

Digital Trade and Data Inquiry

International Trade Committee

Summary

- Which? recommends several actions the Government must take to ensure consumers can have confidence that their interests are being fully reflected and protected in trade policy and trade deals. This includes enhancing cross-border consumer protection; ensuring strong data protection, maintaining the UK's ability to regulate online harms, protecting the UK's strong net neutrality principle and ensuring that consumers reap additional benefits from digital trade.
- Analysis of the Comprehensive Economic Partnership Agreement (CEPA) with Japan, the first major trade deal that the UK signed since leaving the EU, shows that there are elements which already set some worrying precedents in terms of the extent to which the Government is protecting and future-proofing consumer interests in the digital sphere.
- In negotiations considering a UK accession to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) the Government should be acutely aware of the detrimental implications certain digital trade provisions within the CPTPP could have for UK consumers, specifically in the areas of data protection and privacy.
- The Government's approach to digital trade on the global stage should contain a consumer-centric outlook when looking at the extension of the World Trade Organization (WTO) moratorium on customs duties on electronic transmissions, engaging in international developments such as the WTO e-commerce negotiations, and when evaluating international legislation and guidelines that are relevant for the UK's digital trade policy alongside domestic law.

Introduction

1. Which? welcomes the opportunity to provide evidence to the Committee on this inquiry. The true mark of the success of the UK's trade policy as well as in specific deals will be the extent to which trade positively affects people's everyday lives. Digital trade will be a key focus of all of these trade negotiations, as it has been with all modern trade deals. This presents opportunities, but also risks for consumers, many of which they have little understanding of and will therefore look to the Government to protect their interests.
2. This submission draws on our experience in consumer protection relating to digital trade and data, making a range of recommendations for how the Government can both advance and protect the interests of UK consumers through its trade policy.

How the regulation of digital trade impacts consumers

3. Digital trade and its regulation is often discussed in relation to its impact on businesses, markets and the economy, however, it also presents significant risks and opportunities for consumers. The success of the UK's digital trade policy is also heavily dependent on the impact it has on consumers. Which?'s research¹ has shown that consumers find the protection of their interests

¹ [Which? National Trade Conversation](#)

in digital trade negotiations of high importance, however, many consumers have limited understanding of the intricacies of the risks and opportunities, and therefore look to the Government to safeguard their interests.

4. Consumers are affected by the regulation of digitally-enabled transactions of trade in goods and services that are both digitally and physically delivered. Consumers engage with trade that is both fully digital - bought online, delivered digitally and fully consumed digitally - as well as digitally enabled transactions. Products and services that are digitally delivered include mobile phone apps, video games, access to streaming services and e-books. Transactions that are enabled by digital technologies but are delivered physically include buying goods and services on online platforms or websites.
5. UK consumers face many direct challenges when they buy online, especially from sellers located abroad - these include unexpected costs, scams and the sale of unsafe products. Trade agreements can offer opportunities to enhance consumer trust online. The contents of digital trade chapters and provisions in trade agreements impact elements such as consumers' ease of access to products and services originating in different countries, the way their personal data is handled and protected as it flows across borders, regulators' abilities to investigate foreign firms who process their data, the responsibilities placed on global platforms that they engage with on a daily basis, and the enforcement of their wider digital rights and protections.
6. As digital trade is underpinned by data flows, data protection is a critical aspect of the impact digital trade has on consumers. Consumers worry about both the data they share and the data protection framework in the UK being affected by trade negotiations in the name of international data availability.
7. In Which?'s National Trade conversation² - public dialogues held in five different parts of the country, covering all four nations, with participants from a spectrum of backgrounds - consumers were shown Government objectives for digital trade and shared their thoughts, expectations and concerns. Participants could see the opportunities for businesses and the economy to make the trade of goods and the transfer of services easier and faster. However, they were widely concerned about the potential implications for the protection of consumer data and online rights in order to facilitate free flows of data that enable smoother digital trade.
8. People were receptive to the economic benefits that could come from enhanced digital trade, but expected the Government to ensure effective consumer protection. Maintaining the UK's strong - if imperfect - data protection framework was one of the main priorities for participants. Defining the right digital trade terms has the potential to reap great benefits for the UK given its strength in exporting services but necessitates addressing consumer concerns with regard to protections and rights when data crosses borders.

