

**Department for International Trade**

DIT Consultation Team  
Submitted via webform

26 October 2018

Dear Sir/Madam

**Consultation on the UK potentially seeking accession to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)**

**Which area does your organisation represent?**

Health

**How many members does your organisation represent in total?** (Please select only one item)

More than 10,000

**Have any of your members been in contact with your organisation about the UK joining the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)?**

Yes

**What does your organisation think would be the greatest benefits for individuals/sectors that you represent, or the UK as a whole, were the UK to join the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), and why?** (Please supply your answer and any supporting evidence below)

The BMA (British Medical Association) is a professional association and trade union representing and negotiating on behalf of all doctors and medical students in the UK. It is a leading voice advocating for outstanding health care and a healthy population.

The Association welcomes the opportunity to respond to this consultation on the UK potentially seeking accession to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).

Our members have 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, it is BMA policy 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.

We welcome the government's recognition that modern trade agreements act as global instruments driving policy on a range of issues, including environmental protections, intellectual property rights, labour rights and the procurement and provision of public services. We recognise that most sectors, including the healthcare sector, rely on global supply chains to deliver goods and services to the public. Trade Agreements are critical to fairly and safely managing this cross-border integration, and we are pleased that the UK Government has committed to keeping health protection and improvement central to its future negotiations. The BMA is a leader on fair and ethical trade in the healthcare sector and believes strongly that the UK Government should embed its domestic approach to modern slavery in supply chains in future trade agreements.

Many areas within the scope of trade agreements 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. As outlined in the consultation information pack, trade agreements have the potential to enhance health. However, this can only be achieved if controls are put in place to ensure that economic gain is not given priority over health.

Our key objective should the UK seek to join CPTPP is to safeguard the healthcare sector and ensure that the health of the public, both in the UK and globally, is prioritised. We have identified the following key areas in which protections are needed to achieve this outcome:

#### Appropriate scrutiny

Parliamentary scrutiny is a critical safeguard against the potential negative impacts on health and the healthcare sector if the UK seeks accession to CPTPP. As negotiations on CPTPP have already been completed, there is limited scope for the UK to negotiate. Appropriate scrutiny powers for Parliament would help to ensure that the UK does not make concessions in order to join CPTPP which prioritise economic benefits over health protection and improvement.

At present, the UK Parliament does not have adequate powers to effectively guard against these risks. Powers to guide and scrutinise international treaties, including trade agreements, which are currently held by EU legislators on behalf of the UK and other member states, must therefore be returned to the UK Parliament before any discussions on joining CPTPP begin. These include the right to define the scope of possible concessions in advance of the discussions, full access to negotiating texts and an automatic positive vote on the final joining agreement.

These changes would require a significant overhaul of the current process for making and acceding to international treaties, including trade agreements. As part of its review process, in addition to greater parliamentary scrutiny, we would want the UK Government to give serious consideration to how the devolved administrations as well as other key stakeholders, including the health sector, can be involved

in a meaningful, timely and transparent fashion. These stakeholders would provide vital expertise, which could minimise the risk of liberalising aspects of the UK's trade policy in ways that negatively impact health.

#### Inclusion of healthcare services

An essential protection for the healthcare sector is a hard 'carve out' on the provision of healthcare services, particularly the NHS. Allowing sections of the NHS to be outsourced to private companies based abroad would contribute to the worrying increase in publicly-funded care being delivered by the independent sector.

We are aware that CPTPP is similar in many respects to the TTIP (Transatlantic Trade Investment Partnership) agreement between the EU and United States. During the TTIP negotiations, risks to the NHS were recognised and health and public health services were eventually excluded from the scope of the agreement (1). The UK will not be able to negotiate any additional 'carve-out' for healthcare services if it joins CPTPP. The Government must therefore undertake further analysis and provide binding assurances as to whether the provision of healthcare services can be excluded under CPTPP as it is currently drafted (2). We do not believe that the NHS is adequately protected under CPTPP.

To protect the UK's right to regulate its own public services, the healthcare sector should also be exempt from rules on competition that could lock in competitive procurement of publicly funded healthcare services in England or extend it to the devolved nations. This approach is market-driven rather than health-driven and contributes to fragmentation of services. This creates significant barriers to innovative and cooperative models of care that can help improve the health of the country. As above, the UK Government would need to assess whether publicly provide healthcare services can be exempt from competition legislation under CPTPP.

