BMJ

BMJ 2013;346:f3574 doi: 10.1136/bmj.f3574 (Published 5 June 2013)

FEATURE

NHS REORGANISATION

Trade secrets: will an EU-US treaty enable US big business to gain a foothold?

A forthcoming trade treaty between Europe and the United States could have far-reaching implications for the NHS. Some observers believe the Health and Social Care Act was designed with this deal in mind. Will it add a new dimension to competition in the health service? **Peter Davies** reports

Peter Davies, freelance journalist

London

The European Union and the United States are about to agree terms for negotiating a free trade treaty. Prime minister David Cameron has made reaching agreement a priority for the meeting of the G8 countries on 17-18 June, which he is chairing. It is hoped the treaty will be signed by the end of 2014. The European Commission says it will be "the biggest bilateral trade deal ever negotiated,"[1] adding £73bn (€85bn; $110bn) a year to the EU's economy.

Officially titled the transatlantic trade and investment partnership (TTIP), this is the latest in a series of agreements to "liberalise" trade between wealthy nations. The EU has been negotiating a similar deal with Canada, the comprehensive economic and trade agreement (CETA), since 2009. These agreements focus on "harmonising" regulation and opening up markets: often this involves privatising public services. Though governments negotiate the agreements, they are designed to benefit large transnational corporations and protect foreign investors.

Cameron said of the TTIP talks: "Too often in trade, the voices defending special interests shout loudest. But it makes no sense to exclude vital parts of the economy. Everything is on the table with no exception. "[2]

Some health policy analysts have deduced that the NHS will be one of the markets the government opens to US interest. Since the Health and Social Care Act 2012 it has been primed to make ever more use of competition, in England at least. The result could be many more NHS services contracted out to private providers—particularly to US corporations.

Lucy Reynolds, research fellow at the London School of Hygiene and Tropical Medicine, says: "Transnational US corporations are driving this initiative. They've identified breaking open large public services budgets as a profit opportunity at a time when they're not making much money elsewhere. "

How could the agreement damage the NHS?

US companies already provide services to the NHS, so what difference would TTIP make? The most substantial threat is that a future government would be unable to reverse the policy of outsourcing health services to the private sector, even if it proved a disastrous and expensive flop.

Companies seek guarantees through trade treaties that their overseas investments will be protected. Recent agreements have seen the development of investor-state arbitration, which gives corporations the right to sue a government which acts in a way that could damage their profits. A policy decision or legislation that curtailed a company's profit expectations could lead to claims of "expropriation"—the wrongful seizure of private property by a government.

"Trade treaties extend the definition of private property to include non-tangible assets such as the expectation of future profits," explains David Price, senior research fellow at the Centre for Primary Care and Public Health at Queen Mary, University of London. "That's a very big extension. If a corporation says 'you've changed the law and it's damaged my profits,' they can use the law for compensation. The question then arises, what expectation of profits do you include? Common sense would suggest only profits from the lifetime of the contract. But that doesn't necessarily follow. I believe there are cases where the failure to re-let a contract has given rise to disputes."

In the first 16 years of the North American free trade agreement (NAFTA), the three signatories, Canada, Mexico, and the US, faced 66 such claims costing several hundred million dollars in compensation and legal fees. In at least two cases in the EU, governments seeking to reverse privatisations have faced claims arising from bilateral trade agreements.[3]

petergdavies@ntlworld.com

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A group of more than 50 lawyers and academics has warned of the dangers of "investor protection" measures in trade treaties: "The award of damages as a remedy of first resort in investment arbitration poses a serious threat to democratic choice and the capacity of governments to act in the public interest by way of innovative policy-making in response to changing social, economic, and environmental conditions."[4]

Marc Lalonde, an arbitrator in investment disputes and a former Canadian cabinet minister, has argued that investor protection leads to "policy chill, leaving governments reluctant to legislate around public services for fear of lawsuits from disgruntled foreign investors."[5]

The risk for the NHS would be that it could never afford to return a service in-house once it was contracted out. The threat of huge compensation claims would lock it into the expanded competitive market heralded by the Health and Social Care Act, even if evidence showed it was not in patients' best interests. There are also fears of challenges to pharmaceutical pricing policies, health technology assessment, and public health measures such as tobacco control.

Can the NHS avoid this threat?

The government could insist on excluding the NHS from market liberalisation and investor protection measures in TTIP. It would have to be precise about this as recent trade agreements such as CETA have used "negative listing:" anything not explicitly excluded in minutely defined terms is assumed to be included. Meri Koivusalo, visiting senior research fellow at the Open University, advises that this is best done as early as possible before the terms of the negotiations have been agreed.[6] That would, however, contradict Cameron's pledge that "everything is on the table."

