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Health:

The Proposed EU-US Free Trade Agreement and the NHS

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The measures taken by both Labour and Tory governments in recent years to open up health services to the market are not just a British phenomenon. Similar measures have been taken in all other European countries. The main mover in this has been the European Commission, the political representative of European transnational corporations. The European Commission is politically the most neoliberal free-market body in the world, way ahead of the US administration. In the General Agreement on Trade in Services (GATS 1995)) the signatories committed themselves to engage in âEurosÜprogressive liberalisation' and, since that time, European governments have consistently implemented measures to commercialise health services and introduce more competition into the service. This international agreement to open up services to private corporations was given a boost by the financial crisis and the recession.

In 2007, US and EU leaders established the Transatlantic Economic Council to further liberalise trade between Europe and the US. Preparations for this have continued since then and this year (2013) negotiations began to establish free trade between the two leading economies. It will probably be a few years before such a bilateral trade treaty is actually signed. Although publicly promoted as increased trade in goods which will increase jobs, it's really about regulation, investments, the rights of investors and the marketisation of publicly owned services.

Although the media might focus on headline-grabbing public disputes, for instance, French demands for the exclusion of culture (TV, films, broadcasting, etc), the really significant events will take place in secret negotiations between the EU and US and within the EU regulatory framework and in increased private access to public services in Europe as the Commission prepares for the establishment of this free trade area. This preparation is often described as harmonisation. For instance, when Poland applied to join the EU, it had to undergo a massive process of harmonisation in which its laws, economic structures and policies had to be made to fit in with those existing in the rest of the EU. The UK's recent Health and Social Care Act was also framed with an eye to future liberalisation of the services sector across the EU. And the UK government is one of the key backers of a free trade area with the US.

Will the negotiations succeed in establishing EU-US free trade? There are hurdles, for instance, French demands for the exclusion of culture, agricultural subsidies in Europe, and European resistance to hormone-treated beef. But the European Commission, the EU economic elite, the UK and German governments and the European Parliament are all committed to it. The European population is not well informed partly because these issues are never properly explained in the media and also because it is focused on domestic issues and economic and social problems. The media are owned by the same corporations and elites that are in favour of liberalisation. Organised EU-wide political resistance to health marketisation is weak so far. There have been a few EU-wide conferences in the recent period in the Netherlands, in Poland and in France, but the social and political forces represented were small. So it may be difficult to mobilise significant social opposition across Europe to the US-EU trade agreement. If social mobilisation is possible, the aim might be to exclude health from the conditions of the treaty or to demand its non-ratification..

The Canada-EU Trade Agreement (CETA)

In 2009 Canada and the EU began negotiations over a free trade deal (CETA) similar to what is now being negotiated between the US and the EU. But, after four years, the negotiations are still dragging on, hampered by disagreement over imports of beef and dairy products, pharmaceutical patents and exemptions demanded by Canada's provinces. Of course, the negotiations are secret but the text of the proposed agreement was leaked and

has been subject to detailed analysis by legal experts and defenders of public services in Canada. The Canada Health Act, as it exists, requires provinces and territories to restrict the rights of private investors and service providers in order to maintain a health care system based on public administration, universality and comprehensiveness.

The Canadian exemption for healthcare in the proposed free-trade agreement stipulated that any such exemptions have to be in relation to âEurosÜa social service established or maintained for a public purpose' (Annex 2-c-9). Its proposed exemption in the treaty is this:

âEurosÜCanada reserves the right to adopt or maintain any measure with respect to the provision of public law enforcement and correctional services, and the following services to the extent that they are social services established or maintained for a public purpose: income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care.'

But the exclusion is open to interpretation. There are disputes over what can be counted as âEurosÜpublic purpose' and, as in the GATS agreement, the presence of private providers within the public system allows the exclusion to be challenged. Legal opinion in Canada is very critical, claiming that the exemption is deliberately weak. The Canadian conservative government, an aggressively right-wing and neoliberal government, is pushing hard for this free-trade deal.

