

Digital Trade: Opportunities and Risks in Future Trade Deals

Consumers and digital trade

The UK is developing its own trade policy for the first time in over 40 years. Trade talks are already underway with the United States, Australia and New Zealand. A new free trade agreement (FTA) has been agreed with Japan, a continuity agreement has been agreed with Canada in principle, and the UK is also seeking accession to the Comprehensive and Progressive Trans Pacific Partnership (CPTPP).

The true mark of the success of the UK's trade policy as well as these 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.

Which?'s policy report "[Ensuring trade deals work for consumers](#)" called on the Government to put consumers at the heart of trade deals, building on the UK's world leading framework of consumer rights and protections. This is crucial to the Government's approach to the many dimensions of digital trade that could be included in these trade deals – from improved access to digital services to enhanced protections when shopping online.

What is included in the final text of these deals could mean the difference between consumers having easier access to new products originating in different countries or being more susceptible to scams as their personal information flows abroad. The first trade deal that the UK has signed since leaving the EU, the Comprehensive Economic Partnership Agreement (CEPA) with Japan already sets some worrying precedent in terms of the extent to which the Government is protecting and future proofing consumer interests in the digital sphere.

What the public want

Which?'s National Trade Conversation opened up these issues directly to consumers around the country, giving them the opportunity to say what matters most to them – from digital trade to food standards. These public dialogues, held in five parts of the country, in all four nations, and involving people from all walks of life, have provided a unique insight into people's expectations around digital trade, along with other issues that will be on the table, and to the UK's negotiating approach. 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 data protection provisions was one of the main priorities for participants.

In Which?'s National Trade Conversation, consumers were shown Government objectives for digital trade. They 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. The majority view was that a weakening of an already imperfect General Data Protection Regulation (GDPR) regime would remove the necessary minimum protections consumers need against hidden and growing online harms.

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 and looking at protections and rights when data crosses borders:

“It’s always a concern when providing your information anywhere, who could possibly get their hands on it so to have more protection built into any deals would be so beneficial, especially as we pretty much live our lives online now.”

National Trade Conversation (NTC) Participant, South Wales

“I am very concerned about data privacy and data ending up in countries with lower data regulation legislation. I feel it is already a lost battle and would want to see decisive action, including discussions in trade deals, about improving data security for citizens”.

NTC Participant, East Coast Scotland

“I’ve always taken for granted my information is safe online as protected by privacy laws and hadn’t thought of the implications of giving these up for a deal”

NTC Participant, Northern England

“The most important thing to me as a consumer is data protection and sharing of personal data - this should not be compromised and the regulation should be maintained to keep consumer privacy.”

NTC Participant, South Wales

It is important to consumers that the Government strikes the right balance. Trade talks should open up opportunities for innovation that will benefit consumers – whether through greater choice or lower prices for example. However, these trade talks also need to build upon, and ideally enhance, the protections that underpin digital trade, including how consumers’ data is protected.

This paper sets out the opportunities that the Government should take as part of these negotiations. It also sets out the potential risks and actions the Government must take to ensure consumers can have confidence that their interests are being fully reflected and protected. These issues are likely to be more pronounced for some deals than others because of differences in approaches taken by countries – but overall the Government must ensure the following issues are prioritised.

Our recommendations

- **Enhance cross-border consumer protection.** The Government must ensure that future trade deals enhance cross-border online consumer protections so that consumers are better informed about who and where they are buying from, as well as getting easier access to redress and dispute resolution if something goes wrong after an online purchase. This includes agreeing mechanisms for cooperation between authorities to improve consumer protections when shopping online, including cross-border purchases and when using online platforms.
- **Ensure strong data protection.** 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.
- **Maintain the UK’s ability to regulate online harms.** 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 – and in particular, the UK government must stand firm against the US negotiating objective of limiting the UK’s ability to extend legal liability of online platforms, including online marketplaces. 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.

- **Protect the UK's strong net neutrality principle.** The UK must ensure that its trade deals do not weaken net neutrality 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.
- **Secure cheaper roaming when travelling.** There is an opportunity for the government to agree on cheaper and ideally free roaming for consumers' calls, data and text messages when travelling in the trade deal partner country.
- **Ensure other consumer benefits from digital trade.** This includes simplifying cross-border trading procedures, such as provisions around **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.

