade law and trade politics and European law and economy. The team includes experts in economics, international relations and law.

4. After having left the EU, the UK has begun to formulate its trade agenda as a sovereign state. The UK Government has set out its ambition of becoming a champion of digital trade and a rule setter in this field.⁵ The provisions on digital trade under the UK-Japan agreement (CEPA) clearly indicate that the UK has shifted away from EU-style digital trade governance towards an approach that resembles more closely the US/Asia-Pacific one. The UK is also to start negotiations on a digital economy agreement with Singapore soon, the country that is actively promoting a liberal digital economy regime by creating new digital economy agreements such as the Digital Economy Partnership Agreement (between Chile, New Zealand, and Singapore) and the Australia-Singapore Digital Economy Agreement.
5. These movements in the UK's negotiating stance raise the question: How the UK can achieve its ambition of becoming a rule-setter whilst upholding other objectives such as a high level of privacy protection? Is the solution to be found simply in joining the Asia Pacific governance approach? Or is there an alternative way in which the UK can contribute to global digital data governance by reflecting the UK's norms, e.g. as to citizen's rights, while promoting digital trade? These are the fundamental questions to which the UK will have to find answers.
6. Principles of the multilateral trading system affect the options that the UK may have in regard to negotiating digital and data provisions in future trade agreement. In particular, the approach taken in international trade agreements is that regulatory measures are to be applied on a non-discriminatory basis and a transparent manner and that measures are not to be burdensome or trade restrictive more than necessary. If there are potential exceptional cases to meet public policy objectives, exceptional clauses can be added.⁶ Also, conditions for regulations to meet public policy objectives can be made precise. In this way, countries can find a legitimate balance between an economic objective and a public policy objective.
7. To see this, let us compare the degree of public policy space in the context of key digital trade provisions such as the free flow of data, a ban on data localisation requirement, and a ban on forced disclosure of source code. Across three major agreements—the EU-UK Trade and Cooperation Agreement (TCA), the UK-Japan CEPA, and the Comprehensive and Progressive Trans-Pacific Partnership agreement (CPTPP) —we see that the degree of consideration for public policy space is highest in the TCA. CEPA leaves a certain degree of flexibility for public policy measures but policy space is limited in comparison with the TCA. CPTPP includes safeguard measures for public policy purposes but policy space is more limited compared to CEPA. The scope of the agreements also matters. For example, the UK-Japan CEPA widens the scope of prohibition of source code disclosure to algorithms, which is not the case in the TCA and CPTPP.

⁵ See UK's National Data Strategy: <https://www.gov.uk/government/publications/uk-national-data-strategy/national-data-strategy>

⁶ The WTO (GATS) includes the protection of the privacy of individuals in relation to the processing and dissemination of personal data as 'General Exceptions' (Art. XIV. (c) ii). However, the WTO jurisprudence shows that burden of proof is associate with it. See WTO ANALYTICAL INDEX GATS – Article XIV (Jurisprudence), [gats_art14_jur.pdf \(wto.org\)](https://www.wto.org/gats_art14_jur.pdf)

Furthermore, Singapore's recent digital economy agreement with Australia takes more or less the same approach as CPTPP. But the Agreement is much wider than CPTPP and provisions are more detailed.

8. The way in which personal data protection is treated has to be examined in conjunction with the provisions on free data flows. How to reconcile free flow of data under international trade law and data privacy has been intensely discussed in academia over the last several years.⁷ At the point of exiting the EU, the UK has been compliant with the requirements as set out by the EU's General Data Protection Regulation (GDPR), which provides for a high standard of data privacy protection. Yet it may choose to diverge from this standard in its future negotiation on FTAs and/or digital economy agreements. Especially in regard to the EU's adequacy decision, the UK must be aware that any future rules for the onward transfer of personal data to another third country are taken into account for the EU's adequacy assessment (GDPR Art.45. 2 (a)).
9. A good example is the relation with Japan. Under the EU-Japan Economic Partnership Agreement (EPA), the data privacy issue was completely separated from the trade negotiations. As a result, there are no provisions on data privacy in the Agreement. CEPA introduced the provisions of 'personal information protection' (Article 8.80) by replicating CPTPP provisions. It should be noted that Japan and the UK mutually provided the adequacy decision on data privacy separately. In relation to the EU, Japan enacted a supplementary law to protect EU citizen's data in order to receive an adequacy decision from the EU. Japan carries over its special arrangement for the EU to the UK after leaving the EU.
10. If the UK accepted the free data flow provisions in CPTPP, this would imply that the UK accepts free flows of data with countries that do not have GDPR adequacy decision from the EU. At this stage, only three countries (Canada, Japan and New Zealand), out of 11 signatories to CPTPP, have received an adequacy decision from the EU. Will the UK separately assess the level of data privacy protection regimes in the eight CPTPP countries that do not have GDPR adequacy decision from the EU? A careful consideration is necessary as to the UK's position on data privacy arrangement with its FTA partners in conjunction with the provisions on free data flows.