Danger might linger even with an apparently explicit exemption, as commitments in trade agreements can be opaque and complex. Declarations in the preamble may be undercut by the treaty's articles. As Koivusalo points out, sweeping "horizontal provisions" in a treaty can still apply across all service sectors; "standstill clauses" can commit a government to avoiding new legislation incompatible with treaty commitments; and "ratchet mechanisms" can gradually bring previously excluded services into an agreement without further negotiation. The result is a legal minefield. The NHS must therefore be careful that promises of exclusion from TTIP do not bring false reassurance.

Are there any indications that healthcare will be excluded?

Members of the European parliament passed a resolution calling for "market access to public services" to be excluded and demanded a "firm assurance" that health would be protected. But European parliament resolutions are not binding on the European Commission, which is leading the negotiations. Nor is it clear how much influence the European parliament—or EU member states' own parliaments—will have on the detailed content of the agreement.

The BMA lobbied trade minister Lord Green, who assured council chair Mark Porter in a letter that, "The further liberalisation of the procurement of healthcare services is not a focus within these negotiations." He promised that officials would "carefully consider all potential implications and impacts to ensure that national interests, including those of the NHS, are protected."

But this offers merely a hint about negotiating strategy and is far from a guarantee valid in law. Linda Kaucher, a freelance researcher on international trade agreements, asks if any definitive, formal exemption exists and whether it covers market access and investor protection. "Healthcare provision is not part of the talks, but public procurement is—and that covers all government spending," she points out. The Department for Business, Innovation and Skills told the *BMJ* that the mandate for the negotiations is not yet finalised and everything in it remains confidential.

Was the Health and Social Care Act designed with TTIP in mind?

Some policy analysts are convinced the Act's main purpose is to set in train forces that will lead inexorably to privatisation; some argue further that it was conceived from the first as a necessary prelude to an EU-US trade agreement.

Reynolds says other European health services have seen similar "swift privatisations" recently, including Spain and Sweden. As a former chartered accountant who worked on privatisation for both the public and private sectors, she says: "Reading the Act from that professional perspective, it's plain it's nothing but a privatisation document. It reads like a shopping list by corporate lawyers from different industries patchworked together by parliamentary draughtsmen."

Kaucher says she attended an EU Trade Commission meeting in 2010 at which officials flagged the intention to push for a trade agreement with the US and discussed the need for "harmonising" public sector regulation before negotiations began. They said healthcare would be the first area to be harmonised, Kaucher claims.

Lord Owen, a former health minister and foreign secretary in the 1970s, has called for part of the Act to be repealed and for transparency over the mandate for the EU-US trade negotiations. "There is a conspiracy of silence about this matter and about the extent to which EU legislation is challenging the philosophy and principles of the NHS that cannot be allowed to continue," he said.

In a 2005 speech the act's architect, former health secretary Andrew Lansley, then still in opposition, said the European Union should be encouraged to promote competition by ensuring "a strong market orientated regulatory framework is in place in each member state." He continued: "And it will come, I daresay, for education and health in the future as it did for telecoms in the recent past."[7]

Nevertheless, ministers continue to deny any agenda to privatise the NHS or any link between the reforms and the trade talks—most recently in Lord Green's letter to Porter. Yet the Act, and its section 75 competition regulations presented to parliament only on the eve of the reforms' launch this year, obstinately convey a contrary impression. David Lock, QC, a specialist in healthcare law, believes the regulations will create new markets and promote the transfer of NHS services to the private sector by requiring clinical commissioning groups to hold competitive tenders for all services other than those where there could be only one provider. He says: "These regulations will make it clear that competition must be the norm for placing NHS contracts, bringing the existing EU rules explicitly into domestic UK law."[8]

David Price is unconvinced the act was designed with TTIP in mind. Liberalising NHS hospital services has a much longer history, he argues, tracing it to the World Trade Organisation's 1995 general agreement on trade in services (GATS). When

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signing GATS the UK eschewed limitations on foreign investors competing for publicly funded health services that other European countries adopted.[9] Since then, the advent of foundation trusts and the growth of a competitive market in the NHS have also rendered the service liable to EU competition law, Price says. That too enables investors to sue governments for expropriation. Whatever the outcome of the EU-US talks, the NHS's fate may already be sealed.

Competing interests: I have read and understood the BMJ Group policy on declaration of interests and have no relevant interests to declare.

Provenance and peer review: Commissioned; not externally peer reviewed.

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Cite this as: *BMJ* 2013;346:f3574

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