

BREXIT BRIEFING
**Beyond Brexit –
International trade
and health**



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Key points

- At our [annual representative meeting in June 2018](#), doctors made clear their worries that Brexit poses a major threat to the NHS and the nation's health. Given what is now known about the potential impact of Brexit and especially the dangers a 'no deal' Brexit presents, the BMA voted to oppose Brexit and to support the public having a final say on the Brexit deal. We support the UK remaining in the European single market and maintaining open border arrangements with free movement of healthcare and medical research staff.
- The international trade agreements under which the UK, as an EU member state, currently trades with global partners provide vital protection to the NHS, safeguard the UK's right to regulate in the interest of public health, and set high health and safety standards on imported products.
- Depending upon the nature of the final Brexit deal, the UK may not be able to trade under these agreements after Brexit. The UK Government would have several options for trading globally after leaving the EU, including:
 - trade with any of the 164 WTO (World Trade Organization) members under common rules without any preferential agreement;
 - join the EEA (European Economic Area) or EFTA (European Free Trade Association), maintaining single market access with some freedom to negotiate new trade agreements with non-EU countries; or
 - negotiate its own free trade agreements, ideally maintaining favourable access to current trading partners and striking agreements with new partners.
- The UK is already coming under significant pressure from non-EU countries to liberalise aspects of its trade policy in ways that could negatively impact health post-Brexit.
- The UK Parliament does not currently have sufficient powers to guard against these potential impacts through scrutiny of trade negotiations, including access to negotiating texts and an automatic positive vote on the final text of trade agreements. Both EU and US legislators have such powers.
- To minimise these potential impacts the UK Government should commit to exclude from any future trade agreements:
 - the provision of healthcare services, particularly the NHS, and any clauses that could lock in competitive procurement of publicly funded healthcare services;
 - investor protection and dispute resolution mechanisms that could limit the UK's future ability to regulate in the interest of public health;
 - any weakening of current high product safety standards, including the animal welfare and environmental safety standards for food items; and
 - strengthening of IPR (intellectual property rights) that could limit the ability of lower-income countries to procure generic medicines.
- For the UK, this approach would:
 - prevent further commercialisation of the NHS and safeguard future options for rolling back privatisation;
 - ensure that the threat of challenges under investor protection mechanisms do not deter, delay or block public health improvement measures;
 - maintain high standards for imports to protect consumer health and the environment, and avoid raising barriers to trade with the EU for UK exports; and
 - protect the current flexibility of IPR, supporting affordable access to essential medicines in developing countries.

Should there be a failure to secure UK trade agreements with current partners, including the EU – or, at a minimum, transitional arrangements with these countries to maintain favourable market access from March 2019 – the UK would be forced to trade under WTO rules. This would increase taxes on exports in some sectors, including agriculture, and would likely have a significant cost for the UK economy. Mounting pressure to avoid this scenario given the increasing likelihood of a ‘no deal’ Brexit, and the current lack of adequate Parliamentary scrutiny of trade negotiations, create a significant risk of Ministers entering into agreements that promote economic benefits over health.

Background

Globalisation has created a world characterised by increased movement of people, goods, and information across national borders. As a result, most sectors rely on global supply chains to deliver goods and services to the public. ITAs (International Trade Agreements) are critical to managing this cross-border integration. These agreements aim to ensure that countries behave fairly towards one another in a competitive market by, for example, agreeing safety standards on goods that cross borders, setting quotas to protect sensitive sectors and setting out how disputes should be settled. ITAs are, however, subject to strong commercial interests and there is limited transparency around their negotiation. Once signed, they are legally binding, and their length and complexity means that they are difficult to change or reverse.

Modern trade agreements have become key global instruments driving policy on a range of issues, including environmental protections, IPR (intellectual property rights), labour rights and the procurement and provision of public services. Many areas within the scope of ITAs impact on the healthcare sector as well as health equity and the wider social determinants of health, with significant implications for the health of people both within the UK and globally.

