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## Transatlantic Trade and Investment Partnership (TTIP)

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House of Commons, Backbench business debate  
Thursday 10<sup>th</sup> December

### About the BMA

The British Medical Association (BMA) is a voluntary professional association and an independent trade union, which represents doctors and medical students from all branches of medicine all over the UK. With a membership of over 160,000, we promote the medical and allied sciences, seek to maintain the honour and interests of the medical profession and promote the achievement of high quality healthcare.

### Key points

- The BMA recognises the economic benefits that the Transatlantic Trade and Investment Partnership (TTIP) could provide and, given the strong correlation between increased prosperity and improved health outcomes, welcomes the positive impact that such developments may have upon the health of the UK's population.
- However, we have serious concerns about the potential for the TTIP – especially the proposed investor protection mechanisms – to threaten the NHS's ability in the future to provide high quality healthcare to all, in line with its founding principles, by facilitating a legal framework which could be exploited by businesses to challenge legislation and policy in the UK.
- Whilst some assurances have been made, at both EU and UK level, that healthcare will be protected from any adverse effects of the TTIP, the BMA believes that due to the nature of the agreement and its potential reach in the future, a wholesale carve-out should be granted to UK health services to ensure their absolute exclusion from the scope of the TTIP.

### Background

The BMA is concerned that the signing of the TTIP treaty will tip the balance of power further towards private corporations and away from the public sector.

From the start of the process of drawing up the TTIP, the BMA has sought commitments that healthcare would not be included as part of the negotiation talks between the European Commission (EC) and the United States. Whilst we have received assurances that "*the further liberalisation of the procurement of health services is not a focus of these negotiations*", we remain concerned that the trade agreement will threaten the NHS's ability to provide high quality healthcare to all, regardless of wealth.<sup>1</sup>

Two particular aspects of the TTIP that could potentially threaten the NHS are:



1. **Scope** – the TTIP may facilitate further commercialisation of the NHS via the inclusion of health services within the agreement’s scope.
2. **Investor protection (IP) mechanisms** – these may be used by corporate interests to attack EU member states’ public services or to challenge legislation which seeks to improve public health. For example, companies could have the legal means, backed by the threat of compensatory payments, to prevent the reversal of the outsourcing of NHS resources to the private sector.

### 1. Scope: Commercialisation of the NHS

The BMA recognises that there are several layers of intended protection for public healthcare services within the proposed TTIP, based on the provisional text of the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada (as CETA is seen as a template for TTIP). The EC considers this to constitute an effective carve-out for health services, and the BMA believes these measures to be well-intentioned. From the UK’s perspective, as long as the provision of our National Health Service falls within the definition of “*services considered as public utilities*”,<sup>2</sup> then the TTIP reservation should be applicable.

However, the Health and Social Care Act (HSCA) 2012 has been criticised for facilitating commercialisation and privatisation of the NHS, and, whilst it is currently the case that the NHS would fall within this definition, this may not be the case in the future. If commercialisation and privatisation were to continue further, it is possible that by the time TTIP comes to be concluded and adopted into EU law, the public healthcare service in the UK may no longer reflect the definition of a ‘public utility’, and, therefore, potentially fall outside of the currently envisaged protections.

With no established guidance – either from case law or legislation – it is unclear as to the degree of commercialisation that would be required to take public healthcare services outside this definition, and therefore outside of this protection within the TTIP. *Consequently, the BMA is calling for additional action to secure the absolute exclusion of the provision of UK healthcare services from the scope of the TTIP’s application.*<sup>3</sup> *This would reflect the existing carve-outs in the TTIP for the audio-visual sector, and for healthcare services from the Services Directive.*<sup>4</sup>

### 2. Investor protection (IP) mechanisms

#### *Investor-to-State Dispute Settlement (ISDS)*

The ISDS, a highly contentious arbitration settlement system, would allow investors to bring forward legal proceedings against a foreign government that is part of the treaty, if they believe that their interests have been unfairly damaged by public policy decisions, which indirectly result in the expropriation of their investment.

