

CAN THE NHS BE MADE EXEMPT FROM THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP (TTIP)?

A briefing paper from *Keep Our NHS Public*

November 2015

[Addendum July 2019: this briefing was written in 2015. It continues to hold acute relevance for the situation in 2019 and beyond. For today, where you see 'TTIP' please read 'new generation trade deals' – with the US, other countries or trading blocks, and pre- or post-Brexit]

KEY POINTS

- Despite reassurances to the contrary, there is no certainty that the NHS will be excluded from TTIP and other new generation trade agreements;
- If TTIP is agreed, the NHS needs to be excluded from the whole treaty so as to ensure the UK government's freedom to regulate, and to ensure the wise use of public resources and equity in access to health services, including affordable access to new medicines.
- The NHS has to be seen in the broader context of the integration of health and social services and of ensuring a high level of health protection, health promotion and action on social determinants of health.
- This needs to apply across all chapters in trade agreements, and effective exclusion should not only be made for services and investment liberalisation, but also for investment protection, government procurement and with respect to any new negotiations on domestic regulation, intellectual property rights, pharmaceuticals, medical devices and regulatory cooperation.
- **We suggest the clause below to be inserted in TTIP, in the event of its passage, to ensure a general exclusion for health and social care services from all of the treaty's measures:**

"Nothing in the TTIP shall be construed to apply to any measures, including regulation and expropriation, adopted or maintained by a party to the agreement with respect to health care, health services, health insurance, social care, social care services, social insurance, public health measures, including health protection, promotion and occupational health and safety, and to the safeguarding of equal, safe and affordable access to new health technologies and products".

INTRODUCTION

TTIP, the trade and investment agreement being negotiated between the European Union (EU) and United States (US), is essentially concerned with 'liberalisation'- the opening up of opportunities to overseas investors, the permanent removal of trade and non-trade barriers and the protection of investment.

If TTIP is agreed, it can be expected to have wide ranging effects on health and health care. For example, it could restrict national governments' freedom to regulate for health, as we have seen with the challenge from Philip Morris to Australia's plain packaging law on tobacco.¹ Intellectual property clauses could extend patent protection for drug companies, delaying access to generic medications and raising the NHS's drug bill. 'Harmonising' EU and US regulations on food safety, toxic chemicals, or labour rights could have worrying consequences for the UK public's health. These effects, as well as the constraints on regulation, will have serious implications for NHS costs and ability to deliver services.

So although this paper concentrates primarily on TTIP and the NHS (because that is where the public debate is currently focused), the wide-ranging implications for health and health care arising from across the different chapters of TTIP mean, ultimately, that the NHS cannot be treated in isolation. In addition, the NHS cannot be understood as a neatly bounded entity – as proposals for the integration of health and social care demonstrate.

WHAT WILL TTIP MEAN TO THE NHS?

The NHS - originally set up as a system of comprehensive, publicly funded, publicly provided, and publicly accountable health services available to all - is becoming increasingly fragmented and marketised following the Health and Social Care Act (HSCA) of 2012. TTIP will extend this process: new markets will be created for the private sector by opening up public services and government procurement contracts to unrestricted competition from wholly or partly US-owned, profit-driven corporations.

Private health companies, many of which tried to prevent ObamaCare in the US, see the public health services of Europe and the budget for the NHS as vast business opportunities, ripe for exploitation. With TTIP, under the 'national treatment' rule of trade-in-services,² **U.S. health care providers would be given an equal footing with those in the United Kingdom**, including having equal access to tax breaks and government subsidies. However, **public sector providers**, not having the massive resources that enable large corporations to respond to invitations to tender, would be **substantially disadvantaged in the competitive tendering process**.

¹Koivusalo M. Policy space for health and trade and investment agreements. *Health Promotion International* Vol 29, No S1 (2014).

²The World Trade Organisation's principle of **national treatment** is a general prohibition on the use of taxes and regulatory measures that give protection or advantage to domestic companies.

In addition, if NHS services are opened up to transnational investors through TTIP, the commitment to 'market access'³ extends to maintaining this opening: what has been liberalised will become permanent. The UK HSCA effectively liberalises the market via compulsory competitive tendering, and so **a marketised NHS will become irreversible under TTIP.**

Many free trade agreements include an investor protection measure (such as Investor State Dispute Settlement or ISDS) to protect the foreign investments that corporations make in countries that are party to the agreement. Such measures give overseas investors the unique right to undermine national laws and by-pass domestic courts by using special tribunals to directly sue the host country's government if it introduces any measure that may damage the investor's profits.

The inclusion of investor protection measures in TTIP will give corporations the power to sue any public sector organisation (such as a clinical commissioning group) or government (and ultimately the tax payer) that threatens their corporate interests, including any potential loss of future earnings from, say, new safety regulations. Where investment protection (typically ISDS) has been included in other trade and investment deals, it has not only led to substantial pay-outs in compensation from governments to transnational corporations (e.g. \$1.77 billion was awarded to US oil company Occidental Petroleum against Ecuador when it terminated a contract for oil production in the Amazon), but it has created a 'chill effect', deterring governments from attempting to legislate in scenarios where there is a fear of being sued. Critically, in the case of TTIP, it is inevitable that this fear will deter any future government from repealing the HSCA, however disastrous this is proving to be for our health services.

WHAT ARE WE BEING TOLD ABOUT NHS INCLUSION?

