Your assessment of the current state of play of the Article 50 negotiations and the outcome(s) which are most likely to emerge from the process in the coming months

Despite the sound and fury of recent weeks, particularly surrounding the Salzburg summit in mid-September, the substance of the Article 50 negotiations remains unchanged, and these continue to hinge on a resolution to Irish border issue. As the Prime Minister said in her statement following the Salzburg meeting, we have reached an “impasse”, and it is largely—if not entirely—owing to the Irish border.

Both sides agreed in the December Joint Report to implement a ‘backstop’ which would prevent infrastructure and checks being introduced on the island of Ireland in the event that these could not be avoided through the future relationship between the UK and the EU. The UK Government has focused almost all of its efforts since then on designing a future relationship to render any backstop obsolete. Perhaps the most striking thing about the Chequers Plan was the way it seems to have been based primarily on the need to find a way to avoid an intra-Irish border. The European Commission has produce d a relatively detailed proposal foreseeing Northern Ireland remaining in the EU Customs Union and the single market for goods, enforcing product safety and animal welfare standards at the border between Northern Ireland and Great Britain. This has been rejected out of hand by Theresa May, something which she reiterated in forceful terms following the Salzburg summit.

If anything, Salzburg will most likely necessitate a change in the UK Government’s approach to this backstop issue. Instead of trying to circumvent any backstop, the government will have to engage more actively in co-designing a backstop that both sides can live with, not just something that can be dismissed in the event that, as Mrs May has repeated, “there’s a delay in implementing our new relationship”. The EU’s proposal, as it currently stands, is clearly unacceptable not just to the Prime Minister but to a broad cross-section of MPs in the House of Commons as well, including, notably, a number of Remain-inclined MPs who have otherwise resisted Theresa May’s approach to the Brexit talks.

However, there is reason to think that a compromise is possible on the backstop to facilitate the completion of the overall Withdrawal Agreement. As Mrs May repeated in her post-Salzburg statement, “no new regulatory barriers should be created between Northern Ireland and the rest of the UK unless the Northern Ireland Executive and Assembly agree” (emphasis added). This language mirrors almost exactly Paragraph 50 of the December Joint Report, which said that, “the United Kingdom will ensure that no new regulatory barriers develop between Northern Ireland and the rest of the United Kingdom, unless … the Northern Ireland Executive and Assembly agree that distinct arrangements are appropriate for Northern Ireland” (emphasis added). So, despite nine months of negotiations having passed since the Joint Report, this paragraph clearly remains prominent in the Prime Minister’s thinking.

Of course, on the one hand, it could be read as a reassurance to her colleagues in the Democratic Unionist Party (DUP) that the UK Government will not undertake unilaterally to
increase the number of checks between Great Britain and Northern Ireland without the support of the Northern Ireland Executive and Assembly, for which there is little prospect of convening before the end of the Article 50 period. However, on the other hand, the suggestion that increased East-West checks could even be an option worth mentioning implies it is something the Prime Minister still hasn’t ruled out.

Although other withdrawal issues aside from the Irish border are unlikely, ultimately, to scupper a deal, it is worth highlighting that there remain a number of contentious issues yet to be resolved, including geographical indications—something extremely pertinent for Scottish food and drink producers—intellectual property rights and the protection of personal data throughout the transition period. Indeed, the terms of the transition period itself have received insufficient attention and scrutiny. For instance, there seems to be little awareness that it is already set to last beyond the end of 2020 as currently drafted, not just because that is likely to be insufficient time to conclude the future relationship but because the UK has already agreed to remain part of and contribute to a number of EU data systems up to as late as 2026.

An overview of the key milestones in the Article 50 process through to March 2019

In the run-up to the end of March 2019, the key milestones are obvious enough; however, when they will be achieved is more difficult to assess. Broadly, as far as the negotiation stage is concerned, a solution is required to, first, the Irish backstop and then, second, the statement on the future relationship. As for the latter, there are conflicting imperatives at work. The UK Government appears to want as much detail as possible—and even a legal guarantee that the statement will be turned into a treaty in future, something which is impossible for the EU to sign up to based on the Treaties—as a quid pro quo for signing up to the Withdrawal Agreement and, in particular, the financial commitments contained therein. If and when those are overcome, as mentioned, there remain a number of important but less intransigent issues to address.