Key impacts of ITAs on health include:

- Inclusion of health services (e.g. NHS) in ITAs, enabling foreign organisations to provide healthcare services and potentially locking in privatisation
- Investor protection and dispute resolution mechanisms, potentially deterring or delaying regulations designed to protect public health
- Entry of foods and other products with lower animal welfare or environmental standards, posing a potential risk to consumers
- Strengthening of IPR, limiting access to generic versions of essential medicines needed in low-income countries

The UK's role in international trade

For over 45 years, the UK's international trade policy has been determined by the EU. During this period, the UK has benefitted from frictionless trade within the EU's single market and been governed by shared policies on trade with third countries (countries outside the EU/EEA) through the EU customs union (see Box 1). Under this system, trade agreements with third countries are negotiated by the EC (European Commission) on behalf of all member states.

Box 1 – The EU single market and customs union

Single market

Members of the EU's single market (member states plus Norway, Iceland, Liechtenstein and Switzerland) abide by four freedoms: unhindered movement of goods, services, capital and people across borders within the bloc. Taxes and quotas on traded items are abolished within the single market. Members minimise 'non-tariff barriers' to trade through harmonisation of standards and mutual recognition, such as mutual recognition of professional qualifications allowing free movement of doctors between countries.

Customs union

Separate from the single market, the EU member states (and Monaco) form a customs union with the same tariffs, quotas and standards on imports from nations outside the union. Tariffs are charged on imports when they pass through customs inspections at the first EU port of entry. After that, imports are freely traded between members.

Norway, Iceland, Liechtenstein, and Switzerland are not part of the EU customs union. This means that their domestic products can be freely traded within the single market, but any imports from third countries will be subject to EU inspection and taxes when they enter the customs union.

A key driver for Brexit has been the UK Government's ambition to develop an independent trade policy and to strike its own trade deals with countries outside Europe. However, a significant proportion (11%-36%^a) of UK exports are currently traded via agreements at the EU level.¹ The UK would need to take action to avoid losing its favourable access to these markets after March 2019. Failure to do so would force the UK to trade under WTO rules, resulting in increased taxes on exports in some sectors. In the event of a 'no deal' Brexit, it is estimated that trading with both the EU and third countries under WTO rules could cost the UK an additional £80 billion per year by 2033.^{2,3}

To temporarily extend EU trade agreements during a transition period, or permanently replace them with similar UK agreements, the UK would need to negotiate 40 agreements with up to 70 third countries.⁴ Many countries would use this as an opportunity to seek more favourable conditions for their own exports, such as lowering regulatory barriers on product safety standards.^{5,6} The UK is likely to come under similar pressures if it seeks to negotiate ambitious new trade agreements with large economies, such as the US (United States) and China. The EC estimates that it takes a minimum of 2-3 years to finalise an ITA,⁷ which raises serious concern about the capacity of the UK's new DIT (Department for International Trade) to negotiate so many trade agreements before the end of the proposed transition period in December 2020.

Although the UK Government is not able to officially negotiate trade agreements until it has left the EU, it is currently holding confidential trade discussions with 21 countries. A full list of the countries has not been released, but DIT has launched several public consultations on future agreements with its preferred trading partners, including the US, Australia and the 11 nations^b signed up to CPTPP (the Comprehensive and Progressive Agreement for Trans-Pacific Partnership).⁸

a 11% of UK exports are to non-EU countries with a fully implemented ITA; a further 25% of UK exports are to non-EU countries with an ITA that has been nearly completed or is complete pending ratification.

b Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam

There is also a worrying lack of Parliamentary scrutiny over the process set out in the Trade Bill, which is the primary legislation intended to enable the roll-over of existing ITAs. The Bill does not give MPs the automatic right to vote on trade deals or to read the actual negotiating texts, meaning that they would have a much more limited role than EU Parliamentarians currently do. At present, this leaves Parliament without any legal mechanism to directly influence or permanently block trade agreements.⁹ The limited role of the devolved administrations is also of serious concern given that future trade agreements may affect devolved matters, including provision of healthcare services, animal welfare and environmental policies. We believe this creates a significant risk that Ministers could agree to substantial changes while transitioning from EU to UK trade agreements, which could promote economic benefits over health.

We urge Parliament to amend the Trade Bill to ensure that it contains adequate measures for parliamentary oversight of trade negotiations, including scrutiny of negotiating texts and an automatic positive vote on final agreements, in line with the rights and responsibilities of its EU and US counterparts.

