

Written evidence submitted by Shanker Singham (FRE0003)

I include responses to the questions which the Committee has asked, including references to specific articles and other papers I have authored which I believe would help the Committee with its enquiry.

I have also included to accompany my evidence, evidence on the NI Protocol which has been separately submitted to the NI Select Committee.

What impact has the COVID-19 pandemic had on the negotiations? Have the UK and EU been affected differently? What further consequences might the pandemic have on the progress of the negotiations and the nature of any future relationship?

I don't think the UK and EU have been affected differently by the Covid outbreak. It is clearly an exogenous unforeseen event, and as such general principles of international law would suggest that some varying of the agreement between the Parties might ultimately be possible if it proved necessary or useful. It is too early to consider this as the parties are able to make progress using the new modality of video conference calls. The gaps between the parties at the moment also do not lend themselves to better resolution by face to face meetings.

The areas of difficulty have not changed and they are very much as I have set out in the attached article (see <https://globalvisionuk.com/uk-and-eu-negotiating-mandates-compared/>).

Taking each one of these in turn it appears that the European Commission still thinks that it is negotiating with the May administration which had a track record of conceding to every EU request.

The offer of a zero tariff, zero quantitative restrictions free trade agreement seems still conditional on the UK accepting that its economy should be under the European legal order in respect of state aids. This is clearly not going to work in terms of an agreement. Similarly unless the EU accepts that the UK is going to operate as an independent, coastal state, it is unlikely a deal would ever be reached.

These two issues are at the core of the disagreement as unless the European Commission changes its views (which means accepting that the UK is independent sovereign state), there is absolutely no point in extending the transition period on the terms of the current Withdrawal Agreement. More time cannot solve these differences. Indeed what is more likely to do so is the compression that a fixed end of the negotiating period actually gives. One would hope that both parties will respond to the urgent need to develop some economic growth in the world coming out of Covid-19, by swiftly moving to resolve differences where the sort of landing zone I have alluded to in previous articles actually exists. But this is really a binary decision for the EU.

On state aids, if the UK's position was that the reason for objecting to the EU ask was that the UK wanted to distort its market in anti-competitive ways to achieve trade advantage that would be one thing. But the UK is not saying that. It is saying that it is prepared to develop its own anti-subsidy regime to ensure that its market is not distorted. It would be the first time that one trading partner had required another to promulgate an entirely new

legal order of its own to limit anti-competitive market distortions. This is far more significant than ordinary trade agreement chapters on subsidies and anti-dumping. In the world of trade, it would be a big win. It would also advance the goals of the EU, US and Japan to reduce market distortions (announced at the December, 2017 WTO ministerial) around the world in particular with respect to China and could set a template for future trade relationships. To turn that down because the UK was not willing to put itself under EU state aids control would seem to be churlish and self-defeating.

On fisheries, if the UK's position was that it was not willing to countenance any access to its EEZ for foreign fisherman (as is the case for the US), that would be a legitimate cause for EU complaint. But, again the UK is not saying this. It accepts that there will be access for foreign fisherman. It just does not agree with the current access and wants to renegotiate it like an independent coastal state which is what it seeks to be. Either the EU respects that or it does not. Again, it would seem odd that the EU would allow this issue to torpedo an agreement with all the impact that will have on French and German dairy farmers, French and Irish beef farmers, and so on.

On governance, will the EU really let an agreement fail because they disagree with the shape of the container of the relationship? If the UK is willing to reduce its obligations to a series of agreements rather than a single all-containing association model, will they really reject the whole thing?

On Northern Ireland, I have much more sympathy with EU arguments. Here the UK does need to present a credible plan of some kind. But equally with respect to trade across the GB-NI channel the bar is not that high. As long as the UK can make the case that its proposal protects the single market and customs union as much as it is protected on other EU external borders, then it would certainly be unjustifiable for the EU to reject it. But the onus is on the UK to propose something.