#### Investor protection and dispute resolution mechanisms

We are aware the CPTPP contains an ISDS (investor-state dispute settlement), which the UK would be party to if it joined the agreement. These mechanisms are frequently used to challenge health and environmental protection measures in areas such as food safety and tobacco control, if investors believe their profits will be negatively impacted (2). They could also be used to block development of new models of care by preventing future rollback of privatisation in the English NHS.

We recognise that CPTPP's ISDS has attempted to mitigate some of these issues but do not believe it affords sufficient protection of the right to regulate to protect and promote health (2). At a minimum, we believe that policies aimed at improving health should be excluded from the scope of any ISDS mechanism to which the UK is subject. The UK Government should also secure legally binding assurances from its trade partners explicitly affirming the right to restrict trade in the interest of public health and the healthcare sector.

#### Foods and other products with lower standards

The UK's product safety standards, including on food items, are currently amongst the highest in the world. The UK, as an EU member state, uses the precautionary principle to assess risk and inform safety standards and regulation to promote public health. This approach requires manufacturers to prove a product is safe. It ensures that human, animal and plant health, and the environment, are at the centre of regulatory decision-making. CPTPP contains clauses that run a significant risk of undermining the UK's ability to apply the precautionary principle (2). The UK should not join CPTPP if it is unable to ensure that our current high standards can be maintained.

CPTPP also contains provisions on both technical barriers to trade and regulatory cooperation that go beyond WTO (World Trade Organization) rules (2). We strongly oppose the UK committing to any measures as part of a future trade agreement that require regulatory cooperation between national and or commercial stakeholders on new regulations. This could greatly limit future Governments' freedom to implement new health improvement measures. It risks a race to the bottom on standards, in addition to restricting the UK's right to regulate in the interests of health. We believe that the WTO's rules on technical barriers to trade are sufficient to protect commercial interests from unduly trade-restrictive measures.

#### Intellectual property rights and affordable access to essential medicines

It is vitally important that the UK retains its current ability to support lower-income countries to affordably access essential medicines using so-called 'TRIPS flexibilities' (i.e. special WTO provisions for lower-income countries to legally procure generic versions of medicines that are still under patent – and otherwise unaffordable). Timely access to new medicines is critical to effectively controlling established and emerging patterns of ill health globally. The UK Government should therefore ensure that new trade agreements reinforce generous TRIPS flexibilities, or at a minimum, do not restrict their use.

The UK is a major pharmaceutical-producing nation and a leading global health actor. The UK should not limit the freedom of future Governments to set and amend domestic legislation, or enter into agreements with other countries, regarding production and export of generic medicines under TRIPS flexibilities. To retain this flexibility the UK must not join any existing trade partnerships that include measures which could strengthen patent protections for pharmaceuticals. These include restrictions on the situations in which TRIPS flexibilities can be used, which can undermine their use in low-income countries to support routine procurement of essential medicines (3).

#### References

1 Khan, et al. (January 2015) London School of Economics and Political Science  
The transatlantic trade and investment partnership: international trade law, health systems and public health. Available online: <<http://www.lse.ac.uk/business-and-consultancy/consulting/assets/documents/the-ttip-international-trade-law-health-systems-and-public-health.pdf>>

2 Labonté, R., Schram, A., & Ruckert, A. (June 2016), Globalization and Health, The Trans-Pacific Partnership Agreement and health: few gains, some losses, many risks. Available online: <<http://doi.org/10.1186/s12992-016-0166-8>>

3 Ellen, F.M, et al. (2018), Medicine procurement and the use of flexibilities in the Agreement on Trade-Related Aspects of Intellectual Property Rights, 2001–2016. Available online: <<http://www.who.int/bulletin/volumes/96/3/17-199364.pdf>>

**What concerns, if any, does your organisation have about the UK potentially joining the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), and why? (Please supply your answer and any supporting evidence below)**

While we welcome the UK Government's assurances that, following Brexit and in future trade negotiations, the NHS and the right to regulate public services will be protected, and that the same or higher standards will be maintained, we do not consider these assurances sufficiently concrete or binding.

