

# The UK-US Free Trade Deal and the NHS

## Free-Trade deals are not about trade as we normally understand it

Trade in goods such as cars and electronics is a very small part of modern trade deals. This basic trade was agreed a long time ago with some exceptions such as agricultural products. Modern trade deals are largely about having common rules (standards, regulations, protections) and opening up public services to private corporations (always described as “liberalisation of services”). What the Centre for Economic and Policy Research said about the EU’s failed trade deal with the US (TTIP) back in 2016 is still true of any deal between the US and the UK: “As much as 80% of the total potential gains come from cutting costs imposed by bureaucracy and regulations, as well as from liberalising trade in services and public procurement.” It is this “liberalisation of services”, a pro-business policy pursued and enforced by all western governments, that is behind the UK government’s push to contract more and more health services to private companies and this will be a key part of any UK-US deal.

## The use of language to mislead

The UK government has begun negotiations with the USA over the free trade treaty. It has published an initial [document](#) setting out its aims in the negotiations. According to Boris Johnson, “There are no circumstances whatever in which this government or any Conservative government will put the NHS on the table in any trade negotiation. Our NHS will never be for sale.” The claim that “the NHS is not for sale” is legally true. The government “contracts out” NHS services to firms like Deloitte and Serco. These do not own the service, they provide it on behalf of the NHS. They can’t charge patients for the service. The real issue for NHS campaigners is the contracting out. The government claims that the NHS is not for sale but continues to contract health services to private corporations. The “not for sale” claim is just a way of misleading the public about what is really at issue.

Another common phrase used by governments in response to claims that public services are up for sale in international trade treaties is that the government “maintains the right to regulate” public services. In the UK government document, we find exactly this claim, that the government will “protect the right to regulate public services”. This assurance is completely misleading. All rights are limited by law. And in a legal treaty concerning trade in services, the right to regulate will be constrained by the terms of the legal treaty. So the government will have the right to regulate public services within the terms set down by the treaty. For example, most trade deals contain “standstill” or „ratchet” clauses that lock in existing levels of privatisation and make it difficult for any government to roll back privatisation or deregulation in the future. For instance, in 2007, the government of Slovakia changed the law on private health insurance. Under the new law private health insurance companies would have to reinvest their profits in the health system. The private companies used the terms of an investment treaty with the Netherlands to mount a legal challenge, claiming the law was illegal and demanding compensation for lost profits. There are many similar cases worldwide where corporations challenge government decisions in court based on the text of international trade agreements.

## US corporate access to the NHS

The real issue for NHS campaigners is whether US corporations will have the right to access the NHS and other public services markets in the UK in a way that will increase the trend towards greater privatisation.

Equal access for the US is part of the deal. The government document actually shows how this would happen in the part of the document setting out its aims in the area of public procurement. Public procurement is a big issue for the UK in its relations with the US. Many state governments in the US, when contracting public services, have a policy of "buy American" and the UK wants to get into that state procurement market in the US. The US procurement market is valued at £1.4 trillion and the UK currently has access to only a third of this market. The US, in turn, will want access to state procurement here. Will the US have the right of access to NHS and other public service contracts in the UK? Here's what the government document on procurement says:

"There were some comments calling for the UK's international procurement obligations to favour UK domestic suppliers, but the UK's domestic regulations, which apply to Government procurement, require contracting authorities and contracting entities to treat suppliers equally and without discrimination. These principles will continue now the UK has left the EU".

In other words, the US will have access to government procurement of services in the UK; US corporations will be treated "equally and without discrimination".

But all kinds of corporations have access to public service contracts. What difference would it make if US corporations were thrown into the mix? In fact, they are already part of the mix and have been for some time. Any US corporation that has a branch or subsidiary in the UK can tender for NHS contracts. US companies now run about 13 per cent of NHS mental health beds. Optum, headquarters in Minnesota, is a subsidiary of the US giant health corporation, United Health. Optum has contracts with many CCGs across England. In 2015, Optum won a place on NHS England's Lead Provider Framework (LPF) for commissioning support services. In 2014 Optum won a £150 million three-year contract to carry out acute commissioning services for 18 Wessex and the Thames Valley clinical commissioning groups, including Oxfordshire CCG (*Health Service Journal*, 14 April 2014).

If US corporations like United Health already have access to NHS contracts, what difference would a US-UK trade deal make? It would make a difference in two ways. Firstly, US corporate access to the NHS would be anchored in an international legal treaty which a future government could not change. During the past year there was some talk of the NHS moving away from competition and towards greater "integration". There was even a suggestion that the government would abolish the need for CCGs to tender services on the private market. But if US corporate access to public service contracts were written into a US-UK trade deal, it would be difficult to see how abolishing tendering in health services could happen without legal challenge.

Secondly, there's the hugely unpopular ISDS which sank TTIP. The Investor-State Dispute Settlement (now renamed, after the TTIP debacle, as Investment Court System) would allow US corporations to sue UK governments if, in the awarding of public service contracts, US corporations were treated unfairly, or governments didn't adhere to the treaty, or future corporate profits were negatively affected by new government regulations. This threat in itself has a powerful influence on government decision-making and the framing of new regulations.

## What's the solution?

Is it possible to protect the NHS from a trade treaty dealing with services? Yes, one way to do this is by “positive listing”. Only the services offered explicitly are ruled by the treaty. If health services were not listed, the NHS would be excluded from the treaty. The alternative is “negative listing” where everything is on offer unless it is explicitly excluded. This is the US favoured approach. In the negotiations between the EU and the US over TTIP, member states of the EU had the option to exclude specific services. The UK chose not to make any exclusions. So if the government really wanted to show that the NHS is not on the table, it could do that quite simply with a statement in the treaty that all health services were excluded from the treaty.

The US-UK trade deal will use negative listing. What we need to demand, therefore, is that the NHS should be explicitly excluded from the treaty. In the negotiations with the US over TTIP, the German government made such an explicit exemption which stated that it could adopt any measure in health and social services, even “where services may be provided by different companies or entities involving competitive elements”. This reference to competitive elements is important because free trade treaties have defined “public services” as “services carried out exclusively in the exercise of governmental authority” and not involving competition. As we know, competition for contracts has become a major feature of the NHS.

Finally, there's the question of public and parliamentary input into the whole process of agreeing and ratifying an international trade deal. Reports in the media have said that the Conservative government may limit or even [exclude parliamentary debate](#) on the terms of trade treaties after Brexit. It is entirely in keeping with the record of this government that it would attempt to limit parliamentary debate or involvement except for the final ratification of the deal which would be a simple take-it-or-leave-it vote.

Gus Fagan

20 May 2020

**Contact Oxford**

**KONP:**

***secretary.konpox@g***

***mail.com***

***<https://keepournhspublicoxfordshire.org.uk/>***