

Written evidence submitted by David Henig, Director of the UK Trade Policy Project (FRE0062)

- Do you believe the UK and the EU will reach a deal on a negotiated FTA by the end of the Transition Period? If so, why so? If not, why not?

We can see the areas in which the EU are prepared to compromise against their demands, on access to fishing grounds, and ECJ involvement in the level playing field provisions. However for there to be a deal the UK will have to reciprocate on these issues, on acceptance of much EU text, and on many UK demands such as diagonal cumulation of rules of origin. We simply do not know if these are concessions the UK is willing to make, thus cannot be sure as to whether there will be a trade deal or not. This may well come down to a personal decision by the Prime Minister.

- Given the time constraint imposed by the Transition Period, what sort of trade agreement do you believe can be struck by 31st December 2020? What issues should each side be prioritising? To what extent do the priorities set out in the negotiating mandates match your assessment of what the two sides should be seeking? On which areas does each side have the most negotiating leverage?

It appears that both sides want to agree a basic trade agreement which ensures no tariffs or quotas if rules of origin are met, along with an enhanced set of rules compared to those of the WTO. This would come alongside other agreements such as on access to fishing waters. In general in trade agreements the larger party has the greater leverage, as their market is larger, and loss of access more costly to the smaller party. The main concern I have is that there is insufficient time to ensure the detail in areas like customs or rules of origins works for UK business. I also think the UK side is taking an unrealistic approach on regulatory sovereignty which will damage the influence and access of our businesses. For both sides I would like to see an agreement which allowed for further discussion over time to cover the issues which are not satisfactorily negotiated this year.

- If the UK and the EU are close to reaching agreement on an FTA in the Autumn, how likely are they to provide for a phased implementation of its provisions pending ratification? How might this be achieved in the drafting and how might it look in practice?

The UK faces the largest change in our trading relationships with Europe in modern history with the end of the transition period. Much of this change is known now, in the end of frictionless trade, but some will depend on the details to be agreed or not in a trade agreement. Companies and governments will need time to implement these details, and therefore it would be useful for them to agree a new implementation period of a few months to prepare within the trade agreement, potentially to cover UK-EU direct goods and services trade.

- Do you believe that both the UK and the EU are equally committed to reaching a zero-tariff, zero-quota FTA as envisaged by the Political Declaration by the end of the year? If not, which side do you believe is more committed and why might this be the case?

I think neither side is fully committed to reaching a deal this year. The UK government have said they are prepared to walk away without a deal. Equally I think the EU will not be prepared to concede to a level they believe damaging to the single market, and would rather no deal than this. The EU are also realistic than trade talks take time, not least to explore issues fully with stakeholders. If talks were to fail and the UK to leave the transition period without a deal I think a new deal would take some years to complete.

- The UK Government initially stated that it would seek a “best in class” FTA with the EU. Do you believe this is still the case? At the same time, the UK Government has also stated that it is simply seeking a deal similar to those that the EU struck with Canada, Japan or South Korea. Does this represent a “best in class” agreement? If so, why so? If not, why not?

Best in class like the word ambitious is used often in trade talks and is essentially meaningless. EU agreements with Canada, Japan and South Korea can be considered deeper than some predecessors such as with Mexico and Chile (both of which are now being updated) by virtue of including a greater number of disciplines on trade related rules and moves towards regulatory alignment. However they are a long way short of a single market or even the deep integration of an agreement like that with Ukraine, and would leave considerable numbers of barriers in place. I would not use the phrase best in class to refer to any trade deals.

- The EU has repeatedly emphasised that the FTAs it has reached with Canada, Japan or South Korea are unrealistic models for any trade deal struck with the UK. Why is that? Do you believe the EU’s concerns about geographical proximity and economic interdependence are merited? If so, why so? If not, why not?

In a sense whether the EU’s position is merited or not is irrelevant, since that is their position, and we are not going to change it by complaining. Even to do so looks like still believing that we are a member state with a voice that matters in Brussels. However in terms of plain facts we can see that the EU has not previously applied the same model for trade agreements for neighbours to that of more distant countries. Thus for example the Ukraine Association Agreement clearly goes much further than trade agreements with Canada and Japan in terms of regulatory alignment. Thus they have previously applied a different model. Part of the problem was of course the Barnier waterfall indicating that a CETA style deal may be available to the UK, which as I wrote last year was never the case. <https://ecipe.org/blog/isolation-or-integration-eu-fta-brexite/>

- A number of specific areas – for example governance, fisheries and level playing field provisions – are seen by many commentators as key issues in the FTA negotiations. Do you agree with this analysis? And what further areas, if any, do you believe are particularly critical to the likelihood of an overarching trade agreement being reached?