The EU seems to have stated stronger reservations on healthcare:

âEurosÜThe EU reserves the right to adopt or maintain any measure with regard to the provision of health services other than hospital, ambulance or residential health services which are privately funded.
Participation of private operators in the health system is subject to concession. An economic needs test may apply. Main criteria: number of and impact on existing establishments, transport infrastructure, population density, geographic spread, and creation of new employment.

Several member states reserve the right to adopt or maintain any measure with respect to the provision of privately funded hospital, ambulance or residential health services.'

Legal opinion would be required to assess the strength of this exclusion, it does appear, on the surface, to be stronger than the Canadian reservation. The EU Services Directive of 2006 which aimed to promote âEurosÜa competitive market in services' made a similar general exception for healthcare:

âEurosÜ(17) This Directive covers only services which are performed for an economic consideration. Services of general interest are not covered by the definition in Article 50 of the Treaty and therefore do not fall within the scope of this Directive. (Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market)

In all these treaties and directives, the same general exemption formulas are used - services âEurosÜmaintained for a public purpose' (Canada) , services âEurosÜin the exercise of government authority' (GATS), services âEurosÜof general interest' (EU Directive). What all these formulas have in common is that they are vague, open to interpretation, and are weakened by other clauses in the treaties. In the GATS treaty, for instance, the very next clause defines âEurosÜin the exercise of public authority' as âEurosÜany service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers'. This reference to other service providers immediately undermines the general exclusion. A legal review of the GATS treaty by the World Health Organisation in 2002 concluded that âEurosÜThe exclusion from GATS provided by Art 1:3c does not apply to a service merely

because the government provides it'.

The proposed EU-US Free Trade Agreement.

The mandate for the EU negotiators, the âEurosÜrecommendation from the Commission on the negotiating Directives for a comprehensive trade and investment agreement with the US', finalised in May 2013, has been leaked. The aim of the Agreement, according to the Commission, is to remove âEurosÜunnecessary obstacles to trade and investment, including existing NTBs, through effective and efficient mechanisms, by reaching an ambitious level of regulatory compatibility for goods and services, including through mutual recognition, harmonisation and through enhanced cooperation between regulators'. (Art 24)

Once again, there is the same brief âEurosÜexemption' as we find in GATS:

'20. Services supplied in the exercise of governmental authority as defined by Article I.3 of GATS shall be excluded from these negotiations'.

In other words the protection of public services such as health is no stronger than in GATS, which critics already regard as extremely weak. These weak exclusions are also undermined by requirements which provide international corporations with a number of legal loopholes. For instance, criteria such as âEurosÜnon-discrimination', âEurosÜnecessity' and âEurosÜproportionality' are routinely used to challenge government regulation. GATS has a âEurosÜnecessity test' which prohibits measures that âEurosÜconstitute unnecessary barriers to trade in services'. In 1997, the the EC challenged Italy's public monopoly on job placement centres. The European Court of Justice agreed with the EC and ruled Italy's program was a violation because it was "liable to affect trade."

The proposed EU-US treaty would set in stone all liberalisation and privatisation measures already achieved at the time the treaty is signed and bring all future regulations within the restrictive provisions of the new agreement:

'15. The aim of negotiations on trade in services will be to bind the existing autonomous level of liberalisation of both Parties at the highest level of liberalisation captured in existing FTAs, in line with Article V of GATS, covering substantially all sectors and all modes of supply...'

It's also important to note that exclusions relate only to present provisions. Future regulation or changes in regulations would not be excluded from treaty provisions. In order to maintain sufficient regulatory policy space, health services need to be fully excluded from all marketisation measures, protecting both existing and future policy measures. The Canadian-EU treaty specifically excluded future measures from protection and the EU's proposals limit protection only to existing measures. Future regulatory changes to contain costs, strengthen social solidarity or improve quality of the service could then become either more open to market forces or more difficult to implement and vulnerable to compensatory claims.

There are two other areas which, although they raise concerns across a number of areas not directly related to health, would have a powerful affect on public health provisions. These are harmonisation and investor-protection.