Q5: What does the UK-Japan Agreement indicate about the UK's approach to digital trade and data provisions in future trade negotiations?

11. The UK-Japan Agreement (CEPA) clearly shows the UK's emerging departure from the EU's approach to digital governance. Given that CEPA's e-commerce provisions were mostly taken from CPTPP and its scope was extended reflecting innovation (e.g. algorithms and AI) based on the Japan-US Digital Trade Agreement, it is observed that the UK is heading towards an Asia-Pacific style digital trade governance. This movement could be consistent with an attempt by

⁷ See the latest contribution in the area by Yakovleva, S. and Irion, K. (2020). Pitching trade against privacy: reconciling EU governance of personal data flows with external trade, *International Data Privacy Law*, 2020, Vol. 10, No.3, pp201-221.

the UK government to use CEPA as a stepping stone for developing its digital trade strategy. A digital economy agreement with Singapore, if agreed, and being a member of CPTPP would reflect an approach that the UK increasingly values the free flow of data and digital innovations more compared to other public policy objectives.

12. Although the UK Government portrayed the e-commerce chapter in CEPA as a cutting-edge set of rules, its social implications are still largely unknown. Since CEPA was negotiated within an extremely short period of time and there was not enough time to scrutinise the content, substantial policy discussions that need to involve non-business stakeholders should take place before the UK Government takes next steps.⁸

Q6: What approach should the UK take towards renewing the WTO's moratorium on customs duties on electronic transmissions?

13. The 1998 Declaration on Global Electronic Commerce (WT/MIN(98)/DEC/2) contains the following operative text regarding a moratorium on electronic transmissions: WTO members will “continue their current practice of not imposing customs duties on electronic transmissions”. This wording has been replicated in subsequent Decisions to temporarily renew the moratorium.
14. The periodic renewals have recently been challenged vocally by some large developing countries, for a variety of reasons but mainly because of alleged concerns about (i) loss of tariff revenue, (ii) loss of policy space and adverse impact on industrialisation, (iii) giving market access to digital products from advanced economies for free, and (iv) a perception of not benefitting from the digital economy.
15. We believe that some of these concerns are either largely unfounded or potentially exaggerated, whereas others have merits in principle, although the taxation of electronic transactions would not be a solution to address legitimate concerns.
16. Therefore, as the moratorium facilitates the international exchange of digitised goods and services, and may encourage the trade of potentially digitisable products, we believe that it would be sound economic policy to support both a renewal of the current moratorium as well as efforts to make the moratorium permanent. This reflects the current position of the UK Government. That said, in principle governments should aim at maintaining at least approximately tax neutrality across digital and non-digital modes or activities, so as to avoid distortion in economic activity.

⁸ Morita-Jaeger, M. and Ayele, Y. (2020). The UK-Japan Comprehensive Economic Partnership Agreement: Lessons for the UK's future trade agreements. UKTPO Briefing Paper 50, December 2020. [The UK-Japan Comprehensive Economic Partnership Agreement: Lessons for the UK's future trade agreements « UK Trade Policy Observatory \(sussex.ac.uk\)](https://www.uktradeobservatory.org.uk/wp-content/uploads/2020/12/UKTPO-Briefing-Paper-50-The-UK-Japan-Comprehensive-Economic-Partnership-Agreement-Lessons-for-the-UKs-future-trade-agreements-UK-Trade-Policy-Observatory-sussex.ac.uk)