All of these areas are clearly important in the FTA negotiations. However the breadth and scale of the UK-EU trading relationship is such that many more issues could become flashpoints. For example financial services or data equivalence, rules of origin, SPS (animal

and plant health regulations), geographical indications, technical standards, and conformity assessment have all been mentioned at one time or other as areas of potential difference. In a normal trade negotiation there would be time to consider all of these over time, but the compressed timescales could see disagreements escalate into issues that could derail talks.

- Looking at recent FTA negotiations between the EU and Canada on CETA and between the EU and Japan on their EPA, what lessons do you think the UK could have learned/should have learned/is learning/may yet still learn about negotiating an FTA as a third country with the EU?

Both Canada and Japan had to make what was for them painful concessions for an EU trade deal, for Canada for example in terms of increased agriculture quotas and access to the public procurement of their provinces and cities, for Japan in terms of regulations that were seen as discriminatory non-tariff barriers. The same could therefore be expected for the UK, but on different issues. Lessons from the TTIP negotiations between the EU and US that I was involved with include the difficulty of dividing the Commission from Member States, and the time taken for the EU to consider new issues given the need to consult widely with Member States and European Parliament.

- Looking at the UK's role as a Member State in those same negotiations, what lessons do you think the EU could have learned/should have learned/is learning/may yet still learn about now negotiating with the UK as a third country?

The Commission is clearly the main player in external negotiations, balancing Member State demands carefully, often with reference to precedent and a mandate that is difficult to change. Member States may know that not everything in the mandate will be delivered exactly, but the Commission will consult with them at all stages to maintain the sense of balance. We should also know that in such a short negotiation it is highly unlikely that the Commission can change many of their standard positions. There is also no evidence from our experience of membership that a third country complaining about the EU will make any difference whatsoever.

- Looking at further FTA negotiations the EU is holding with other third countries, how important do you believe they are to the potential conclusion of FTA negotiations with the UK? In which areas is the EU particularly concerned that conceding to the UK's requests might lead to other trading partners of the EU asking for the same, and to what extent are these fears justified?

The issue of precedent is always important in trade negotiations, and the UK's proposed frameworks around equivalence, professional qualifications and rules of origin clearly go beyond in ways that would lead to demands from others.

- Looking at FTA negotiations the UK is holding with the United States and Japan, what impact might these have on the UK potentially reaching an FTA with the EU?

The EU may consider the potential competition from the UK having tariff free deals with the US and Japan but not with them, but that is unlikely to make a significant difference to their approach. Indeed if there were to be a UK-US trade deal that allowed in US food the EU may

conclude the value of a deal had been reduced, as producers could not easily compete. The conflicting demands of US and EU in areas like food and technical standards are well known, but both are likely to be waiting for clear steers from the UK as to our approach, thus for example keeping to more of an EU approach is likely to open up greater possibilities around mutual recognition with the EU, while moving to US approaches is likely to be a disincentive to the EU to make greater concessions.

This though is a very complex question of negotiating dynamics with many factors to consider, and difficult to do justice in a short answer.

- At the beginning of FTA negotiations, what progress did you expect would have been made by this month's High-Level Conference? To what extent, do you believe the negotiations are ahead of/behind this schedule? How important could the High-Level Conference be/has it been in shaping the final outcome of the UK-EU FTA negotiations?

Trade talks typically make a slow start and very few specialists expected the UK-EU talks to be different. Both sides demonstrated to their domestic audiences their intent to be tough, which is always an important part, but also published draft texts, which is not normal at such an early stage. Hopefully the two sides have been exploring potential compromises and discussing reconciling less controversial detail while this has been happening. The high level conference was a positive sign insofar as the two sides were able to reach an agreement on the next stage of activity, which is often the main role of leader level meetings at this stage. However it is likely to be September or October before both sides can potentially shape a final outcome, making the necessary concessions. There is not much time to do this, and similarly little time to explore all of the details.

- What would be the main differences between a UK-EU trading relationship as roughly set out in negotiating mandates published by the two sides and that resulting from a no-deal scenario? If only a limited trade deal is agreed, what are the possible consequences for areas that are not covered?