Potential health implications of the UK entering into ITAs with non-EU nations

A number of health actors, including the Faculty of Public Health,¹⁰ the Royal College of Paediatrics and Child Health,¹¹ the Brexit Health Alliance¹² and the European Public Health Alliance,^{13 14} have raised concerns about the potential for future UK trade agreements with non-EU nations to negatively impact public health and the healthcare sector. The World Medical Association recognises that trade agreements have the potential to enhance health – if controls are put in place to ensure that economic gain is not given priority over health protection and improvement.¹⁵ We have identified the following key areas of risk for health within future UK trade agreements:

– Inclusion of healthcare services in ITAs

We have serious and longstanding concerns about the inclusion of healthcare services within the scope of ITAs. This would risk healthcare service provision being outsourced to private companies based abroad, further contributing to the rising proportion of publicly funded care being delivered by the independent sector.

At present, EU law requires publicly funded services above a certain value to be procured through competitive tendering, opening up the market to private providers. This legislation prohibits anti-competitive behaviour, including cooperation between the providers and commissioners of those services. Although individual member states can exempt certain services, including publicly provided healthcare, from these rules, the UK Government has chosen to apply them to the NHS in England, alongside domestic competition legislation such as the Health and Social Care Act 2012. The Governments of Scotland, Wales and Northern Ireland have chosen to restrict competition in their health services.

As a result, all NHS services in England are currently required to be put out to competitive tender. These market-oriented policies contribute to fragmentation of services and create significant barriers to innovative and cooperative models of care that could help improve the health of local populations. The UK Government could choose to eliminate the requirement to procure NHS services in England through competitive tendering after it leaves the EU.¹⁶

However, as the UK seeks to negotiate ITAs with countries like the US, where healthcare is largely provided on a private basis, there is a risk that the UK could agree to similar requirements on procurement. We believe that the inclusion of healthcare services in future ITAs could therefore prevent the rollback of competition and privatisation in the English NHS, and potentially lead to its expansion within England and to the devolved nations. During the TTIP (Transatlantic Trade Investment Partnership) negotiations between the EU and US, health and public health services were eventually excluded from the scope of the agreement.¹⁷

We welcome the UK Government’s assurance that “the values and principles which have underpinned our National Health Service for the past 70 years [will] not be traded away with the US or any other trade partner we might have”.¹⁸ However, we call on the Government to go further by making a firm commitment to exclude the provision of UK healthcare services from the scope of all future trade agreements, ideally through a hard ‘carve-out’.

– Investor protection and dispute resolution mechanisms

Many ITAs include investor protection or dispute resolution mechanisms. These mechanisms allow foreign private companies to sue national governments for compensation if they believe their investments have been negatively impacted by public policy decisions. These legal challenges take place outside the normal court system and judgments generally cannot be appealed. We believe that there is a significant risk these mechanisms could be used to block future rollback of privatisation in the English NHS, and that they could negatively impact the development of new models of care.

There is a recent precedent for this: a Dutch private health insurance firm sued the Slovakian Government under an investor protection agreement after it decided to reverse liberalisation of the national sickness insurance market.¹⁹ The Slovakian Government lost the case and was ordered to pay €22.1 million in damages to the company.

We are concerned that there is also a risk of these mechanisms being used by foreign investors to deter or block – or gain profits from – measures intended to improve public health. A 2013 review identified 40 legal challenges to health and environmental protection measures brought under these mechanisms in areas such as food safety and tobacco control.²⁰ More recently, the tobacco company Philip Morris used a dispute resolution mechanism to sue the governments of Australia and Uruguay as a result of their tobacco plain packaging initiatives.^{21 22} Although neither case was successful, we are aware that even unsuccessful cases can be extremely expensive.²³ This high cost could potentially deter governments from developing other initiatives in the future – and increase the burden of ill health if the introduction of public health measures is delayed.

The UK Government has given assurances that the threat of investor protection claims will not alter its plans to introduce public health measures.^{24 25} However, despite these assurances, we believe that including these mechanisms in any future UK trade agreement risks limiting this and future governments’ ability to introduce health improvement regulations and initiatives. This could include, for example, legal challenges to extending the minimum unit alcohol pricing rules recently introduced in Scotland to other UK nations in the future. This risk is even greater for potential future trading partners with less powerful economies and regulatory systems, which may experience pressure from UK-based companies wishing to export unhealthy products, such as foods with high sugar or fat content.