17. In support of the view that the moratorium does not, for all practical purposes, pose a threat to tariff revenue, we notice that the set of “potentially digitisable products” from across four HS Chapters encompasses 85 products at the HS 6-digit level. Using recent trade volumes and applied tariff rates for these products, the maximum amounts of customs revenues from these digitizable products potentially at risk from the moratorium are small. In 2017, it would amount to less than 1 per cent of total tariff revenues collected from all industrial products.
18. Even if there was some loss of tariff revenue, there are offsetting benefits to the partial loss in customs revenues from digitization. Generally, the moratorium—by removing costs and frictions—is contributing to increases in domestic consumer welfare as well as the competitiveness of the domestic manufacturing base, as service inputs such as software become ever more important for technologically advanced products. Specifically, one might imagine that (i) more digital imports lead to more production or exports of devices in order to access digital products (e.g. smartphones); (ii) more trade may lead to more inbound investment flows; (iii) digitalization can enhance consumer welfare via new offerings (eg. educational services); and (iv) there may be benefits for manufacturing competitiveness, which in the future may come to rely more and more on inputs that are amenable to being transmitted electronically.
19. It is legitimate for governments to look for new ways of generating income in a digital economy. However, taxing imports of electronic transmissions is unlikely to be efficient for two reasons: first, e-commerce transactions tend to be price-sensitive and therefore trade volumes will react promptly, thereby greatly shrinking the base upon which tariffs would be levied. Second, it is commonly more efficient (and more equitable) to tax broadly in terms of revenue generation, e.g. using a value-added or sales tax, as opposed to narrowly focussing on electronic trade transactions.
20. In summary, we support the UK Government’s position⁹ to uphold the moratorium and to make it permanent.

Q7: What objectives should the UK have when negotiating digital and data provisions during its accession to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)?

21. From a broader perspective, the UK’s potential accession to CPTPP may yield long-term strategic benefits for the UK. First, the UK could become a rule-changer by joining CPTPP. The UK’s accession to CPTPP would completely change the geopolitics surrounding CPTPP and may trigger further expansion of CPTPP. By using CPTPP as a platform for coalitions of involving smaller economies that support a rules-based international trading system, the UK could pursue multi-layered economic diplomacy. Second, the major economic benefit would be that CPTPP will provide a platform for applying unified sets of rules (e.g. rules of

⁹ Statement by the UK’s Ambassador to the WTO, Julian Braithwaite, during the WTO General Council on 16-18 December 2020 (<https://www.gov.uk/government/speeches/wto-general-council-uk-statement>).

origin) so that UK businesses could more easily link up to economies in the Asia-Pacific region.

22. It ought to be recognised, though, that full compliance of existing CPTPP rules is a pre-condition for the UK's accession to CPTPP. As provided in the CPTPP accession process document ('5. Benchmarks' in Annex to CPTPP/COM/2019/D002), a CPTPP aspirant economy has to "demonstrate the means by which they will comply with all of the existing rules contained in the CPTPP". We note that CPTPP members are determined to strictly follow these benchmarks. It is worth noting the remark made by the Japanese Minister of Foreign Affairs when the UK formally submitted the accession request on 1st February 2021 in this regard. He strongly emphasised "*the importance for the United Kingdom to show to other members as well as to the public, repeatedly, its determination to meet the high standards of the CPTPP, including to comply with all of the existing rules in the CPTPP without exception.*"

Implications:

23. The preceding suggests that there is no room for the UK to negotiate CPTPP rules including digital and data provisions. Can the UK fully agree with digital and data provisions under CPTPP? There seems to be several challenges for the UK as and when it accedes to CPTPP. One of them is the issue relating to a balance between economic objectives and public policy objectives such as free data flow and data privacy protection as discussed in the answers for Q4 and 5. Another issue is the provision of non-discriminatory treatment of digital products (CPTPP Article 14.4). It is noteworthy that the UK did not include this non-discriminatory clause in either the TCA or CEPA. If there was a specific reason for that, can the UK change its position for CPTPP? The third is about dispute settlement (Article 14.18). Some exceptions, such as obligations under non-discriminatory treatment and cross-border transfer of information by electronic means, were allowed only for two developing countries: Malaysia and Viet Nam for the first two years (Art. 14.18). It is difficult to see that the UK would be allowed to have such an exception. The issues raised above have to be carefully examined.