Defining Digital Trade

Digital trade is generally considered to encompass digitally-enabled transactions of trade in goods and services that can either be digitally or physically delivered.¹ Some digital transactions include trade which is fully digital - bought online, delivered digitally and fully consumed digitally.

Products and services that are digitally delivered include mobile phone apps, video games, access to streaming services and e-books. However, digital trade could also include transactions that are enabled by digital technologies but delivered physically. That includes buying goods and services on online platforms or websites.

Digital trade has been a strong focus of recent trade agreements. These therefore help to give an indication of the issues that could be part of the UK's negotiations and the potential opportunities and risks for UK consumers. The UK Government is in a unique position because it is defining its trade policy and treaties with the rest of the world at the same time. The many interdependencies between these new deals will also ultimately determine the risks and opportunities for consumers. However, certain opportunities and risks are more general and exist regardless of these. There are certain immediate risks such as the need to establish continuity after the end of the transition following EU exit. The opportunities may also be indirect and dependent on the interaction between many different policy areas across all sectors of the economy.

Opportunities

Modern trade deals have included specific chapters on digital trade – and the UK has made it clear that this will be at the heart of the free trade agreements it is negotiating. The Secretary of State for Trade, the Rt Hon Liz Truss MP has for example stressed that: *“Trade agreements we are negotiating with key partners will go further than others in addressing barriers to digital trade, opening up huge opportunities for our exporters and also for inward investment into the UK”*.²

There is the potential for trade deals to include positive aspects eg. supporting electronic commerce, facilitating electronic contracts and signatures or fighting spam, and potentially enhancing some online consumer protections. However, there are also some fundamental associated risks that must be addressed so that consumers are protected and get the benefits of these opportunities.

Enhancing consumer trust online

UK consumers are facing many challenges when they buy online, especially from sellers located abroad. Trade agreements could offer opportunities to enhance their trust online. The consumer protection provisions³ in the UK-Japan agreement (CEPA) 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.

Future UK trade agreements should be even more ambitious and include rules promoting better information for consumers, to help them make appropriate choices. Consumers should also have easy access to redress and dispute settlement if something goes wrong.

Trade agreements could also address the crucial issue of product safety. Which?'s investigations have repeatedly found problems with unsafe products sold on online marketplaces where both the seller and marketplace can be based outside the UK. Efforts must be made to make sure consumers are not harmed by unsafe products sold online. Additionally, UK regulators and regulators in other countries should work together to better protect consumers by cooperating on consumer protection, market surveillance, enforcement, redress and dispute resolution.

These types of rules to enhance consumer trust are being discussed in the framework of the World Trade Organization (WTO) e-commerce negotiations. The first proposal⁴ to which the UK contributed in 2019 constitutes a good basis as it covers information provided to consumers, illegal and fraudulent practices, access to redress and dispute resolution as well as international cooperation. The inclusion of such rules in UK trade agreements could lead to positive benefits for consumers and would contribute to enhance their trust in digital trade.

Ensuring no custom duties for digital goods

There is an opportunity to extend the protections offered by the WTO's Information Technology Agreement (ITA) and also support the moratorium on digital tariffs in trade agreements in order to keep down the costs of accessing digital products and services for consumers.

Tariffs raise the cost of products and services for consumers. The Information Technology Agreement, which entered into force in July 1997 and was expanded in 2015, eliminated tariffs on a large number of technology products. The ITA covers technology products such as computers, telecommunication equipment, semiconductors, semiconductor manufacturing and testing equipment, software, scientific instruments, as well as most of the parts and accessories of these products. However, it took 18 years to update the coverage of the ITA, meaning that emerging products such as 3D printers, smart TVs and virtual reality technologies are not covered under the ITA's positive list. The UK has the opportunity to prevent the introduction of tariffs for emerging technologies in any trade agreements it concludes and simultaneously push for increased product coverage at the WTO.

The term "electronic transmissions" is commonly understood to include services⁵ which are purchased and delivered digitally - software, e-books, digital music, movies, videos, games. Banning customs duties on electronic transmission appeared as one of the key aims of the USA for a trade deal with the UK.⁶

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, and revert to WTO trading rules. This could in turn lead to the higher costs being passed on to consumers in higher prices. In recent years there have been some criticisms of the moratorium

by certain nations due to some implications for developing countries. 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 transmitted.⁷

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 2020.⁸ However, due to COVID 19 Kazakhstan, the country which was due to host this conference, proposed the postponement of the conference until 2021.⁹

The UK has the opportunity to include commitments in future trade deals to ban the imposition of customs duties in connection with the import or export of digital products transmitted electronically.