How the UK should approach negotiating digital and data provisions in its future trade agreements

9. It is important to consumers that the Government takes a balanced approach to negotiating digital and data provisions. Digital trade talks should open up opportunities for innovation that

² [Which? National Trade Conversation](#)

will benefit consumers – whether through greater choice, access or lower prices for example. However, these trade talks also need to build upon, and ideally strengthen, the protections that underpin digital trade, including how consumers' data is protected.

10. The Government should seek to **enhance cross-border online consumer protections** so that consumers can feel confident engaging with digital trade and feel protected online. The consumer protection provisions in Article 8.79 in the UK-Japan Agreement (CEPA) for example are a positive first step in this direction. They refer to the need to have consumer protection laws in place to prevent fraudulent and deceptive practices as well as activities that can harm consumers. The provisions also recognise the need for cooperation between competent authorities. Future UK trade agreements should be even more ambitious and include rules promoting better information for consumers regarding who and where they are buying from, to help them make appropriate choices. Clear and straightforward pathways to redress and dispute resolution should be created to remedy instances where something goes wrong after an online purchase. This includes agreeing mechanisms for cooperation between competent authorities to improve consumer protections when shopping online, including cross-border purchases and when using online platforms. For example the EU-UK Cooperation Agreement sees both parties agree to adopt or maintain measures to ensure the effective protection of consumers engaging in electronic commerce transactions, including granting consumers access to redress for breaches of their rights, and a right to remedies if goods or services are paid for and are not delivered or provided as agreed.
11. A critical aim should be to **ensure strong data protection both domestically and internationally** when a UK consumer's data flows abroad. The Government must uphold the current high standards of data protection in force in the UK and ensure that negotiations with potential trade partners who have lower protections do not undermine the UK's ability to regulate to upgrade consumers' privacy and data protections in the future.
12. Trade rules on cross border data transfers should facilitate free flow of data whilst ensuring the highest level of data protection and privacy for consumers by retaining full autonomy and the exclusive right to regulate in the field of personal data protection with safeguards from interference. Unrestricted data flows to countries that have weaker provisions on data protection would expose UK consumers to a market on personal data that gives businesses disproportionate powers over consumers through information asymmetries and lack of accountability.
13. References to data protection without specific detail made in trade agreements could be detrimental to UK consumers if the language introduces flexibility into the well regulated UK system by promoting interoperability or compatibility between the Data Protection Act 2018 (DPA 2018) and weaker international rules for data transfers. Adoption of international data protection laws can initially sound positive, but recent deals, such as the USMCA, have linked acceptance of international law to flexibility between international guidance, such as that developed by the OECD and domestic provisions. The OECD guidelines for example are more limited than current UK data protection rules, therefore convergence with this guidance would result in the weakening of the data and privacy protections currently enjoyed by UK consumers. **Language in trade texts and commitments that blur the lines between strong and weaker regimes should be avoided.** Promoting interoperability with international standards that offer weaker data protection than the UK's current domestic regulation under the DPA 2018 must be avoided in future agreements to ensure the highest possible protection for consumers and prevent promoting flexibility into a well regulated system. Failing to do so could

also put an EU adequacy decision at stake and result in further divergence from the strong data protection regulation currently enjoyed by UK consumers.

