

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

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.

1.2 We are grateful for the opportunity to submit evidence to the Committee. Our particular interest is the potential impact that free trade agreements (FTAs) can have on health and health services. Trade deals can have wide ranging effects on the public's health through, for example, lowering standards for farming and food production, reducing labelling on products, making medicines more expensive and less accessible, threatening personal data privacy, and undermining worker's rights. This submission however focuses on:

- the objectives of proposed trade negotiations
- the potential risks of agreements to public services, especially the NHS, including the risks posed by the inclusion of Investor-State Dispute Settlement (ISDS);
- Parliament's lack of ability to scrutinise on-going negotiations.

1.3 At times our submission refers to the US-UK FTA as an example, but our concerns also apply to the other trade agreements that the UK is negotiating.

2. The objectives of trade negotiations

2.1 The Government has said that, in trade deal negotiations, the NHS is "not on the table". However, many organisations and civil society groups fear that this statement is misleading. One of the stated objectives of the UK's negotiating position for the US-UK FTA is to

"... rigorously protect the UK's freedom to provide public services, such as the National Health Service, in the national interest. The NHS is not for sale and the Government is committed to the guiding principles of the NHS – that it is universal and free at the point of use".¹

2.2 However, KONP feels that the guiding principles of the NHS are selectively drawn in this statement: there is no reference to other principles, such as that the NHS is publicly funded and publicly provided. We are concerned about the implications of this selectiveness, especially as publicly provided services have been shown to offer best value: their primary concern is quality patient care and not dividends for shareholders. Despite this, and regardless of the huge costs involved in compulsory competitive tendering,² private companies are delivering more and more NHS services. Measures in trade deals such as standstill and ratchet mechanisms would make this trend almost impossible to reverse. We would therefore wish to see the principle that the NHS is publicly funded and provided underscored in negotiating objectives for all future trade agreements.

¹ <https://www.gov.uk/government/news/liz-truss-kick-starts-uk-us-trade-talks>

² Estimated at between £4.5 to £10.9 billion per annum <https://fullfact.org/health/how-much-nhs-market-system-costing/>

2.3 One a similar note, we are concerned that the Department for International Trade's assurance³ that the NHS is not for sale to the private sector (whether overseas or domestic) is little more than bromide. We are not suggesting that that the government intends to sell the entire public service or that specific NHS services are 'up for sale'. Instead, we are concerned that "rigorously protect[ing] the UK's *right* to provide public services" (our emphasis) will still allow overseas-based private companies to have more and more access to an NHS 'market'.

3. The risks to public services such as the NHS

3.1 Failure to exclude the NHS

3.1.1 Some suggest that the General Agreement on Trade in Services (GATS) protects NHS services from inclusion in trade deals because these are "provided in the exercise of governmental authority". However, this exclusion does not extend to services provided in part on a commercial basis or to where there is competition between service suppliers, as is now the case with the NHS. This means that, unless explicitly and comprehensively excluded from a trade deal, NHS services and their regulation may be subject to wider GATS obligations, such as most-favoured-nation treatment and market access.⁴

3.1.2 Increasingly, trade deal negotiations are based on negative listing, whereby everything is 'on the table' unless explicitly named and excluded from all relevant chapters. However, comprehensive exclusion of the NHS is hard to achieve, as it is increasingly difficult to define its boundaries: for example, digital services are now essential for NHS data management, patient consultations and decision-making.

3.1.3 In negotiations for previous trade deals, such as the Transatlantic Trade and Investment Partnership (TTIP) and the Comprehensive Economic and Trade Agreement (CETA), the UK government chose not to name and exclude NHS services (only ambulance services,⁵ and, in CETA, only privately funded ambulance services⁶). If the current government takes the same approach with future trade deals, this could have a range of implications.

3.1.4 For example, a treaty that does not fully exclude the NHS could undermine NHS England's plans to move away from competition in order to facilitate greater 'integration' of health services.