The UK government's position on not discussing an extension of the transition period has shocked the EU side. They expected that, of course the UK would seek an extension, thus displaying weakness and continuing to look like the junior partner in the relationship, as they did during the May years. I have explained why I think extending the transition period on the terms of the WA would be a mistake at <https://www.conservativehome.com/platform/2020/04/shanker-singham-brexit-and-why-the-transition-period-must-not-be-extended-beyond-december-this-year.html>). It is simply too great a risk to remain a rule-taker with no say. Chancellor Merkel's reference to a Financial Transactions Tax for all EU countries should be a salutary wake-up call regarding the dangers of the WA's transition period rule-taker status. And, there is no evidence that more time would do anything to solve the binary choice the EU has to make on the first three issues I highlight above. If it is not going to change when faced with the compression of a real deadline, why would it change when that deadline is thrown out? In the meantime, the UK would lose all present opportunities (see article above). However, this is not to say that the parties cannot together recognise that a force majeure event could impact their approach to implementation of whatever they agree, if anything. The argument that business needs certainty cuts both ways. What could be less certain than extending the negotiating period, when businesses don't know what they have to conform to. The better business approach is to use the lessons learned from shutdown to plan for no immediate agreement with the EU while using their Brussels relationships to move Brussels to a more reasonable place. UK business' lobbying should not stop at the door of the UK government. Extension only provides more certainty, if you are certain that the current terms the UK is on will not really change, or indeed you want this. But of course, the Johnson administration has been crystal clear that the current terms will change.

- *How would you characterise the approach the UK and EU are taking to the future relationship negotiations? In which ways, if any, do these approaches differ from the withdrawal negotiations? What new challenges might both parties face?*

The negotiating of the FTA is fundamentally different from the withdrawal or divorce negotiations. The backdrop of these negotiations has radically changed as a result of the Covid outbreak. Given the urgent need to kickstart the global economy, and the political drivers bringing the Parties together, I would anticipate that some of the differences (see above) that have been key stumbling blocks so far will become less difficult as the deadline is approached. There will also be powerful economic drivers which will push the parties to agree a deal. For example no trade deal will mean no agreement on the agricultural TRQs under which trade would flow between the UK and EU. This would mean no Irish beef, French beef, lamb or dairy, Bavarian dairy etc into the UK market which would be devastating. It is unlikely that leaders of Member States would be willing to inflict this harm on their citizens if a reasonable deal were possible with the UK.

- *What is your assessment of the likelihood of an agreement given both sides' negotiating mandates? Has this assessment changed since the talks began? If so, why?*

I think a deal is more likely now because of the pandemic and the urgent need to kickstart the global economy. The European Commission needs to regain the confidence and trust of member states who have expressed concerns about the handling of the Covid crisis and resultant economic fall-out. The crisis has exposed rifts between member states and exposed very different approaches to economic and other issues. It has increased pressure on the Eurozone, and made a Euro crisis more likely. All of these factors will make it important for the EU-27 to be more rather than less likely to agree a deal with the UK.

- *What progress would you expect to have been made by the end of June? How do you think talks might progress over the coming year? How long would you expect the UK and EU's respective ratification processes to take?*

I would not expect much to change between now and the June round of negotiations. I would anticipate that at this point, assuming the parties are in broadly similar places to where they are now, we will see a decision point in the negotiations. The EU will now assume the UK will not be seeking to extend and will have to eliminate that possibility from its consideration. There is a quite a binary choice as noted above. The EU does need to move off its positions that require the UK to remain subject to the EU's legal order. If they refuse to do this after the next two rounds of negotiation, then it would be wise for businesses to prepare for leaving without an immediate agreement. Ratification and implementation should be separated from the negotiating period. While it is crucial that the EU feels the compression of a deadline, and that this will not be easily extended, this is because the transition period's terms, specifically the fact that the UK is a rule taker without a say, and subject to the common commercial policy are particularly disadvantageous to the UK. It is not surprising why the EU would want such a disadvantageous period extended. They have also made clear that Brexit is a distraction for them and dealing with the Covid-19 outbreak is an existential issue. If an extension were given, it is likely the EU would simply use the extra time to deal with its immediate and pressing concerns, safe in the knowledge that the UK would be unable to act, and make no effort to resolve any of the issues at large in the FTA negotiation. Such arguments do not necessary apply to a ratification and implementation period where there is greater