The main difference between deal and no-deal is the structures that a deal will establish to smooth the trade frictions that are inevitable outside the single market and customs union. Thus for example cooperation between customs authorities should be helpful for goods traffic. Similarly there could be processes in place to consider mutual recognition of goods, regulations, or professional qualifications. There will still be considerable friction compared to now, but with no structures in place such frictions could more easily lead to significant trade disruptions.

- What scope is there for temporary or transitional measures either agreed between the two parties or put in place unilaterally?

A question of detail which I am unable to comment on effectively.

- It is clear from negotiations held thus far that the EU wants a single overarching agreement and that the UK is seeking several separate agreements. In your view,

how would these different governance arrangements affect how any future trading relationship between the two parties might operate?

The EU has multiple agreements with many countries, from complex trade agreements to specifics like mutual recognition of organic food. Putting in place an overall structure for such agreements makes considerable sense, as an anchor to a relationship. In the absence of this there will still be many UK-EU conversations, still considered in the context of the overall relationship, but without an overall structure to effectively aid resolution. I cannot see why this would be in the UK's interests, as this would allow the EU to make diverse threats to the UK for example in financial services equivalence without any easy way to respond.

- For example, what are the standard forms of dispute resolution contained in FTAs? To what extent do these differ based on the scope of an FTA?

The standard dispute settlement mechanism of FTAs is not intended to be used. As I wrote recently

“One of the odder aspects of FTAs is that in practice, often elaborate state-to-state dispute settlement mechanisms are seldom used. For example, the USA has 14 FTAs, from which there have only ever been 4 disputes, of which 3 were in the context of the North American Free Trade Agreement. The EU currently lists 3 disputes among its 41 agreements. In the past, countries have chosen to take disputes to the WTO, possibly as a way of using collective pressure for compliance, rather than risk mutual retaliation which would undermine a trade agreement.

As suggested by the creation of an EU Chief Trade Enforcement Officer, this situation may be about to change. The EU aims to be more forceful when applying agreements, including (and perhaps particularly) one with the UK. However, in reality, this will be far from straightforward.

Much of the language in FTAs is ambiguous, creating a framework for trade rather than a detailed legal description of all rules. For instance, commitments to labour or environmental standards, though sometimes not subject to dispute settlement, are often ambiguous and difficult to enforce. Commitments to equivalent regulations are not to be taken literally, but provide a broad framework for the interaction of the two parties' regulatory systems with trade.

Entering dispute settlement every time such a problem arises would soon render the agreement unworkable. Hence the reluctance to use these in general, given that both parties are probably not following the agreement to the exact letter. Agreeing on a more tightly defined language would likely be impossible. Therefore, the UK and EU must find ways to build a working relationship without having to resort to such mechanisms.”

- It appears the UK and the EU differ in their interpretation of what is legally required to take place during the Transition Period to fulfil respective obligations under the Withdrawal Agreement. Would a failure to fully implement the Withdrawal

Agreement by either side prevent agreement on a future trading relationship being reached? What areas of implementation are proving most controversial?

As suggested by the previous answer it is difficult to enforce treaty commitments which two sides choose to interpret differently. The Withdrawal Agreement with regard to Northern Ireland is either poorly drafted, or more likely deliberately drafted to render unclear to the lay reader the actual obligations, and this is causing problems. The only real solution is to continue talking, but this can be difficult when one side perceives a breach. But ultimately the two sides have to find a common understanding. In this sense treaties only provide the basis for a permanent conversation.

- How might they be resolved?

As above. Dialogue.

- What impact has the COVID-19 pandemic had on the FTA negotiations? Have the UK and EU been similarly affected? To what extent have negotiations been limited due to the absence of face-to-face discussions? What further consequences might the pandemic have on the progress of the negotiations and the nature of any future trading relationship?

These are not normal FTA negotiations. The envisaged timescale would already have set a record for a modern trade agreement, and the month or so completely lost to covid in the early stages makes this all the more so. Neither side has the time to carefully construct the usual compromises with their own side and the other party. Both sides have been struggling internally with new working arrangements. In normal circumstances we would assume this would mean taking longer, but as this has been ruled out it seems to make more likely that much of the detail of any deal would have to be agreed without significant discussion. This probably benefits the EU, whose text is more likely to be the basis of a final agreement, but until we see any final text we cannot be sure of this.