Cheaper data roaming

Including free roaming in trade deal negotiations could save UK holidaymakers and those travelling for business significant amounts of money. Roaming is the practice of using a mobile service – data, texts and calls on another operator’s network usually while abroad. Mobile connectivity is important for consumers when they travel and more broadly for consumer engagement in digital trade when they are abroad. For example, if a consumer is out of range of wifi and would like to book a ride or use online maps to navigate, they might be discouraged to do so if that means that they need to pay exorbitant prices (ie. because they have to make use of a data connection on their device).

There have been no extra costs for UK consumers when using their phones in EU countries since 2017. However, Which? research has revealed that UK consumers can still face high roaming charges in the USA, New Zealand and Japan – all countries the UK is in negotiations over trade deals with or in principle has agreed a trade deal with.

UK consumers value free roaming.¹⁰ **There is an opportunity to negotiate free or lower cost roaming for UK consumers when abroad, subjected to the market dynamics and compatibility with regimes in other countries.** This would not breach WTO rules, however, to date FTAs have not included provisions on mobile roaming – other than relating to improving transparency of pricing for example, as seen in the recently signed UK-Japan deal.

Around 5 million UK consumers visit the USA every year and would potentially benefit from it there.¹¹ Some UK telecom operators already have agreements with some providers in New Zealand, USA and Australia which under certain tariffs offer free roaming in these countries.¹² The situation with the EU is slightly different. The ban on retail surcharges cannot be addressed by UK law alone; the UK needs an agreement with the EU to maintain the abolition of retail charges and retain low caps on wholesale charges to ensure that consumers are protected from high roaming surcharges when travelling in the EEA. If no binding roaming agreement is agreed between the UK and the EU, networks will be allowed to charge UK consumers extra for using their phone in the EU from 1 January 2021. Providers such as EE, O2, Vodafone and Three have said they have no plans to charge extra. However, this does not bring legal certainty. Such voluntary commitments can be withdrawn at any time, are not enforceable and can lead to negative competition and pricing problems due to the lack of regulation at wholesale level. Which? wants the existing ban on roaming charges to be maintained, to ensure consumers are not faced with higher calls for data use, text messages and calls when travelling.¹³

Simplifying consumer contracts

There is an opportunity to retain domestic consumer protection and strengthen them in external interactions by including provisions around consumer e-signatures. E-signatures issues are amongst the challenges that companies and consumers face when accessing and using internet services.¹⁴ The absence of mutual recognition and divergent rules between countries can create additional costs and have the overall effect of lowering confidence in the online transaction environment. In a physical trade, some transactions require identity verification through signature or other means to endorse the transaction between the seller and the buyer, and between two or more parties generally.

Paper documents have been used in commercial transactions in national and international trade, and there are rules on contracting, contract enforcement and validity.¹⁵ When transactions occur online, there can be issues if consumers buy from countries that have no regulations for electronic contract transactions and electronic identity verification. A barrier is posed by countries that do not accept and recognise electronic contracts in the same way as physical contracts. This is a particular challenge in cases where parties need to ensure that people signing a document are those who they claim to be remotely, that the document which was sent is authentic (has not been changed) and that it is transmitted securely through trusted channels, including in the case of consumer contracts where people are buying goods or services.

The EU and UK have eIDAS (the electronic identification and trust services directive) which sets the regulatory framework to help verify the identity of individuals and businesses online or to confirm the authenticity of e-documents.¹⁶ By agreeing provisions on these elements in trade deals with other countries consumers can be sure that international contracts concluded digitally are as legally binding as the ones on paper.