flexibility provided that the UK is no longer a rule taker and not subject to the common commercial policy. The UK's ratification process should not take long given that all that is required is parliamentary approval and the approval of the devolved nations. Given the costs of not approving and the Government's majority this should be straightforward. The EU ratification process is possibly longer, possibly requiring member state ratification as opposed to just the EU parliament (depending on whether it is a mixed agreement or not). But even in the case of a mixed agreement, member states are unlikely to act in the way that Wallonia did for the CETA ratification process, as Member States will have too much to lose from not ratifying the agreement.

- *Given the time constraint imposed by the Transition Period, what sort of agreement do you believe is possible between the UK and the EU? What issues should each side be prioritising? To what extent do the priorities set out in each side's negotiating mandates match your assessment of what they should be seeking? On which areas does each side have the most negotiating leverage?*

The UK is seeking a Free Trade Agreement along the lines of those the EU has with other countries. The most recent EU agreements are the CETA and the EU-Japan agreement. If the EU agreed to do that, an agreement could be reached quite quickly, especially given the starting points of both parties and critically that fact that lobbies have not developed behind tariff barriers or regulatory protection as there has not been any previously. FTAs take time to negotiate because governments have to square away their domestic lobbies whose protection (in the form of tariffs, quotas or regulatory barriers) is to be removed in the FTA. This is not the case for the UK-EU FTA where no such issues arise. The time taken to get to an agreement therefore depends only on political process. This can be resolved by direct high level political pressure at head of state, and chief negotiator level.

- *What would be the main differences between a UK/EU relationship as roughly set out by both sides' mandates and a no-deal scenario? If only a limited deal is agreed what are the possible consequences for areas that are not covered? What scope is there for temporary or transitional measures either agreed between the two parties or put in place unilaterally.*

Goods. The principle difference between no further agreement and the UK mandate would be in the area of tariffs, quotas and regulatory issues. On tariffs, the Common External Tariff would apply to goods exported from the UK to the EU and the UK's Global Tariff would apply to goods exported from the EU to the UK. Quotas apply to agriculture, and unless other arrangements are made (for example in the WTO TRQ negotiations) there would be no TRQ between the UK and EU. This would mean no agricultural trade whatsoever between the parties. This is the largest difference but would have a differential impact on EU farmers for whom it would be catastrophic. UK farmers would have to immediately find alternative export markets (such as the US, CPTPP countries, China and RoW). Its ability to do so would depend on how open it is prepared to be, although it should be pointed out that UK farmers excess production could certainly be absorbed by the domestic market. If there is no agreement providing for regulatory recognition, then UK exporters would have to rely on conformity assessments and manufacture products to EU standards (they would likely to do so anyway) conducted in EU member states. For imports from the EU, the UK could unilaterally recognize these for conformity assessment, standards and even underlying product market regulation. There would still be potential customs-related checks, but these would be required whether there was an FTA or not.

With respect to customs checks and clearance issues, regardless of FTA outcome (EU or UK mandate), checks would be needed. Only the intensity of regulatory physical checks could be diminished if there are regulatory recognition agreements in place.

Services. The UK certainly wishes to see financial and other services covered by the agreement. If there is no agreement, UK financial services exporters into the EU can either set up branches in members states (which many, if not most of them have already done) or they will have to rely on Reverse Solicitation EU rules to sell services into the EU-27. This is better for larger more established firms rather than smaller ones, who would otherwise need to be licensed.

Mutual Recognition. Without any kind of deal, the EU would not recognize the UK's trusted trader scheme, its testing of whether products satisfied EU standards for export, and the like. However, the UK could unilaterally recognize EU programmes, standards and even underlying product regulation.

There is also the possibility (and the likelihood) that in the event that no further agreement was reached, the sides would come together to deal with urgent issues (such as mutual recognition of trusted trader systems for instance), and basic conformity assessment and market surveillance.