We therefore call on the UK Government to commit to completely exclude investor protection mechanisms from its future trade agreements. UK ITAs should seek to promote health by explicitly guaranteeing the right to restrict trade in the interest of public health and the healthcare sector, in line with the protections provided under current EU trade agreements.

– Entry of foods and other products with lower standards

The British public are currently protected by high health and safety standards on foods and other imported products. These standards are agreed at EU-level and shared by all EU member states. EU policy in this area is guided by the precautionary principle.²⁶ This allows the bloc to take precautionary action against potential threats to human, animal or plant health, or to the environment if scientific analysis has indicated possible risk but the results are inconclusive. Precautionary action can include withdrawing an item from the market or banning it from being imported into the EU. Other countries, notably the US, may require greater certainty that a product is harmful before taking action.²⁷

WTO rules on TBT (technical barriers to trade) require members to show that their standards are not “more trade-restrictive than necessary to fulfil a legitimate objective”.²⁸ These rules can be used to challenge precautionary health and environmental protection measures, and countries may face economic sanctions as a result. Some trade agreements, including the trans-Pacific CPTPP agreement, which the UK is currently consulting on the possibility of joining, go even further to avoid TBT. They do this by locking in the least restrictive common standards and requiring cooperation between national and commercial stakeholders on new regulations.²⁹ This can greatly limit governments’ freedom to implement new health improvement measures.

The EU, as one of the worlds’ largest markets, has the negotiating power to insist that any items it imports meet its high standards, and is able to absorb the economic cost of lost trade or sanctions that may result. The UK, however, accounts for just 3.85% of the global economy and would not have the same level of influence when negotiating future ITAs.³⁰ For example, Australia is already lobbying the UK strongly to allow import of hormone treated beef, which is banned in the EU for precautionary reasons, as a condition for early agreement on a trade deal.³¹ The US has also stated that divergence from restrictive EU food standards would be a necessary condition of any future trade agreement.³²

While variation in standards is sometimes considered purely technical, we have ongoing concerns that it can indicate weaker animal welfare and environmental standards, which can put human health at risk. For example, chlorine treatment of chicken in the US has received significant media attention. The actual health and safety implications of chlorine treatment are unclear, but the reasons for it are of greater concern. These include lower animal welfare and hygiene standards, which are linked to substantially higher rates of salmonella infection in humans in the US than in the UK.^{33 34}

Accepting any food imports into the UK, from the US or other third countries, which do not meet current high standards would raise significant barriers to trade with the EU. This is because UK food exports would need to be physically inspected at a ‘hard’ border. Recent internal impact assessments from Dover and Kent councils reveal serious gaps in the legal powers, infrastructure, human resource and funding needed to adequately inspect supply chains at UK ports, which would take several years to resolve.³⁵ There could be additional complexity in the devolved nations as many aspects of transportation, agriculture and animal welfare are devolved matters, and the land border between Northern Ireland and the Republic of Ireland poses a particular challenge. Moreover, according to the UK Government’s own analysis, the economic benefits of continuing a close and frictionless trading relationship with the EU far outweigh the potential benefits of aligning standards to trade more closely with the US – our second largest trading partner.³⁶

We welcome the UK Government’s promise that it will maintain “equivalent or higher standards when we have left the EU”,³⁷ and we are pleased to see industry lending its voice to support these goals.³⁸ However, we remain concerned that urgent pressure to agree trade deals may result in the UK accepting products with lower health and safety standards.

We call on the UK Government to preserve the current transparent, independent and evidence-based approach to product safety, ensuring that the highest standards of health and safety are maintained after Brexit. The Government should demonstrate its commitment to this approach by ruling out entering into any future ITAs that go beyond WTO TBT rules, risking a race to the bottom on standards for economic gain.