The EU's trade agreements from recent years with Singapore and Japan both include the promotion of the recognition of electronic signatures to different degrees. The UK-Japan agreement, CEPA, deals with recognition of electronic signatures in direct terms, by outlining that, unless otherwise provided for in its laws and regulations, "a Party shall not deny the legal effect or validity of an electronic signature or the authenticating data resulting from electronic authentication, solely on the grounds that it is in electronic form". This goes slightly beyond the EU-Japan agreement, by including authenticating data resulting from electronic authentication in the scope alongside the signatures themselves. **The UK has the opportunity to include similar provisions on electronic signatures in future trade deals.**

Risks

Weaker data protection

The UK regime for data protection and privacy provides high standards that could be at risk from the measures to promote cross-border data flows in trade deals. This is an important issue for consumers as purchases move online and data gathering digital technology becomes embedded in all kinds of everyday goods, from fridges to vacuum cleaners. Without strong data protection measures, consumers' data could potentially be collected, gathered and used in ways that they did not consent to or expect.

Measures in trade agreements on cross-border data flows could make it harder to control the transfers of personal data of UK consumers to countries with lower protections. These measures could clash with the current UK regime of data protection under the GDPR and risk the existing flows of data with the EU and an adequacy decision after the Brexit transition period.

An adequacy decision means that the European Commission makes an administrative decision that establishes that a country, territory or a specific sector – eg. public sector or certain businesses – ensures an adequate level of data protection. Data transfers in this context are treated as transfers within the EU, without the need for companies to make any extra arrangements. Adequacy decisions are a preferable tool to ensure data flows with consumer privacy and personal data protections. Contrary to rules in trade agreements, they encourage third countries to maintain strong data protection regimes as they can be unilaterally revoked and be subject to court scrutiny if people’s rights are at risk.

References to data protection without extensive detail made in the free trade agreement (FTA) could be detrimental to UK consumers if the language used introduces flexibility into the well-regulated UK system by promoting interoperability or compatibility between GDPR and weaker international rules for data transfers. Rules that do not offer a strong level of privacy and data protection are not compatible as they would not offer consumers an equivalent protection to that provided by UK law.

The text of the US-Mexico-Canada Agreement (USMCA), the most relevant deal for the US’s likely approach to a trade deal, allows for voluntary undertakings by companies relating to privacy to be equally as valid as regulation. This is also the approach taken in CPTPP, which the UK would like to become a signatory to.

References to adoption of international data protection laws can initially sound positive, but recent deals, such as the USMCA, have linked this to flexibility between international guidance, such as that developed by the OECD. This is more limited than current UK data protection rules, therefore convergence with this guidance would result in the weakening of the privacy protections currently enjoyed by UK consumers.

The data protection clauses in those agreements would not immediately force the UK to replace GDPR with a lower regime altogether or automatically stop it from adopting a more stringent regime. However, these texts would blur the lines between strong and weak privacy regimes.

For these very reasons, it is very concerning to see a shift in approach in the UK-Japan CEPA, compared with the EU-Japan deal that the UK was previously party to. In the EU-Japan deal the approach 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. In the UK-Japan deal there is 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 is not strong enough and allows for challenge.

Another difference between the EU-Japan Agreement and the UK-Japan deal is the inclusion of an article that covers personal information protection, rather than preserving full autonomy to regulate in this area. Mechanisms to promote “compatibility” of personal information protection are encouraged and the UK-Japan Agreement states that this “may include the recognition of regulatory outcomes”. The article also states that each party shall take into account principles and guidelines of international bodies. It is also stated 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”.

This suggests that the UK is moving away from its commitment to GDPR protections. 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.

The UK needs to ensure that the trade deals it negotiates do not undermine the current level of data protection consumers can expect in the UK and the right to upgrade such protections in the future if the current protections are deemed insufficient to protect consumers.

In 2016 an independent study¹⁷ commissioned by a group of international organisations that Which? is a member of, showed that the current international trade regime (article XIV of the WTO General Agreement on Trade in Services) does not sufficiently safeguard privacy and data protection. The study concluded that trading partners could use trade agreements to attack each other's data protection and privacy rules. This puts people's fundamental rights at risk. Therefore, the UK, together with EU countries, adopted a model clause¹⁸ in 2018 to make sure that trade rules on cross border data transfers will facilitate the free flow of data while ensuring the highest level of data protection and privacy for their consumers by retaining the right to regulate in the field of personal data protection with safeguards from interference. This principle of retaining full autonomy over personal data protection regulation is present in the EU-Japan deal, however in the UK-Japan agreement mechanisms to promote compatibility of personal information protection are encouraged. The UK should continue to use the model clause when negotiating rules on data flows in trade agreements with third countries, in order to fully protect consumers' data protection rights, and ensure they can trust the digital economy.¹⁹