- *Our previous witnesses have outlined four key areas of initial disagreement:*
 - *Governance;*
 - *Level Playing Field;*
 - *Fish; and*
 - *Co-operation in Criminal Matters.*

Have there been any recent developments in these areas? Could you sketch out possible compromises? Which other issues do you foresee emerging as sources of disagreement as the negotiations progress?

See above for a detailed response to this.

- *Why does the EU want a single agreement and why does the UK want several separate agreements? How would these different governance arrangements affect how any future relationship between the UK and the EU would operate? What are the standard forms of dispute resolution contained in FTAs? To what extent do these differ based on the scope of an FTA? What form of dispute*

resolution procedures are both parties seeking in this agreement? How do these differ from those set out in the Withdrawal Agreement?

The EU wants to have an association agreement because it wants to ensure that the UK is closely linked into EU systems. The UK on the other hand does not want to have such a close arrangement, but prefers an FTA on similar terms as previous FTAs. While an argument can be made that this is less important than the actual substantive arrangements between the Parties, I would argue that this governance question is central to the other areas of disagreement. They boil down to a question of whether the EU is prepared to accept that the UK is an independent political actor, or an associated state.

FTAs do include dispute settlement mechanisms. These involve standard arbitration mechanisms, and sometimes include provisions that require parties to select forums (either WTO dispute settlement or the dispute settlement mechanism of the FTA). Some allow parties to select any forum.

- *Are precedents such as CETA and the EU-Japan FTA useful as templates for an agreement between the UK and EU? Based on both sides' mandates, how would an UK-EU FTA differ from those precedents? What would be the possible implications of those differences with respect to, for example, level playing field provisions?*

Yes. While I tend to resist the notion that an FTA can be described by reference to a particular country, clearly EU precedents can be helpful in making the argument that what the EU has granted other countries should be granted to the UK. I have drafted an FTA on this basis which was launched with David Davis and Greg Hands in February, 2019 (see [here](#)). I have analysed the difference between both sides mandates in the attached article (<https://globalvisionuk.com/uk-and-eu-negotiating-mandates-compared/>).

Provided the EU accepts that the UK has left the EU, and seeks to be an independent state, then I believe there is a landing zone possible here.

- *Is it normal for only one side of a negotiation to publish draft legal texts? Are there any benefits or drawbacks, for either side, from doing so? What are the UK's main areas of contention going to be in the draft EU legal text? What proportion of the contents do you believe are acceptable to both sides and where will attention be focused? Because draft legal texts have been published at this stage, is an agreement more likely by the end of 2020?*

This can sometimes be done. I have advocated that the UK do this in order to overcome the obstacles to progress in the negotiation and to put text on the table so that the EU would have something to react to and the private sector has something to work with. These would not normally be published, but a draft agreements and actual language should be submitted. I think the fact that both Parties are now discussing an FTA will mean that a final agreement is much more likely.

- *How likely is a transition period extension? Does an extension request from one party place any obligations on the other side? What steps would the UK and EU need to take for an extension to be agreed? What practical matters would need to be decided? What role would the UK Parliament and EU institutions play in this process? How might an extension affect the dynamics of the negotiations and the scope of any future agreement?*

I have dealt with this issue in an article for Conservative Home

(<https://www.conservativehome.com/platform/2020/04/shanker-singham-brexit-and-why-the-transition-period-must-not-be-extended-beyond-december-this-year.html>). For the key issues of disagreement, there will have to be a binary choice made by the EU, without which no extra amount of time will help secure an agreement. If the EU does not accept that the UK will not agree to have any part of its legal order under EU control, then it is difficult to understand how an agreement might be reached. Similarly with fisheries, unless the EU agrees that the UK will be an independent coastal state for the purposes of negotiation of access to the EEZ, negotiating within the auspices of the NEAFC, it is difficult to see if there can be any progress towards an agreement.

- *What actions does the UK Government believe it is legally required to take by 31 December*

2020 to fulfil its obligations under the Withdrawal Agreement? Would a failure to implement the Withdrawal Agreement by either side prevent agreement on a future relationship from being reached? What areas of implementation are likely to prove most controversial? How might they be resolved?

