



# Future Care Capital

INFORM. CONNECT. TRANSFORM.

## Parliamentary Briefing

### TRADE BILL

December 2020

## About Us

Future Care Capital (FCC) is an independent charity which undertakes research and project activity to improve health and care outcomes for individuals living in the UK. Our work is focused upon the potential that data, technology and innovation harbour to bring about a step-change in the years to come. We have produced several publications which explore how the UK might better harness the value of healthcare data, including: Intelligent Sharing (2017); Taking Next Steps to Harness the Value of Health and Care Data (2019); and Research and Commercial Use of Healthcare Data (2020). Our briefing explores key themes arising from the Trade Bill ahead of further discussions amongst parliamentarians about its implications for digital trade, where it has the potential to impact health and care.

## Context

As the UK transitions from membership of the European Union (EU), the Government is proactively seeking to 'replace' trade deals to which the UK was previously a party as an EU Member, as well as entering into 'new' trading relationships in its own right. The Trade Bill concerns the former and affords the Government powers to implement "rolled-over" trade agreements; this includes, for example, the Japan and Canada deals agreed to by the Secretary of State for International Trade in October and November 2020 respectively. It is not, explicitly, intended to deal with "new" trade agreements that the Government hopes to negotiate in future. However, that leaves in some question the status of new or enhanced provisions in 'replacement' deals which are said to *improve upon* or expand (pre-)existing agreements.

## The Challenge

The UK is a leader in digital exports (ranked 5th globally)<sup>1</sup> as well as being a leading nation in the development and deployment of data-driven technology in healthcare<sup>2</sup>. We therefore welcome the introduction of the Trade Bill and its aims, to the extent that it harbours the potential to expedite access to and use of data, technology and innovation in the design and provision of health and care services. However, a number of key challenges need to be addressed when considering the Bill and its implications for data-driven healthcare in the UK:

- 1) Some professional bodies and civil society organisations have called for a specific, if broad-ranging, 'carve-out' for publicly funded *health and care services* in the Trade Bill. We are concerned that *health and care data processing services and IT systems* for commissioners, analysts and clinicians might not be regarded as "health and care services" in the context of trade agreements, such that explicit reference to their protection in the Bill may be required.

The Government's response to the ongoing public health emergency is reliant upon access to and processing of pertinent health and care data or, in other words, control of data processing services and IT systems for which statutory bodies – in particular, PHE, NHSE/I and NHS Digital - are responsible. This capability is of vital importance in the context of the pandemic but should be guaranteed in perpetuity, since it will underpin the efficient and effective operation of health and care services in the UK as our reliance upon next-generation tools, treatments and technologies continues to evolve. It also amounts to a significant *national asset or resource* with the potential to function as a dynamo in relation to research, innovation and continued growth of the Life Sciences, Health and Care Tech sectors. The Trade Bill should recognise this and incorporate explicit provisions which prevent a situation from arising whereby outsourcing/off-shoring or foreign direct investment in digital infrastructure for health and care, whether intentionally or otherwise, results in regional disparities at odds with the ethos of our National Health Service which might, for example, exacerbate health inequalities and/or the Government's stated intention to bring about a 'levelling up' of communities across the UK.

- 2) The Government continues to explore the scope to secure a Free Trade Agreement with the EU at the time of writing, but it is unclear whether the Government will succeed in securing an adequacy agreement which would, as things stand, hinge upon UK adherence to the EU's General Data Protection Regulation (GDPR) as it evolves. We are concerned about the potential for divergence from the EU's GDPR to result in a 'watering down' of data protection rights for individuals, since they currently underpin public trust in both primary

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<sup>1</sup> According to [Unlocking Global Tech Report: a Guide for Global Tech Leaders](#) [2020], UK digital tech exports are currently projected to grow by 35% by 2025, resulting in an additional £8.15bn worth of tech exports - £31.45bn by 2025. The UK is the 5th greatest digital tech services exporter in the world at £23.3bn in 2019, behind India, the US, China and Germany.