14. Trade deals should not limit the UK's ability to regulate to protect consumers from online harms, such as unsafe products, scams and fake reviews. In particular, the UK Government must **stand firm against external negotiating objectives of limiting the UK's ability to extend legal liability of online platforms**, including online marketplaces. The US negotiating objectives for a deal with the UK show that protecting large multinational platforms from regulation and regulators is a goal as part of a UK deal. This is in direct conflict with the UK Government's current trend of stronger digital regulation and oversight when it comes to online harms and platform responsibility³.
15. The Government should also ensure that the trade deals it negotiates **do not limit regulators' essential access to source code or algorithms that are needed to scrutinise business practices and protect consumers**. Measures designed to prevent the disclosure of source code and give stronger intellectual property protections to businesses could reduce the transparency and accountability of technical systems that are increasingly being used in many decision systems that affect the lives of consumers. Companies can use algorithms to make unfair, deceptive or discriminatory decisions relating to pricing, marketing and a host of other uses of profiling data services. Access to source code only under narrow public policy exceptions may not be enough to protect consumers in commercial settings.
16. The UK must ensure that its trade deals **do not weaken its strong net neutrality principle** which guarantees that everything on the internet is available to everyone and that internet service providers (ISPs) are not allowed to restrict access to some services or slow down the traffic to websites and apps that do not pay premiums. Measures introduced in trade deals to promote net neutrality and an open internet are not always up to the current high standards existing in the UK if only basic commitments to keep an open internet are made, that are vague and leave significant space for interpretation. Both USMCA and CPTPP contain clauses that do not fully deliver on net neutrality - ensuring access to part of the internet, with full internet access not guaranteed.
17. Additionally, the Government should seek to **ensure other consumer benefits from digital trade**. This includes simplifying cross-border trading procedures, such as provisions around cheaper roaming when abroad, consumer e-signatures so consumers can be sure that international contracts they conclude digitally are legally binding, and the inclusion of commitments to ban customs duties in connection with the import or export of digital products transmitted electronically to prevent higher costs being transferred to consumers in the form of higher prices.

The UK-Japan Agreement and indications for the UK's approach to digital trade and data provisions in future trade negotiations

18. The UK-Japan CEPA signals a concerning shift in the UK's approach to digital trade negotiations. There are significant differences in the UK-Japan CEPA to the EU-Japan deal that the UK was previously party to, that signal a departure from the EU approach moving towards a more US-style approach. The Agreement significantly differs from the EU-Japan EPA on how it deals with

³ [United States - United Kingdom Negotiations: Summary of Specific Negotiating Objectives](#)

data protection – and what this means for the level of protection UK consumers can expect in the future.

19. Article 8.80 of the UK-Japan CEPA covers personal information protection. It encourages mechanisms to promote compatibility and states that this “may include the recognition of regulatory outcomes”. The article also outlines that each party shall take into account principles and guidelines of international bodies. This is of concern because the principles and guidelines established by international bodies (such as the OECD for example) are weaker than the UK’s current data protection regime. The footnote to this article is particularly worrying as it states that the enforcement of voluntary undertakings would be acceptable: “*For greater certainty, a Party may comply with the obligation in this paragraph by adopting or maintaining measures such as a comprehensive privacy, personal information or personal data protection laws, sector-specific laws covering privacy, or laws that provide for the enforcement of voluntary undertakings by enterprises relating to privacy*”. Creating precedent for self-regulation to be on an equal footing to the comprehensive data protection regime as currently exists in the UK is detrimental for UK consumers who enjoy higher protections and could see these reduced when their data is sent abroad without adequate safeguards.
20. Part of the UK’s prior approach, as part of the EU, to digital trade and data protection had been to prohibit specific restrictions to cross-border data flows and retain exclusive rights to regulate data privacy, rather than seeking broad commitments in its trade agreements. Language in broad commitments can promote interoperability between regimes, thereby weakening the protections of the stronger regulated regime - in this case the UK.
21. Article 8.84 includes a general binding commitment not to “prohibit or restrict the cross-border transfer of information by electronic means” with privacy as a legitimate public policy exception. However, the privacy exception allows for challenge. Again, this suggests that the UK is moving away from its commitment to UK GDPR protections and the Data Protection Act 2018. Inclusion of such provisions is not only concerning for cross-border data flows between the UK and Japan, but could also have implications for how UK consumers’ personal data is then shared with other countries that Japan has agreements with and would appear to put the possibility of an EU adequacy decision at risk.
22. This also appears to contradict the UK’s published strategic approach to a deal with Japan, which stated that the Government noted stakeholders’ concerns on the importance of data protection and privacy standards and that the UK would “*seek to facilitate the continued flow of data with the EU and international partners, whilst ensuring the UK’s high standards of personal data protection*”⁴.
23. The UK-Japan CEPA also includes provisions that ban mandatory disclosure of source code, software and algorithms expressed in that software (Article 8.73), although with some exemptions, including for regulatory bodies, judicial authorities or conformity assessment bodies in specific circumstances. Provisions designed to prevent the disclosure of source code and algorithms can pose problems in terms of transparency and accountability of technical systems that are also increasingly being used in many decision-making systems that affect the lives of consumers. It is essential that the Agreement does not inhibit the UK’s ability to ensure appropriate consumer protection from online harms. The Government must ensure that the