July 2020



Committee on the Future Relationship with the European Union

House of Commons, London, SW1A 0AA

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19 May 2020

David Henig
Director
UK Trade Policy Project

Dear Mr Henig,

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. 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.

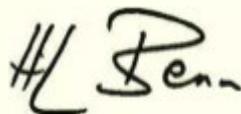
The ambition of this letter is to help the Committee better understand the intricacies of Free Trade Agreement negotiations and to hear from industry experts on what sort of FTA you believe may or may not be agreed between the UK and the EU in the months ahead.

- Do you believe the UK and the EU will reach a deal on a negotiated FTA by the end of the Transition Period? If so, why so? If not, why not?
- Given the time constraint imposed by the Transition Period, what sort of trade agreement do you believe can be struck by 31st December 2020? What issues should each side be prioritising? To what extent do the priorities set out in the negotiating mandates match your assessment of what the two sides should be seeking? On which areas does each side have the most negotiating leverage?
- If the UK and the EU are close to reaching agreement on an FTA in the Autumn, how likely are they to provide for a phased implementation of its provisions pending ratification? How might this be achieved in the drafting and how might it look in practice?
- Do you believe that both the UK and the EU are equally committed to reaching a zero-tariff, zero-quota FTA as envisaged by the Political Declaration by the end of the year? If not, which side do you believe is more committed and why might this be the case?
- The UK Government initially stated that it would seek a “best in class” FTA with the EU. Do you believe this is still the case? At the same time, the UK Government has also stated that it is simply seeking a deal similar to those that the EU struck with Canada, Japan or South Korea. Does this represent a “best in class” agreement? If so, why so? If not, why not?
- The EU has repeatedly emphasised that the FTAs it has reached with Canada, Japan or South Korea are unrealistic models for any trade deal struck with the UK. Why is that? Do you believe the EU’s concerns about geographical proximity and economic interdependence are merited? If so, why so? If not, why not?
- A number of specific areas – for example governance, fisheries and level playing field provisions – are seen by many commentators as key issues in the FTA negotiations. Do you agree with this analysis? And what further areas, if any, do you believe are particularly critical to the likelihood of an overarching trade agreement being reached?

- Looking at recent FTA negotiations between the EU and Canada on CETA and between the EU and Japan on their EPA, what lessons do you think the UK could have learned/should have learned/is learning/may yet still learn about negotiating an FTA as a third country with the EU?
- Looking at the UK's role as a Member State in those same negotiations, what lessons do you think the EU could have learned/should have learned/is learning/may yet still learn about now negotiating with the UK as a third country?
- Looking at further FTA negotiations the EU is holding with other third countries, how important do you believe they are to the potential conclusion of FTA negotiations with the UK? In which areas is the EU particularly concerned that conceding to the UK's requests might lead to other trading partners of the EU asking for the same, and to what extent are these fears justified?
- Looking at FTA negotiations the UK is holding with the United States and Japan, what impact might these have on the UK potentially reaching an FTA with the EU?
- At the beginning of FTA negotiations, what progress did you expect would have been made by this month's High-Level Conference? To what extent, do you believe the negotiations are ahead of/behind this schedule? How important could the High-Level Conference be/has it been in shaping the final outcome of the UK-EU FTA negotiations?
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- It is clear from negotiations held thus far that the EU wants a single overarching agreement and that the UK is seeking several separate agreements. In your view, how would these different governance arrangements affect how any future trading relationship between the two parties might operate? For example, what are the standard forms of dispute resolution contained in FTAs? To what extent do these differ based on the scope of an FTA?
- It appears the UK and the EU differ in their interpretation of what is legally required to take place during the Transition Period to fulfil respective obligations under the Withdrawal Agreement. Would a failure to fully implement the Withdrawal Agreement by either side prevent agreement on a future trading relationship being reached? What areas of implementation are proving most controversial? How might they be resolved?
- What impact has the COVID-19 pandemic had on the FTA negotiations? Have the UK and EU been similarly affected? To what extent have negotiations been limited due to the absence of face-to-face discussions? What further consequences might the pandemic have on the progress of the negotiations and the nature of any future trading relationship?

The Committee staff will be happy to discuss with you the inquiry, any issues raised, or the process for submitting written evidence. They can be contacted at: freucom@parliament.uk.

Yours sincerely,



Hilary Benn
Chair of the Committee