We are concerned that, following Brexit and particularly in the event of a 'no-deal' scenario, the UK will be under significant economic pressure to secure new trade agreements that go some way to minimise Brexit's cost, even at the expense of policies that protect and promote health. Our concerns relate to the potential negative impacts of trade on the health of people both within the UK and globally. For example, it is paradoxical for the NHS to provide healthcare using instruments and resources which are manufactured in conditions that flout basic labour rights, including through use of child labour. The current members of CPTPP have diverse labour standards and track records of upholding labour rights. Entering into a free trade agreement with countries that have poorer labour standards could open UK supply chains to goods produced under unethical conditions, and further entrench systematic labour rights abuses abroad.

We are particularly concerned about the possibility of the UK joining CPTPP, given its similarities to the contested TTIP agreement and that negotiations on CPTPP are already complete. The UK would therefore be unable to negotiate the controls and protections necessary to ensure that economic benefits are not given priority over health. We believe there is a significant risk that joining CPTPP could undermine protections that the British public and the health sector have benefited from through membership of the EU. We provide further detail of our concerns, and the policy safeguards we have called for to mitigate them, below.

#### Appropriate scrutiny

At present there is a worrying lack of Parliamentary scrutiny over the process for negotiating international treaties, which currently leaves Parliament without any legal mechanism to directly influence or permanently block trade agreements (4). Scrutiny powers currently held by EU legislators must be returned to the UK Parliament, rather than retained by the executive, before beginning any

discussions on joining CPTPP. We believe there is a risk of Ministers entering into agreements that promote economic benefits over health if these powers are not returned to Parliament after Brexit.

We have further concerns about the limited role of the devolved administrations given that entering existing trade relationships is likely to affect devolved matters, including provision of healthcare services, animal welfare and environmental policies. We do not believe the current consultative framework set out by the Department for International trade provides for adequate involvement of the devolved parliaments. We are similarly concerned that there is not a mechanism for formal engagement with the health sector, including health ministers but also civil society actors.

#### Inclusion of healthcare services

We have serious and longstanding concerns about the inclusion of healthcare services within the scope of trade agreements, which could open the NHS up to further creeping privatisation if healthcare service provision is outsourced to private companies based abroad. Our members – the UK’s medical workforce – have consistently opposed such private sector provision of NHS care, which has a destabilising and fragmentary effect on NHS services, and frequently represents poor value for money.

We are particularly concerned that the current wording of CPTPP would not effectively exclude the English NHS from the scope of the agreement, as it only excludes public services which are not provided through a competitive process. We are further concerned that, if healthcare services are included, it could prevent future rollback of competition and privatisation in the English NHS, and potentially lead to its expansion within England and to the devolved nations.

#### Investor protection and dispute resolution mechanisms

We have significant concerns about legal challenges brought under investor protection and dispute resolution mechanisms, such as the ISDS (investor-state dispute settlement) provisions within CPTPP. We believe that these mechanisms could be used by foreign investors to deter or block – or gain profits from – measures intended to improve public health. There are recent examples of this taking place in Australia and Uruguay, where the tobacco company Philip Morris used a dispute resolution mechanism to sue the governments of both countries as a result of their tobacco plain packaging initiatives.

While we welcome the UK Government’s assurances that the threat of investor protection claims will not alter its plans to introduce public health measures, and that it has never lost a challenge brought under such mechanisms, we are aware that even unsuccessful cases can be extremely expensive (5). We are concerned that this cost could be high enough to potentially deter future Governments from developing health promotions initiatives, similar to tobacco plain packaging and minimum unit alcohol pricing – and increase the burden of ill health if the introduction of such public health measures is delayed or prevented.

We also have concerns that these controversial 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. We note a recent precedent in which the Slovakian Government was ordered to pay €22.1 million in damages to a Dutch private health insurance firm under an investor protection agreement after it decided to reverse liberalisation of the national sickness insurance market (6).

#### Foods and other products with lower standards

We are particularly concerned that CPTPP contains chapters on both sanitary and phytosanitary measures and technical barriers to trade that go beyond WTO (World Trade Organization) rules (7). We note with extreme concern that both of these chapters are included within the scope of CPTPP's ISDS mechanisms.

These chapters would risk locking in the least restrictive common standards and opening the UK up to legal challenges on safety standards, particularly on foods, that go above them. We are concerned that these requirements would severely weaken the UK's ability to use the precautionary principle. We are similarly concerned that the chapter on technical barriers requiring cooperation between national and commercial stakeholders on new regulations would undermine the UK's right to regulate.