⁴ UK-Japan Free Trade Agreement: The UK’s Strategic Approach, Department for International Trade, May 2020.

trade deals it negotiates do not limit regulators' essential access to source code or algorithms that are needed to scrutinise business practices and protect consumers.

Renewing the WTO's moratorium on customs duties on electronic transmissions

24. There is an opportunity to extend the protections offered by the WTO's moratorium on customs duties on electronic transmissions in order to keep down the costs of digital products and services for consumers. The term "electronic transmissions" is commonly understood to include services which are purchased and delivered digitally - software, e-books, digital music, movies, videos, games. Goods ordered through electronic means but imported through physical channels are explicitly excluded.
25. The UK and the European Union have continually supported the extension of the e-commerce moratorium as it has provided significant economic benefits to European companies and consumers. A lapse in the moratorium could mean the introduction of customs duties on electronic transmissions, should the UK fail to reach free trade agreements that make explicit arrangements in this area, and revert to WTO trading rules. This could in turn lead to the higher costs being passed on to consumers. When duties are imposed, the affected importing businesses tend to pass their higher costs on to domestic consumers.
26. In recent years there have been some criticisms of the moratorium by certain nations due to some implications for developing countries. The debate has been heavily focused on its potential revenue implications. India and South Africa have called for a "re-think" of the moratorium, discussing the potential revenue lost by developing nations due to the expansion of items that are electronically transmitted⁵.
27. Those expressing concerns regarding the moratorium have referred to United Nations Conference on Trade and Development (UNCTAD) research⁶ that estimated that the moratorium could prevent countries worldwide from collecting more than \$10 billion in tariff revenue. However, an OECD study suggests that allowing the moratorium to lapse would be a mistake. The OECD's research⁷ determined that placing customs duties on electronic transmissions would result in greater costs than any marginal gains in tariff revenues. Following its analysis, if countries begin imposing duties on electronic transmission, they will suffer a net loss in consumer welfare alongside export competitiveness.
28. As goods which were previously physically delivered become digitised, it allows greater access for consumers. When the tariffs and transport costs associated with physical delivery are removed, the foregone Government revenue is generally distributed to the consumer, in the form of cheaper prices. If tariffs were to be introduced for the digitally delivered goods, the Government would recover some revenue but at the expense of consumers, who would see a reduction in consumer surplus, generating a deadweight loss for the economy - a loss of economic efficiency⁸. The higher price charged to consumers would result in a section of consumers who would not purchase the goods at that higher price point. An introduction of customs duties on electronic transmission would limit the number of consumers participating

⁵ [Communication from India and South Africa, WTO Work Programme on Electronic Commerce](#)

⁶ [UNCTAD 2019, *Growing Trade in Electronic Transmissions: Implications for the South*, UNCTAD Research Paper, No. 29.](#)

⁷ [Andrea Andrenelli and Javier Lopez Gonzalez, *Electronic Transmissions and International Trade –Shedding New Light on the Moratorium Debate*, \(Paris: OECD, November 2019\).](#)

⁸ [Andrea Andrenelli and Javier Lopez Gonzalez, *Electronic Transmissions and International Trade –Shedding New Light on the Moratorium Debate*, \(Paris: OECD, November 2019\).](#)

in this side of e-commerce and the benefits associated with it. As our research has shown, consumers care about greater variety of goods, ease of access and lower prices when it comes to digital trade⁹.