Limiting business accountability

Measures designed to prevent disclosure of source code, and give stronger intellectual property protections to businesses (such as preventing forced technology transfers in exchange for market access) could reduce the transparency and accountability of technical systems that are also increasingly being used in many decision systems that affect the lives of consumers. This includes things such as credit, financial data, court sentencing or migration status. There is a risk that international companies could have greater powers to use algorithms to make unfair, deceptive or discriminatory decisions such as presenting different prices to some UK consumers or even a different offer altogether.

As previously mentioned, 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. This combined with measures in trade deals preventing the disclosure of source codes and algorithms could be problematic as it could become more difficult for regulators to scrutinise business practices. There are growing concerns about the use of algorithms in many decision systems that affect the lives of consumers.

The US negotiating objectives for a deal with the UK however include to "establish rules to prevent governments from mandating the disclosure of computer source code or algorithms".²⁰ The USMCA also specifically prohibits the requirement to transfer algorithms expressed in source code as a condition. The CPTPP which the UK has said it would like to become a signatory to, 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 for example.

Companies can use algorithms to make unfair, deceptive or discriminatory decisions such as presenting different prices to some people or even a different offer altogether. Pricing decisions could take advantage of consumers' vulnerabilities or circumstances, with Uber's surge pricing being one example.²¹

In addition to pricing and marketing, profiling data services can also be used for political campaigning and to subvert the democratic process that provides the basic foundation for consumer rights. Data brokers search public records from schools, courts or police - as these do not have privacy restrictions in the USA - and buy commercial databases such as magazine subscribers. These companies work with social media platforms to further profile individuals.

Digital trade chapters can include provisions on public policy exceptions for regulatory bodies and judicial authorities to access source code and technical systems, as this is essential for them to effectively fulfill their consumer protection functions. However, their ability to do this may still be constrained depending on the language of these provisions. Access under narrow public policy exceptions may not be enough to protect consumers in commercial settings.

There is again concerning precedent being established in the UK's trade deal with Japan in this regard. The Agreement includes provisions that ban mandatory disclosure of source code, software and algorithms expressed in that software, although with some exemptions, including for regulatory bodies, judicial authorities or conformity assessment bodies in specific circumstances. **It is essential that this Agreement and any future Agreement that the UK agrees to do not inhibit the UK's ability to ensure appropriate consumer protection from online harms.**

Weaker wider digital regulation and oversight

In Which?'s National Trade conversation, two specific areas of digital trade were the focus of discussions: consumer data protection and online consumer rights. Participants were typically surprised to learn about the lower levels of consumer data protection and security in some countries compared to the UK. Participants wanted reassurance that a future trade deal with the US, for example, would not compromise the levels of data protection they currently enjoy and concessions would not be given relating to online consumer rights.

The US Government's negotiating objectives show that protecting large multinational digital platforms from regulation and regulators will be a goal as part of a UK deal. This includes protecting online marketplaces and social media platforms from regulation that enhances their liability for the safety or accuracy of the content they host - and protecting companies from having to provide details of their algorithms to regulators.

There is therefore a risk to the UK Government's current trend of stronger digital regulation and oversight when it comes to platform responsibility and online harms - and the adoption of a softer approach that delivers fewer protections for UK consumers than originally intended. If the US succeeded in inserting these types of provisions, it would have consequences for the UK's approach to domestic regulation.

There is precedent for this in other trade deals, such as USMCA. There is potential for provisions in trade agreements to inhibit attempts to introduce regulation extending liability to online marketplaces in the UK, as the UK Government is considering as part of its work on online harms, and as Which? has specifically called for.