'5. The Agreement shall be composed of three key components: (a) market access, b) regulatory issues and Non-Tariff Barriers (NTBs), and (c) rules'.

What is aimed for here is the harmonisation of EU and US regulations. Since tariffs in the United States and the European Union are already low, the proposed agreement focuses in particular on regulatory issues. The agenda of transatlantic business interests is to use these negotiations as a means to pursue deregulation efforts that have been unsuccessful to date. The European Commission has released a list of 130 âEurosÜmeetings with stakeholders' on the EU-US free trade talks. At least 119 meetings were with large corporations and their lobby groups. This means that more than 93% of the Commission's meetings with stakeholders during the preparations of the negotiations were with big business. Industry representatives have pushed for harmonization of the regulations that have limited their access to some of our most important consumer and environmental safeguards, which could include such things as health and safety at work, restrictions on harmful chemicals and hormones in food, environmental standards, and so on.

The other issue is investor rights. So-called investor-state dispute settlement would enable US companies investing in Europe to skirt European courts and directly challenge EU governments at international tribunals, whenever they find that laws in the area of public health, environmental or social protection interfere with their profits. This type of investor challenge to public authorities already exists in many agreements. For instance, a similar provision in NAFTA allowed the US company Lone Pine Resources to challenge the Canadian government. In 2011 the provincial government of Quebec, with broad popular support, introduced a moratorium on fracking until a proper environmental study had been carried out. The company then demanded $250 million in compensation from Canada. In 2012, the Swedish energy giant Vattenfall launched an investor-state lawsuit against Germany, seeking â ¬3.7 billion in compensation for lost profits when the German government decided to phase out nuclear energy after the Fukushima nuclear disaster. There are many more examples.

In fact, Canada is the sixth most sued country in the world and currently faces over $5 billion worth of investor claims under NAFTA. For that reason, it attempted to limit when a company could invoke investment arbitration in CETA. But the EU is fighting back strongly, seeking more investor-friendly definitions of âEurosÜdirect' and âEurosÜindirect expropriation' or what could contravene an investor's âEurosÜfair and equitable treatment'. âEurosÜIndirect expropriation' would allow an investor to challenge any government law, regulation or other measure that would reduce or eliminate company profit.

These treaties being negotiated are a minefield of threats to public services and government regulations. he structure of health services and the mix of public/private is different in each member state and individual member states may want different protections. But member states do not negotiate international trade agreements. This is in the hands of the EU Commission, according to article 207 of the EU treaty. Trade policy is an exclusive power of the EU - so only the EU, and not individual member states, can negotiate on trade matters and conclude international trade agreements. However, the same article stipulates that, where public services such as health are affected by an international treaty, the Council of Ministers has to agree unanimously:

âEurosÜThe Council shall also act unanimously for the negotiation and conclusion of agreements:
'... (b) in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them.'

So the population of individual member states could demand that their government refuse to endorse the treaty if healthcare or other sensitive issues raise concern. It is unlikely that a UK Tory government would go along with this but it is something that could be raised now with the Labour Party.

The European Parliament also has to vote to ratify this treaty before it can come into force. It makes sense, therefore, for campaigners to put pressure on the EP. A big majority of MEPs is in favour of a free trade agreement. The vote to begin negotiations with the US passed by a wide margin, with 460 votes in favour, 105 against and 28 abstentions. But the EP also agreed to support French demands for an exclusion of cultural services (381 votes in

favour, 191 against, with 17 abstentions). This vote is not binding on the EU negotiators. But the French threat of a veto on the treaty might persuade the Commission to make exclusion of culture part of the EU position. The ratification vote doesn't take place until the deal has been signed. It's unlikely that the European Parliament would reject an agreement at that late stage.

This treaty, if passed, would represent an enormous challenge to public-owned health services across Europe. There was very little awareness in Europe, even among those wanting to defend public services, to the implications of the EU-Canada agreement, even though that has been on the negotiating table for over four years. It is essential that campaigns in Britain pay serious attention to the US-EU negotiations and link up with campaigns in other EU states.