With respect to trade and the NI Protocol, the major issue is implementing the NI Protocol unless it has been superseded by a UK-EU FTA. The UK does need to put forward a credible, feasible proposal for managing the NI-GB trade channel in accordance with the NI Protocol. We have provided evidence to the NI Select Committee on this point, and I am attaching that evidence to this submission. This represents the sort of mechanism we believe the UK could put forward as a credible approach. It will be difficult for the EU to resist such an approach if it protects the EU SM as well or better than on the EU's other external borders.

May 2020



Committee on the Future Relationship with the European Union

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24 April 2020

Shanker Singham
CEO Competere

Dear Mr Singham,

The House of Commons Committee on the Future Relationship with the European Union is inquiring into the progress of the negotiations between the UK and the EU. Under normal circumstances, the Committee holds regular oral evidence sessions in Westminster. However, measures to prevent the spread of the coronavirus make this difficult.

The Committee is keen to gather as much evidence as possible to inform its deliberations so I am writing to you to ask whether you would be willing to help us with our work by making a written submission. We welcome general responses to our [call for evidence](#), which was published on 4 March. We also hope that you would be willing to answer some of the more specific questions set out below on issues that fall within your area of expertise. Such submissions need not address every bullet point and can include other matters that you think are relevant to the negotiations and should be drawn to the attention of the Committee.

- What impact has the COVID-19 pandemic had on the negotiations? Have the UK and EU been affected differently? What further consequences might the pandemic have on the progress of the negotiations and the nature of any future relationship?
- How would you characterise the approach the UK and EU are taking to the future relationship negotiations? In which ways, if any, do these approaches differ from the withdrawal negotiations? What new challenges might both parties face?
- What is your assessment of the likelihood of an agreement given both sides' negotiating mandates? Has this assessment changed since the talks began? If so, why?
- What progress would you expect to have been made by the end of June? How do you think talks might progress over the coming year? How long would you expect the UK and EU's respective ratification processes to take?
- Given the time constraint imposed by the Transition Period, what sort of agreement do you believe is possible between the UK and the EU? What issues should each side be prioritising? To what extent do the priorities set out in each side's negotiating mandates match your assessment of what they should be seeking? On which areas does each side have the most negotiating leverage?
- What would be the main differences between a UK/EU relationship as roughly set out by both sides' mandates and a no-deal scenario? If only a limited deal is agreed what are the possible consequences for areas that are not covered? What scope is there for temporary or transitional measures either agreed between the two parties or put in place unilaterally.
- Our previous witnesses have outlined four key areas of initial disagreement:
 - Governance;
 - Level Playing Field;
 - Fish; and
 - Co-operation in Criminal Matters.

Have there been any recent developments in these areas? Could you sketch out possible compromises? Which other issues do you foresee emerging as sources of disagreement as the negotiations progress?

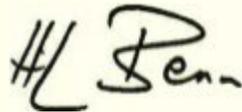
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resolution procedures are both parties seeking in this agreement? How do these differ from those set out in the Withdrawal Agreement?

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- Is it normal for only one side of a negotiation to publish draft legal texts? Are there any benefits or drawbacks, for either side, from doing so? What are the UK's main areas of contention going to be in the draft EU legal text? What proportion of the contents do you believe are acceptable to both sides and where will attention be focused? Because draft legal texts have been published at this stage, is an agreement more likely by the end of 2020?
- How likely is a transition period extension? Does an extension request from one party place any obligations on the other side? What steps would the UK and EU need to take for an extension to be agreed? What practical matters would need to be decided? What role would the UK Parliament and EU institutions play in this process? How might an extension affect the dynamics of the negotiations and the scope of any future agreement?
- What actions does the UK Government believe it is legally required to take by 31 December 2020 to fulfil its obligations under the Withdrawal Agreement? Would a failure to implement the Withdrawal Agreement by either side prevent agreement on a future relationship from being reached? What areas of implementation are likely to prove most controversial? How might they be resolved?

The Committee staff will be happy to discuss the inquiry, any issues raised, or the process for submitting written evidence. You can contact them at freu@parliament.uk.

Yours sincerely,



Hilary Benn
Chair of the Committee