In the USA platforms have been seen strictly as intermediaries that do not have control over the content on those platforms, and are therefore not liable for the content on them unless they

have specifically been made aware of it and have failed to respond. The EU has had a similar approach – and but is proposing to update legal requirements so that platforms have greater legal responsibility and liability as part of the Digital Services Act Package.²²

The UK has proposed a comprehensive regulatory framework for online harms, however, this could be influenced or subverted through commitments in its trade negotiations. Depending on the outcomes of the trade deals with other countries, and particularly the USA, the UK could adopt a softer approach that delivers less protection for consumers than originally intended. The USMCA strictly prohibits treating online platforms as “the suppliers of internet services” as an information content provider to determine liability for any harms (with the notable exception of intellectual property).²³

The USMCA provisions also indicate that online platforms should not be held liable for outcomes of the measures and solution that they introduce to protect harmful content, such as Google ContentID (a tool used to monitor videos on Youtube for copyright infringement) or Microsoft’s PhotoDNA (an image scanning software used by many companies to identify photographs of child exploitation in cloud storage and other online services).²⁴ Provisions in trade deals could make it harder to introduce UK laws that would introduce new responsibilities for online platforms to prevent online harms, including scams and the sale of unsafe products. Which? investigations repeatedly highlight that existing controls are inadequate and leave consumers poorly protected.²⁵

The Government must stand firm on its commitments to tackling online harms and ensure that there is nothing included within trade deals that inhibits its ability to do this to deliver the right protections for UK consumers, including extending liability to online platforms under specific circumstances. Trade deals should instead be used as a tool to enhance cooperation between regulators on these difficult cross-border consumer rights issues.

Unwanted spam message

The EU and UK currently have strong protections for consumers regarding marketing emails, which may only be sent to consumers who have provided prior consent. Other countries do not have such stringent rules on these communications, so including these provisions in trade agreements could provide further protection to UK consumers. The USA deems some commercial messages as legitimate without prior consent being given, as opposed to the UK that requires consumers to ‘opt-in’. In the US, the CAN-SPAM Act allows direct marketing email messages to be sent to anyone, without permission, until the recipient explicitly requests that they cease (opt-out).²⁶ There is therefore a risk of consumer exposure to large volumes of marketing communications without consent that in turn increases the likelihood of fraudulent communications being less detectable.

In previous trade deals, the USA included some rules for spam, (mainly at the request of other parties), but did not provide the same level of protection as in the EU/UK. USMCA tackles unsolicited commercial communications, but the protections are substantially weaker to the regulatory framework in the UK. However, in the proposed draft trade agreement with the EU, the UK Government proposed flexibility stating that there should be opt-in or opt-out which indicates the potential intention to shift towards an opt-out system.²⁷

The opt-out regime enables the establishment of large mass communications and spam databases, which means consumers could be exposed to more spam emails to which they have not subscribed to. This in turn could increase consumers’ vulnerability to scams. In an opt-in regime consumers are more likely to be wary of any unsolicited communications that they receive, whereas in an opt-out regime it is harder to distinguish between fraudulent emails and legitimate

marketing communication within a plethora of emails received. **The UK must therefore ensure that provisions included within future trade deals do not weaken consumer protection and expose consumers to unwanted “spam” communications.**

Weaker net neutrality principle

Net neutrality (or often referred to as ‘open internet’) is the principle that requires that all Internet Service Providers (ISPs)²⁸ treat all communications equally and without discrimination. In the UK and EU, blocking, throttling, and discrimination of internet traffic by ISPs is forbidden. This principle ensures that ISPs cannot restrict or dictate consumers’ access services of their choice on their devices. Under this principle, consumers are guaranteed that all the connections, access to services, and internet speeds to access these services are treated equally and that internet service providers cannot restrict access to them.

This means that ISPs are not allowed to restrict access to some services or slow down the traffic to websites and apps that do not pay premiums and limited choice for UK consumers in that way. Net neutrality delivers inclusion for consumers because it guarantees that everything on the internet is available to everyone.

Both treaties (USMCA and CPTPP) include some basic commitments to keep an open internet, but “subject to reasonable network management”. The provisions in both trade deals are almost identical and vague, leaving a lot of space for interpretation.

The EU and the UK have strong provisions on net neutrality, whereas in the USA net neutrality rules were relaxed in recent years.²⁹ The details of provisions in the trade deals will give more clarity on the implications on net neutrality. Net neutrality changes could have the most visible impact on video streaming services because they are an important part of using broadband for consumers and drive significant internet traffic.

The measures introduced in trade deals to promote net neutrality and an open internet are not always up to the high standards that currently exist in the UK. CPTPP for example, contains a clause that does not fully deliver on net neutrality.³⁰ This is problematic because it only ensures access to part of the internet. Full internet access is not guaranteed.