In 2013, in response to a question in the House of Commons, David Cameron implied that health services are not exempt from TTIP, saying "I am not aware of a specific exemption for any particular area" but he thought the NHS would "be treated in the same way in relation to EU-US negotiations as it is in relation to EU rules".

In 2014, in a letter to Keep Our NHS Public, a Department of Health (DoH) spokesperson stated that excluding health from TTIP negotiations was not thought to be in the UK's interests. In addition, it was stated that "the further liberalisation of the health services has not been a focus of the negotiations" which could mean that health services remain in a state of limbo, without adequate protection from TTIP.

In May 2014, the Department of Business Innovation and Skills (BIS) was saying of TTIP that the government "will be looking carefully at all aspects, including health" (Lord Livingston, May 2014), while Vince Cable said "there is nothing proposed in TTIP that will lead to the privatisation of the NHS" (May 2014) – a disingenuous comment given that the NHS is already being privatised by other means.

³**Market access** refers to the conditions, tariff and non-tariff barriers set by countries for the entry of specific goods and services into their markets.

In June 2014, as the NHS became a central focus of opposition to TTIP, there followed attempts to suggest that the NHS *will* be protected. For example, during Prime Minister's Questions, David Cameron said, "... my understanding is that the NHS is not at risk, but I understand that people believe it could be, so we need to set out why we do not think that that is the case and what the negotiations will consist of." This clarification has not yet materialised.

In July 2014, a 'leaked' letter from the EU's chief TTIP negotiator, Garcia Bercero, to the Chair of the All Party Parliamentary Group on TTIP implied that the NHS could be protected or 'carved out' from TTIP. It said "Although health services are in principle within the scope of these agreements and ongoing negotiations, we are confident that the rights of EU member states to manage their health systems according to their various needs can be fully safeguarded."⁴ Mr. Bercero is undoubtedly correct to say that the UK will still have the right to manage the NHS if TTIP is agreed. But what he fails to mention are the prohibitive consequences should the UK chose to exercise this right. For example, in the context of any attempt to reverse the privatisation of the NHS, a provision for investment protection within TTIP (as explained previously) would allow US healthcare providers who have entered the NHS 'market' to sue any UK government for expropriation, with the chance of winning compensation substantial enough to threaten the UK's financial stability.

ARE HEALTH SERVICES ACTUALLY INCLUDED IN TTIP?

While statements from official sources have been contradictory, a better indication of whether the NHS is included in TTIP comes from considering whether it is safeguarded under the World Health Organisation's General Agreement on Trade in Services (GATS).

According to the DoH, GATS has long governed whether or not public services are safeguarded from market access and, in the specific case of the NHS and TTIP, the government's stated intention has been to "maintain commitments that are broadly in line with our existing obligations under GATS",⁵ implying that, with TTIP, nothing will change and therefore the NHS is protected. However, the nature of our 'existing commitments' is ambiguous.⁶ **As a service "supplied in the exercise of government authority" (GATS Article 1:3b), the NHS was safeguarded from inclusion in trade agreements as long as it was "supplied neither on a commercial basis, nor in competition" (GATS Article 1:3c).** But once the marketisation of the NHS began (e.g. with the introduction of the purchaser/provider split), its protection could no longer be assumed. Any remaining doubt about the vulnerability of the NHS was removed in 2012, when Section 75 of the Health and Social Care Act (HSCA) ensured competition between service providers. The government's claim of "maintaining our

⁴<http://im.ft-static.com/content/images/c571cdbc-08f0-11e4-9d3c-00144feab7de.pdf>

⁵Department of Health written response to KONP letter, 2014

⁶Brussels Fails To Calm Fears That TTIP Won't Touch British Healthcare. Inside U.S. Trade - 07/25/2014, Vol. 32, No. 30

existing obligations under GATS” is therefore quite consistent with the inclusion of the NHS in TTIP.

Certainly, as mentioned above, Mr Bercero’s letter of July 14 acknowledges that health services are, in principle, on the table, while a leaked draft negotiation document seen in June 2014 says that medical services (including midwifery and physiotherapy) and dental services are included in TTIP.⁷

In addition, individual EU member states are still allowed to register their own special reservations for particular services in the liberalisation tables drawn up by the negotiators and submitted to the other side in the talks. Significantly, the UK government has only registered such a reservation in TTIP for ambulance services.⁸

CAN THE NHS BE MADE EXEMPT FROM TTIP?

As we have argued above, under current GATS rules, public services that are already subject to competitive tendering (as with the NHS after the HSCA) are **not** safeguarded from inclusion in trade agreements.

We have already argued that the NHS cannot be treated as if it is independent of other concerns, such as public health and social care. To remove any doubt about the protection of this broader complex of public services, and to ensure a general exclusion for health and social care services from **all** of the treaty’s measures it is proposed that, if passed, TTIP must include the following clause:

“Nothing in the TTIP shall be construed to apply to any measures, including regulation and expropriation, adopted or maintained by a party to the agreement with respect to health care, health services, health insurance, social care, social care services, social insurance, public health measures, including health protection, promotion and occupational health and safety, and to the safeguarding of equal, safe and affordable access to new health technologies and products”.

For further information, please contact nationaladmin@keepournhspublic.com

Addendum August 2019:

See also <https://keepournhspublic.com/campaigns/trade-agreements/>

⁷<https://www.opendemocracy.net/ournhs/john-hilary/on-ttip-and-nhs-they-are-trying-bamboozle-us>

⁸<https://www.opendemocracy.net/ournhs/john-hilary/on-ttip-and-nhs-they-are-trying-to-bamboozle-us>