<sup>2</sup> [Bioscience and Health Technology Sector Statistics](#) [August 2020].

and secondary uses of sensitive healthcare data (i.e. for direct care as well as for the purposes of research, planning and innovation); although, here, we acknowledge that there is a balance to be struck between established protections and new provisions which might expedite the development of and access to new and improved treatments and technologies. Press coverage and parliamentary discussion of the recently agreed UK-Japan deal point toward the potential for an emphasis placed upon 'championing the free flow of data' to impact the data protection rights of individuals when data is transferred onwards to other jurisdictions. The Government should carefully consider how the Trade Bill's provisions could contribute to or detract from the public's perception of its trustworthiness and accountability in relation to health and care data access and usage by third parties.

- 3) The Government continues to invest significant funds in research and development – most recently, in the Chancellor's Autumn Spending Review, committing a total of £14.6bn for R&D together with £559m to support the modernisation of technology across the health and care system in 2021-2<sup>3</sup>. Its ability to formulate appropriate policies and to regulate access to publicly funded health and care data for the purposes of research, planning and innovation should not be compromised in negotiating digital chapters of international trade agreements. Crucially, the Government should not find itself in a position whereby it is at risk of legal action from its trading partners and multi-nationals if, for example, it offers discounted access to health and care data assets for UK SMEs to stimulate home-grown economic development.
- 4) The Government must negotiate replacement as well as new trade agreements with countries that subscribe to an increasingly protectionist approach to intellectual property. We are concerned that the effect of provisions in some agreements could be to reduce access to the algorithms that underpin them—in particular, where developed countries seek restrictions on forced disclosure of digital technology, treating source code and algorithms as trade secrets. None can doubt the need to prioritise the safety of the public, as new treatments and technologies are developed in the face of the Covid-19 pandemic and traded under both existing and new agreements that the Government might enter into with other countries. The Bill should contain up to date provisions to guarantee patient safety against this backdrop.
- 5) There is widespread recognition that the NHS uniquely controls nationwide longitudinal healthcare data which has the potential to generate clinical, social, economic development as well as commercial value – equivalent to an estimated £10bn/annum, according to Ernst and Young<sup>4</sup>. The Government should take steps to harness the value of that data and, in the context of the Trade Bill, ensure that the public can be satisfied that that value (in the broadest possible sense of the term) will be safeguarded and, where appropriate, ring-fenced and reinvested in the UK's health and care system.

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<sup>3</sup> [Social care loses out but better news for R&D in Treasury Spending Review](#) [November 2020].

<sup>4</sup> [Realising the value of healthcare data: a framework for the future](#) [July 2019].

## The Opportunity

The Government should take steps to retain control of access to healthcare data for the purposes of research, planning and innovation, consistent with its own policy framework and associated regulations in advancing the Trade Bill. This includes the national data opt-out and its Code of Conduct for Data-Driven Health and Care Technology - in particular, principle 10, which governs the derivation of *fair benefits* for the NHS in respect of the research and commercial usage of publicly funded healthcare data. Any proceeds from data collaborations that the Government agrees to, integral to any 'replacement' or 'new' trade deals, should be ring-fenced for reinvestment in the health and care system, pursuant with FCC's long-standing call to establish a Sovereign Health Fund<sup>5</sup>, such that the Bill should contain explicit reference to pertinent provisions. The Government should also ensure that any source code or algorithm underpinning traded medical devices, which might recommend or inform treatment and care, is not beyond scrutiny by an appropriate body — thereby enshrining in law the Government's commitment to patient safety. Under no circumstances should a trade deal preclude regulatory access to any component or element of such a device.

## Further Information

If you have further questions about the Bill or would like to discuss any of the issues raised in this briefing, please do not hesitate to contact:

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<sup>5</sup> [Towards a Sovereign Health Fund](#) [June 2020].