Clauses on net neutrality will not necessarily cause any immediate harm to UK consumers but the inclusion of weaker or vague provisions in new UK treaties could help facilitate low-quality regulation that could set a ceiling for consumer rights in this area going forward. The UK must, therefore, maintain its position on net neutrality in trade negotiations.

Multiple negotiations and interdependencies

The nature of the current trade deal negotiations with the UK deciding its trade approach with multiple countries at once means that the risks and opportunities relating to digital trade for UK consumers will change depending on not only the content but also the order that any agreements are made.

An example is that should the EU consider the UK for a data adequacy decision it would need to consider what mechanisms are in place for further transfers of data to countries with lower protections. The EU would seek to prevent the UK from becoming a “data laundering” haven,³¹ where personal data of European citizens could end up in low protection jurisdictions due to agreements the UK has already entered into with other countries such as the US.

The continuity of data flows between the UK and EU is at stake. In addition, the UK risks diverging from strong data protections if the UK’s continued digital trade negotiations with other countries lead to a lowering of data protection for UK consumers.

Another development is the UK adding both Vietnam and Singapore to its list of countries it has continuity agreements with that will take effect from 1 January 2021. This has been described by the Government as a step closer for the UK to join CPTPP.³² This is important given the concerns we have highlighted regarding some CPTPP provisions and their potential impact for UK consumers, including ruling 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, vague commitments surrounding net neutrality, and allowing for voluntary undertakings by companies relating to privacy to be equally as valid as regulation.

Additionally, UK International Trade Secretary Liz Truss and the Singaporean Minister for Trade and Industry also announced their intention to start negotiations for a Digital Economy Agreement (DEA). This would be a first for Singapore to conclude with a European country. Singapore's published intentions for DEAs include developing frameworks to foster interoperability of standards and systems to support businesses.³³ The text of the Singapore-Australia DEA for example makes mention of each Party taking into consideration international standards such as those published by the OECD when it comes to 'personal information protection'.³⁴ **Promoting interoperability with international standards that offer weaker data protection than the UK's current domestic regulation under GDPR 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.**

References

- 1 Trade in the Digital Era, OECD <https://www.oecd.org/going-digital/trade-in-the-digital-era.pdf>
- 2 Future Trade Strategy for UK Tech Industry, Government Press Release <https://www.gov.uk/government/news/liz-truss-launches-future-trade-strategy-for-uk-tech-industry>
- 3 Article 8.79 UK-Japan CEPA https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/929181/CS_Japan_1.2020_UK_Japan_Agreement_Comprehensive_Economic_Partnership_v1.pdf#%5B%7B%22num%22%3A425%2C%22gen%22%3A0%7D%2C%7B%22name%22%3A%22XYZ%22%7D%2C0%2C842%2C0%5D
- 4 EU Proposal for WTO Disciplines and Comments Relating to Electronic Commerce https://trade.ec.europa.eu/doclib/docs/2019/may/tradoc_157880.pdf
- 5 These are not considered as goods because the consumer buys a licence to access the product – which is an electronically supplied service. More information: Understanding and measuring cross-border digital trade, Cambridge Econometrics, on behalf of the Department for International Trade and the Department for Digital, Culture, Media and Sport. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/885174/Understanding-and-measuring-cross-border-digital-trade.pdf
- 6 Summary of UK Negotiation Objectives, United States https://ustr.gov/sites/default/files/Summary_of_U.S.-UK_Negotiating_Objectives.pdf
- 7 Communication from India and South Africa, WTO Work Programme on Electronic Commerce https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=247027,247023,246849,246824,246785,246786,246779,246780,246766,246733&CurrentCatalogueIdIndex=8&FullTextHash=
- 8 WTO Members Agree to Extend E-commerce, Non-violation Moratoriums, WTO General Council https://www.wto.org/english/news_e/news19_e/gc_10dec19_e.htm
- 9 Twelfth Ministerial Conference, WTO https://www.wto.org/english/thewto_e/minist_e/mc12_e/mc12_e.htm
- 10 The end of roaming charges one year later, EU Public Opinion Survey, 2018 <https://ec.europa.eu/commfrontoffice/publicopinionmobile/index.cfm/Survey/getSurveyDetail/surveyKy/2192>
- 11 Visitors to the US from the UK, Statista <https://www.statista.com/statistics/214796/number-of-visitors-to-the-us-from-the-united-kingdom/>
- 12 Three offers free roaming deals for USA, New Zealand and Australia, News Report, Money Saving Expert <https://www.moneysavingexpert.com/mobiles/cheap-roaming-calls/>
- 13 Which? calls for trade deals to extend free mobile roaming beyond Europe <https://www.which.co.uk/news/2020/10/which-calls-for-trade-deals-to-extend-free-mobile-roaming-beyond-europe/>
- 14 Making Deals in Cyberspace: What's the Problem? White Paper, World Economic Forum http://www3.weforum.org/docs/WEF_White_Paper_Making_Deals_in_Cyberspace.pdf
- 15 Making Deals in Cyberspace: What's the Problem? White Paper, World Economic Forum http://www3.weforum.org/docs/WEF_White_Paper_Making_Deals_in_Cyberspace.pdf
- 16 Regulation on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC (eIDAS), European Parliament and the Council <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014R0910>
- 17 Trade and Privacy: Complicated Bedfellows? How to achieve data protection-proof free trade agreements, Study commissioned by the European Consumer Organisation (BEUC), the Center for Digital Democracy (CDC), the Transatlantic Consumer Dialogue (TACD) and executed by the Institute for Information Law (IViR) at the University of Amsterdam <https://www.beuc.eu/publications/beuc-x-2016-070-trade-and-privacy-complicated-bedfellows-study.pdf>
- 18 EU position on cross-border data flows and protection of personal data and privacy in trade and investment agreements https://trade.ec.europa.eu/doclib/docs/2018/may/tradoc_156884.pdf