– Restrict affordable access to essential medicines through strengthening of IPR

In 2001, the WTO added provisions designed to support affordable access to essential medicines to its TRIPS (Trade-Related Aspects of Intellectual Property Rights) agreement.³⁹ These ‘TRIPS flexibilities’ offer several options for WTO members to legally procure generic versions of medicines that are still under patent – and therefore unaffordable in LMICs (low- and middle-income countries) where health burdens are highest. The growing global trend towards patenting new medicines means that the importance of TRIPS flexibilities is

likely to increase in the future.⁴⁰

A recent WHO (World Health Organization) analysis shows that TRIPS flexibilities have been used extensively, particularly to support routine procurement of essential medicines in LMICs.⁴¹ This has occurred despite high-profile opposition from countries with strong pharmaceutical lobbies, including the US and Switzerland. However, there has also been a worrying increase in ITAs containing provisions that limit the use of TRIPS flexibilities.⁴² These 'TRIPS-plus' provisions impose additional conditions that severely reduce their effectiveness, such as restricting the use of TRIPS flexibilities to emergency situations.⁴³

Although we recognise that pharmaceutical manufacturers need financial incentives to develop new medicines, we must not introduce measures that could allow commercial interest to take priority over public health. Affordable and timely access to new medicines is critical to effectively controlling established and emerging patterns of ill health globally.

We therefore call on the UK Government to reinforce generous TRIPS flexibilities in any future ITAs. The UK should commit, at a minimum, not to limit the use of TRIPS flexibilities through inclusion of TRIPS-plus or similar provisions in future agreements.

Key developments

- In February 2018, the UK Government stated that it would ask the countries it trades with under the EU's ITAs to treat the UK as an EU territory during its 21-month transition period (the 'Guernsey Model').⁴⁴ If this model is taken forward, it would allow more time for DIT to replace EU agreements with UK trade deals and permit greater scrutiny of any amendments. The EU has agreed to support this approach but will not make formal representations to its trading partners until the UK has signed a withdrawal agreement.⁴⁵ This leaves only a small amount of time to secure agreements to avoid a cliff edge of trade disruptions on Brexit day.
- On 12 July, the UK Government published its Brexit White paper outlining a new proposal for its future relationship with the EU. The proposal would split trade in goods from trade in services and create a free trade area with the EU for goods based on continued alignment with current standards and customs rules. This would avoid the risk of creating a hard customs border between Northern Ireland and the Republic of Ireland, a major obstacle to concluding a withdrawal agreement. EU negotiators, however, have flagged that the UK's proposal is not compatible with its own negotiating guidelines as it would not maintain all four freedoms required for single market access.⁴⁶ UK and EU Negotiators will continue to discuss the proposal ahead of a key EU leaders' summit on 20 October.
- On 16 and 17 July 2018, the Customs⁴⁷ and Trade⁴⁸ Bills received a third reading in the House of Commons. A number of key amendments to the Trade Bill were voted down, including those granting greater powers to devolved administrations and guaranteeing MPs an automatic positive vote on the final text of trade agreements. Although the Government did commit to creating primary, rather than secondary, legislation where needed to support implementation of ITAs, this will only apply in a limited number of cases. Many contentious aspects of trade agreements, for example, investor protection mechanisms, do not require implementing legislation. The Bills will be debated in the House of Lords on 4 and 11 September, respectively. The Customs Bill has been labelled as a supply bill and cannot be amended.
- On 18 July 2018, DIT launched four public consultations on its preferred future trading partners: the US, Australia and New Zealand, as well as possible entry into the recently concluded regional CPTPP agreement, which covers Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam.⁴⁹ The UK Government has committed to run a 14-week consultation before any new trade negotiation, in order to capture the views of the public, business and civil society.

Summary

Managing the flow of goods and services across borders in a way that promotes economic growth while protecting and, ideally, enhancing public goods, including health, is of vital importance in an increasingly interconnected world. If the final Brexit deal involves the UK leaving the EU single market and customs union, the UK would need to negotiate a significant number of trade agreements in order to maintain favourable access to global markets and limit the economic cost of Brexit. These trade agreements would substantially influence policies that affect public health and healthcare, in the UK and abroad. For the UK, there is a significant risk that economic pressure to secure trade deals could undermine the protections that the British public and the health sector have benefited from through membership of the EU. As the UK Government looks to develop its independent international trade policy beyond Europe, it will be critical to balance the potential economic benefits of trade against protection of public health and safety, and the NHS.

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British Medical Association

BMA House, Tavistock Square, London WC1H 9JP
bma.org.uk

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