This raises two serious concerns: (i) following a change of political direction, potentially it could not be feasible, given the large compensatory sums that may be involved, to return services that have been privatised – such as healthcare services – to a public service; and (ii) businesses who successfully claim that legislation has damaged their profits could result in millions of pounds’ worth of compensation.

It is unacceptable that EU Member States’ freedom of regulatory choice in the healthcare services sector could be constrained by considerations of potential liability under the ISDS provisions.

There should be no potential for ISDS provisions to be used as a means of preventing any reversal of outsourcing of national health systems' resources to the private sector, and the BMA agrees with the EC that an investor's legitimate expectations cannot include that a regulatory and legislative regime for any particular sector will not change.<sup>5</sup>

### *Investment Court System*

In recognition of the unprecedented level of public concern surrounding the potential for the existing ISDS mechanism to permit companies to frustrate national government's public policy decisions – including health – the EC recently issued a proposal for a new investor protection system.<sup>6</sup>

Following a public consultation in 2014,<sup>7</sup> which called for the TTIP to protect legitimate public policy measures by including provisions to exclude claims for indirect expropriation borne out of commercial interests, the EC proposed a new mechanism for investor protection. The EC's proposal has been presented to the US and will form part of the EU-US ongoing negotiations. The Investment Court System, if adopted, would seek to provide a more transparent process for investor-to-state disputes whilst protecting a government's right to self-determine its regulatory framework.

Whilst our analysis indicates that the new proposals probably decrease the likelihood of a future UK government being sued for the attempted reversal of the outsourcing of NHS resources, or regulatory measures designed to achieve public health objectives, such threats still exist. Consequently, the BMA continues to request that the TTIP's standards of protection must clearly exclude the provision of healthcare services from its scope of application. This would reflect the existing carve-outs in TTIP for the audio-visual sector, and for healthcare services from the Services Directive. It would also be consistent with case law, which has held that entities engaging in public healthcare services provision are not to be regarded as engaged in economic activity and thus are not subject to the EU competition rules.<sup>8</sup>

In the event that a specific healthcare services carve-out is not granted, the BMA would like there to be – as an absolute minimum – a provision in the trade agreement making it clear that EU Member States have an unimpeded right to regulate in the field of healthcare services provision. Such a provision is necessary to enable governments of EU Member States to exercise their democratic mandates.

*The BMA will continue to monitor this issue and will intervene, where necessary, to ensure that the finalised proposals for investor protection mechanisms do not threaten national government's abilities to legislate in the public interest.*

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<sup>1</sup> The BMA has received commitments from a number of officials including the former UK Minister for Trade and Investment, Lord Green, as well as his successor Lord Livingstone. We also received the same commitment from the former European commissioner for trade, Karel De Gucht.

<sup>2</sup> See page 1500, Annex II (*Reservations Applicable throughout the European Union*) of [Consolidated CETA Text](#)

<sup>3</sup> The BMA wrote a letter to UK Health Minister, George Freeman MP, in February 2015.

<sup>4</sup> See recital 22 and Article 2(f) of [Directive 2006/123/EC of the European Parliament and the Council](#)

<sup>5</sup> See [Public consultation on investment protection and investor-to-state dispute settlement \(ISDS\) in the Transatlantic Trade and Investment Partnership Agreement \(TTIP\)](#)

<sup>6</sup> See European Commission press release (Nov. 2015), [EU finalises proposal for investment protection and Court System for TTIP](#)

<sup>7</sup> [Public consultation on investment protection and investor-to-state dispute settlement \(ISDS\) in the Transatlantic Trade and Investment Partnership Agreement \(TTIP\)](#)

<sup>8</sup> See [Case C-205/03 P FENIN v Commission \[2006\] ECR I-6295](#)