- 19 Global Statement to Safeguard Data Protection and Privacy in the WTO Joint Statement Initiative on E-Commerce, BEUC <https://www.beuc.eu/publications/beuc-x-2020-112-global-statement-to-safeguard-data-protection-and-privacy-in-the-wto-joint-statement-initiative-on-e-commerce.pdf>
- 20 Summary of UK Negotiation Objectives, United States https://ustr.gov/sites/default/files/Summary_of_U.S.-UK_Negotiating_Objectives.pdf
- 21 Surcharges, News Report <https://metro.co.uk/2018/05/29/womans-outrage-90-uber-bill-despite-warned-4-3x-surge-charge-place-7586667/>
- 22 The Digital Services Acts Package, European Commission <https://ec.europa.eu/digital-single-market/en/digital-services-act-package>
- 23 UK Digital Trade Negotiations and their impact on consumers, Report commissioned by Which? and delivered by policy consultant Javier Ruiz Diaz
- 24 UK Digital Trade Negotiations and their impact on consumers, Report commissioned by Which? and delivered by policy consultant Javier Ruiz Diaz
- 25 Which? Report <https://www.which.co.uk/news/2020/12/amazon-com-ebay-and-wish-found-selling-dangerous-recalled-products/>
- 26 FTA Guidance on CAN-SPAM <https://www.ftc.gov/tips-advice/business-center/guidance/can-spam-act-compliance-guide-business>
- 27 Draft UK-EU Comprehensive Free Trade Agreement, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886010/DRAFT_UK-EU_Comprehensive_Free_Trade_Agreement.pdf
- 28 Internet Service Providers, often referred as ISPs are companies that enable consumers to access the interconnected networks of the internet.
- 29 US Officially Repeals Net Neutrality Rules, News Report, BBC <https://www.bbc.co.uk/news/technology-44438812>
- 30 Article 14.10: Principle of Access to and Use of the Internet for Electronic Commerce, CPTPP
- 31 UK Digital Trade Negotiations and their impact on consumers, Report commissioned by Which? and delivered by policy consultant Javier Ruiz Diaz
- 32 Government Press Release on Singapore and Vietnam Agreements <https://www.gov.uk/government/news/uk-strikes-singapore-and-vietnam-trade-deals-start-of-new-era-of-trade-with-asia>
- 33 Digital Economy Agreements, Ministry of Trade and Industry Singapore <https://www.mti.gov.sg/Improving-Trade/Digital-Economy-Agreements>
- 34 Australia-Singapore Digital Economy Agreement <https://www.dfat.gov.au/trade/services-and-digital-trade/Pages/australia-and-singapore-digital-economy-agreement>

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