Product standards and regulations as well as sanitary and phytosanitary measures differ significantly between the UK and the 11 nations already party to CPTPP. 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, Australia and New Zealand both permit chlorine treatment of chicken meat. While this may not in and of itself be a health hazard, the reasons for this practice are of greater concern. These include lower animal welfare and hygiene standards, which are linked to rates of salmonella infection in humans that are far higher than in the UK (8, 9, 10).

In addition to the concerns such imports raise for human health, we are aware that accepting any imports into the UK which do not meet current high standards would raise significant barriers to trade with the EU. Such regulatory divergence would mean that UK 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 (11).

#### Intellectual property rights and affordable access to essential medicines

We are deeply concerned by the global increase in trade agreements containing provisions that limit the use of TRIPS flexibilities (12). These 'TRIPS-plus' provisions impose additional conditions that severely reduce their effectiveness, such as restricting the use of TRIPS flexibilities to emergency situations. CPTPP contains such provisions, although these were suspended when the United States left the agreement (13). We remain concerned that these provisions could be reactivated at a later date, particularly if the United States wished to re-join the partnership.

Although we recognise that pharmaceutical manufacturers need financial incentives to develop new medicines, this must not lead to measures that allow commercial interest to take priority over public health. The UK Government would risk undermining Britain's role as a global leader on health if accession to CPTPP curtailed its support for TRIPS flexibilities and strengthened intellectual property rights such that lower-income countries were no longer able to affordably access essential medicines.

### References

- 4 Lang, A. (February 2017), House of Commons, Parliament's role in ratifying treaties. Available online: <<https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN05855>>
- 5 London School of Economics Enterprise (April 2013), Costs and benefits of an EU-USA investment protection treaty. Available online: <<https://www.italaw.com/sites/default/files/archive/costs-and-benefits-of-an-eu-usa-investment-protection-treaty.pdf>>
- 6 Court of Justice of the European Union (March 2018), The arbitration clause in the Agreement between the Netherlands and Slovakia on the protection of investments is not compatible with EU law. Available online: <<https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-03/cp180026en.pdf>>
- 7 Labonté, R., Schram, A., & Ruckert, A. (June 2016), Globalization and Health, The Trans-Pacific Partnership Agreement and health: few gains, some losses, many risks. Available online: <<http://doi.org/10.1186/s12992-016-0166-8>>
- 8 Australian Government Department of Health (2018) National notifiable diseases system. Available online: <[http://www9.health.gov.au/cda/source/rpt\\_4.cfm](http://www9.health.gov.au/cda/source/rpt_4.cfm)>
- 9 Public Health Surveillance (2017) Human Salmonella isolates 2016. Available online: <[https://surv.esr.cri.nz/enteric\\_reference/human\\_salmonella.php?we\\_objectID=4529](https://surv.esr.cri.nz/enteric_reference/human_salmonella.php?we_objectID=4529)>
- 10 Public Health England (May 2018), Salmonella data 2007 to 2016. Available online: <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/711972/salmonella\\_data\\_2007\\_to\\_2016\\_may\\_2018.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/711972/salmonella_data_2007_to_2016_may_2018.pdf)>
- 11 Dover District Council (July 2018), The potential impact of Britain leaving the European Union (EU) on the Dover district. Available online: <[https://www.scribd.com/document/385008556/Dover-District-Council-Brexit-impact-assessment?secret\\_password=cQlpLN1gw7zWwFRT6ixz#from\\_embed](https://www.scribd.com/document/385008556/Dover-District-Council-Brexit-impact-assessment?secret_password=cQlpLN1gw7zWwFRT6ixz#from_embed)>
- 12 The British Medical Journal (December 2011), Developing countries are not making the most of TRIPS flexibilities because of political pressure. Available online: <<http://www.bmj.com/content/343/bmj.d7706>>

13 New, W. (March 2018), New TPP Still Most Advanced IP Trade Agreement Ever, Think Tank Says. Available online: <<http://www.ip-watch.org/2018/03/09/new-tpp-still-advanced-ip-trade-agreement-ever-think-tank-says/>>

**Which of these areas of a free trade agreement best describe the priorities that you have outlined above?** (Please select all that apply)

Custom Procedures  
Products Standards, Regulation and Certification  
Sanitary and Phytosanitary Measures  
Services  
Competition  
Public Procurement  
Intellectual Property  
Investment  
Labour and Environment  
Trade Remedies and Dispute Settlement

We hope that our submission is useful – please do not hesitate to contact us for more information if required.

Yours sincerely



Raj Jethwa  
Director of Policy