29. In December 2019 WTO Members agreed to maintain the current practice of not imposing customs duties on electronic transmissions until the 12th Ministerial Conference (MC12) which was scheduled for June 2020¹⁰. However, due to COVID-19, Kazakhstan, the country which was due to host this conference, proposed the postponement of the conference until 2021¹¹. The UK has the opportunity to continue to support the moratorium and prevent the imposition of customs duties in connection with the import or export of digital products transmitted electronically that has benefited UK consumers.

30. The Government should consider that the burden of duties and tariffs mainly fall on domestic consumers and not on foreign firms¹². With the associated benefits of the moratorium on electronic transmissions being increased consumer welfare alongside economic gains, the Government should continue to take a supportive approach to the renewal of the moratorium.

UK objectives for negotiating digital and data provisions during Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) accession

31. In any negotiations considering a UK accession to CPTPP the Government should be acutely aware of the detrimental implications certain digital trade provisions of CPTPP could have for UK consumers, specifically in the areas of data protection and privacy.

32. Promoting interoperability or compatibility between weaker international rules for data transfers and UK data protection law would introduce flexibility into the well regulated UK system and offer weaker protections to UK consumers than they currently enjoy. Article 14.8 outlines that parties should take into account principles and guidelines of international bodies, and *'recognising that the Parties may take different legal approaches to protecting personal information'*, encourages the development of mechanisms to promote compatibility between the different regimes.

33. Article 14.8 also references the possibility of voluntarily undertaking by companies relating to privacy to be equally as valid as regulation. Allowing for self-regulation to be on an equal footing to the comprehensive data protection regime as currently exists in the UK is detrimental for UK consumers who enjoy higher protections and could see these reduced when their data is sent abroad without adequate safeguards. Article 14.7 also rules out the ability of regulators to require source code of software from businesses as a condition of the import, distribution, sale or use of the software or products containing it.

34. Article 14.10, which deals with the principle of access to and use of the Internet for electronic commerce, does not fully deliver on net neutrality, with full internet access not guaranteed. The UK must maintain its position on net neutrality in trade negotiations to ensure an open internet.

⁹ [Which? National Trade Conversation](#)

¹⁰ [WTO General Council, WTO Members Agree to Extend E-commerce, Non-violation Moratoriums](#)

¹¹ [WTO Twelfth Ministerial Conference](#)

¹² [Andrea Andrenelli and Javier Lopez Gonzalez, *Electronic Transmissions and International Trade –Shedding New Light on the Moratorium Debate*, \(Paris: OECD, November 2019\).](#)

35. The Government must stand firm and ensure that trade deals do not inhibit its ability to deliver the right protections for UK consumers. In negotiations an approach should be taken that does not undermine the current level of data protection and freedoms that consumers can expect in the UK, and retain the right to upgrade such protections in the future.

Domestic and international law relevant to the Government's approach to digital trade