3.1.5 Furthermore, without the exclusion of the NHS, the government may find it difficult to regulate the NHS in future. The claim that the government "will protect the right to regulate public services" is misleading. Treaties create rights and duties under international law. Notably, in terms of domestic law,

where legislation is capable of two different interpretations, where one reading is consistent with a treaty obligation and the other is not, then the courts will

³ <https://www.gov.uk/government/news/liz-truss-kick-starts-uk-us-trade-talks>

⁴

https://www.iatp.org/sites/default/files/GATS_and_Public_Service_Systems.htm<https://www.gov.uk/government/news/liz-truss-kick-starts-uk-us-trade-talks>

⁵ https://trade.ec.europa.eu/doclib/docs/2016/june/tradoc_154617.pdf

⁶ <http://www.tradeunionfreedom.co.uk/wp-content/uploads/2013/01/Labour-Parliamentary-Briefing-on-CETA---The-Comprehensive-Economic-and-Trade-Agreement-between-t....pdf>

*presume that Parliament intended to legislate in compliance with the treaty and not in conflict with it.*⁷

This suggests that a UK government's right to regulate public services is limited by the terms set down in its trade agreements.

3.2 The risks of ISDS

3.2.1 Although the Department for International Trade (DIT) states that decisions about public services will be made by the UK government and not by its trade partners, this assurance fails to recognise that a government's powers can be undermined when a treaty involves investment protection measures, such as Investor to State Dispute Settlement (ISDS).⁸

3.2.2 For example, the Covid 19 pandemic has led the UK government to take extraordinary measures to deal with the crisis, for example introducing emergency regulations and bypassing existing contracts to ensure the urgent provision of supplies, such as personal protective equipment and ventilators. In response, corporate lawyers are already advising foreign investors to make massive claims for compensation using ISDS.⁹ The Corona 19 pandemic highlights how the inclusion of ISDS in a trade deal poses the risk of a huge and additional financial burden for a government that is already struggling with health and economic crises.

4. Parliament's lack of ability to scrutinise on-going negotiations

4.1 While the UK was a member of the EU, it was notable that the UK Parliament was unable to give the same level of scrutiny to proposed trade deals as other EU member states' Parliaments. As things stand, even a major treaty can be ratified with little if any involvement of the UK Parliament.¹⁰ Parliament does not have the power to approve, reject or amend any treaty itself: making treaties is "traditionally an executive power *par excellence*".¹¹ There is no statutory requirement for a Parliamentary debate or vote on most treaties, and although Parliament can resolve not to ratify a treaty, it cannot ultimately block ratification. The convoluted process that allows Parliament to attempt this is overwhelmingly skewed in the government's favour and ultimately depends on whether or not the government is minded to accept defeat.¹²

4.2 In addition, the Constitutional Reform and Governance Act (2010) gives the Government the power in exceptional cases to ratify treaties without laying them before Parliament. However, as the Act provides no indication of what constitutes an exception, the Government is free to define anything as an exceptional case.

⁷ Lord Bingham of Cornhill, House of Lords 3 July 1996 c1465 ff

⁸ ISDS or similar investment protection measures allow foreign investors to sue the government outside the UK's legal system using a trade tribunal of three lawyers. The compensation awarded is massively larger than awards made by the UK's domestic courts and can reach hundreds of millions, if not billions of dollars.

⁹ <https://www.iisd.org/sites/default/files/publications/investor-state-claims-covid-19.pdf>

¹⁰ <https://commonslibrary.parliament.uk/research-briefings/sn05855/>

¹¹ Mario Mendez, 'Constitutional Review of Treaties: Lessons for Comparative Constitutional Design and Practice', cited by House of Commons Library *Parliament's role in ratifying treaties*. <https://commonslibrary.parliament.uk/research-briefings/sn05855/>

¹² <https://commonslibrary.parliament.uk/research-briefings/sn05855/>

4.3 KONP, along with other civil society groups, believes that, in line with the sovereignty sought through Brexit, Parliament should have a stronger role in scrutinising trade agreements and calling the government to account. In addition to existing arrangements for select committee scrutiny, Parliament should be able to examine and approve the negotiating objectives for new trade deals; have access to texts during negotiations; hold debates on the floor of the House prior to the signing of treaties, and have a meaningful role in the ratification of a trade agreement.

4.4 We also believe there should be greater transparency and engagement with the public on the potential impact of each new trade deal, and the same opportunities for dialogue between the DIT and civil society groups as afforded to the business sector.