36. **International Trade Agreements:** The nature of the current trade deal negotiations, with the UK deciding its trade approach with multiple countries at once, means that various international agreements are of relevance alongside international law. Precedent in prior agreed treaties is a good indicator as to the approach potential trading partners will take in negotiations with the UK - this also pertains to digital trade. USMCA, CPTPP and other recent trade agreements help to give an indication of the issues that could be part of the UK's negotiations and the potential risks and opportunities for UK consumers.
37. **International Guidance:** As previously highlighted, many recent trade agreements mention international guidance and guidelines relating to digital trade as a common ground for trading partners to draw inspiration for the regulation of personal information and privacy from. Despite the UK's current data protection framework offering stronger protections than international guidelines, such as the OECD's guidelines on the protection of privacy and transborder flows of personal data, it remains of relevance so long as trading partners seek to promote interoperability between them and domestic law. Convergence between international guidelines would not force the UK to replace current data protection law with a lower regime altogether or automatically stop the Government from adopting a more stringent regime - however, the blurring of lines between strong and weak privacy regimes is detrimental to UK consumers in the long term.
38. **Multilateral Agreements - WTO E-Commerce Negotiations:** The ongoing WTO E-commerce negotiations will ultimately conclude in a new plurilateral agreement on trade-related aspects of electronic commerce - as a member of the WTO this is of relevance to the Government's approach to digital trade. Launched at the World Economic Forum in Davos January 2019, the participating members in the Joint Statement initiative on e-commerce (JSI) seek to produce an outcome that builds on existing WTO agreements and frameworks¹³ and creates a new rule book for digital trade. This will be the foundation of the UK's digital trade rights, obligations and relationships with other WTO nations that it has not concluded more comprehensive digital trade agreements with.
39. The stakes are high for participating countries to design rules that put consumer concerns centrally and protect their rights in addition to ensuring that the digital economy thrives. International consumer and digital rights groups have called on the JSI on e-commerce to safeguard data protection and privacy¹⁴.
40. **Domestic Law:** As digital trade is underpinned by cross-border data flows, domestic data protection and privacy law should play a central role in the Government's approach to digital trade. The updated UK GDPR and the amended Data Protection Act 2018 currently deliver stringent protections for UK consumers and are of critical relevance for future developments.

¹³ [WTO Electronic Commerce News Archive](#)

¹⁴ [BEUC Global Statement to Safeguard Data Protections and Privacy in the WTO E-Commerce Negotiations.](#)

Trade talks need to build upon, ideally strengthen, and not erode the protections consumers currently enjoy.

41. **European Union Law:** With the end of the transition period and the conclusion of an EU-UK Trade and Cooperation Agreement, an EU adequacy decision is the next key development for the UK's digital trade relationship with the EU. The European Commission now needs to complete its processes for assessing adequacy. A bridging solution has been agreed to enable data flows to continue from now until the adequacy decision has been made, to ensure stability in this interim period. This bridging solution will last up to six months onwards from when the Agreement came into force January 1st 2021.¹⁵
42. Article 207(3) of the Treaty on the Functioning of the European Union (TFEU) outlines that negotiated agreements must be in line with the EU's internal policies and rules. Therefore, any trade agreement to which the EU is a signatory must comply with EU law, including its various provisions on the respect of fundamental rights - this includes the right to data protection as set out in Article 16 TFEU and Article 8 of the Charter of Fundamental Rights. As a result, these articles and treaties remain of relevance to the UK for our continued relationship with the EU.
43. Additionally, further developments in EU law pertaining to the digital economy, such as the Digital Services Act (DSA) and the Digital Markets Act (DMA) are of relevance to the Government's approach, as they will impact the UK's future e-commerce relationship with the EU. The DSA and DMA partially tackle key issues in the digital space such as platform responsibility and online oversight structure, seeking to 'create a safer digital space in which fundamental rights of all users of digital services are protected' and to 'establish a level playing field to foster innovation, growth, and competitiveness', and complement the EU's General Data Protection Regulation. As the EU's data adequacy decisions are unilaterally revocable, staying abreast of legal developments and their potential impact for the EU's e-commerce relationships with trade partners is important for determining the UK's continued approach with this important trade partner.

January 2021

About Which?

Which? is the UK's consumer champion. As an organisation we're not for profit - a powerful force for good, here to make life simpler, fairer and safer for everyone. We're the independent consumer voice that provides impartial advice, investigates, holds businesses to account and works with policymakers to make change happen. We fund our work mainly through member subscriptions. We're not influenced by third parties – we never take advertising and we buy all the products that we test.

¹⁵ EU-UK Trade and Cooperation Agreement, Article FINPROV.10A: Interim provision for transmission of personal data to the United Kingdom