Assuming a deal is reached, the next crucial milestone will be the meaningful vote on the deal held in the House of Commons. The Government is likely to come to Parliament with the deal it reaches quickly, but depending on the deal reached it may take some time to achieve a solid majority in favour. This vote has implications for the ratification timetable on both sides of the Channel. The European Parliament will not begin its deliberations properly until it has seen that the UK Parliament has approved the deal. Therefore, the longer the Government delays, this will eat into the time the European Parliament will have to deal with the agreement.

There are various permutations of cross-cutting alliance foreseeable for the meaningful vote. And it is simply too early to predict how MPs will vote. Much will depend not only on the deal that is agreed, but also on timing. The Government will doubtless try to hold the vote as late as possible to increase the sense that MPs face a choice between deal and no deal (however difficult this may be in practice, given that, in the event that parliament votes the deal down, it is highly conceivable that the EU will grant an extension to the Article 50 process).

The next important step will be ratification in the European Parliament. Although it is highly likely that the European Parliament will approve the deal, timing is a key issue. To have a comfortable amount of time to consider the Withdrawal Agreement, the European Parliament would begin its considerations around mid-January, following approval from the UK Parliament. This could feasibly be pushed back even as late as mid-February, which may
necessitate a short extension of Article 50, but the European Parliament must vote on the deal by 18 April. Thereafter, it breaks up for elections and is not set to reconvene until early July.

Meanwhile, the European Union (Withdrawal Agreement) Bill must also be passed for the Withdrawal Agreement to come into force. As Article 168 of the draft Withdrawal Agreement makes clear, the internal procedures on both sides must be completed before this will be the case. Therefore, the Bill is not merely a domestic internal to the UK, but is crucial link in the chain of the whole ratification process. This type of legislation would normally take six months or more to pass through Parliament, but it is likely to have just two or three, and perhaps even just weeks. There is even the possibility that, once MPs have more time to consider the substance of the Withdrawal Agreement at this stage—and particularly the provision on the Irish backstop—that they could seek to amend the Bill. Put simply, although the government will present the Withdrawal Agreement Bill as merely a piece of implementing legislation, it will face substantive resistance from MPs, which will complicate—although ultimately should not block—its passage.

Of course, the previous discussion is premised on the assumption that we reach a deal. The European Union (Withdrawal) Act sets out the provisions (Section 13) in the event that no deal is either reached or becomes a serious prospect. In such a circumstance, a minister—likely Brexit Secretary Dominic Raab or, indeed, the Prime Minister—would have to present a statement to Parliament by 21 January to inform the Commons that no deal were a prospect or had been reached, and set out its planned course of action thereafter. This, effectively, sets the UK Government its own internal negotiation deadline, although of course it could simply state that negotiations were continuing at this point as well.

The potential impacts on Scotland of the negotiations outcome(s)

There are clearly implications for Scotland in the status of Northern Ireland once agreed. Should the latter end up with a ‘special status’ of some description, as seems a possibility, this will set a precedent that different parts of countries can deal with the European Union on different terms. However, a note of caution is needed. The incentives on the EU side for allowing exceptions on the movement of goods in particular across the island of Ireland after Brexit are driven by the pressing interests of a member state. Were a Scottish administration to push for a similar status as Northern Ireland, it would not be at the direct request or need of a member state. This makes such an outcome much less likely. Nevertheless, the precedent of Northern Ireland could add support to the argument that, whether independent or otherwise, Scotland could have a different relationship with the EU than the rest of the United Kingdom.

The extent to which the Scottish Government’s stated objective of remaining in the single market and customs union is likely to be realised

Even at this late stage, no outcome can be definitively ruled out. There is a plausible scenario by which Theresa May cannot get her deal through the House of Commons, either resigns or loses a confidence vote, and we either end up with a new Conservative leader and government or even a general election. In such a scenario, the uncertainties would be so great that even a further referendum could not be ruled out for certain, although this seems less plausible than a general election. This is because there would have to be a majority in the House of Commons not just to hold a second referendum but also to define the question of that vote in primary legislation. Just as there may be no majority for any single Brexit deal,
there is unlikely to be a majority for any particular referendum question. By contrast, Labour support for a general election means that if any Conservative government wanted one it would be possible either by a two-thirds majority of MPs or a simple majority for a no-confidence vote. Given all of this uncertainty, membership of the single market and customs union, although ruled out by the current government, could once again become live options with a change of political leadership and/or government.

However, this does not appear to be the most likely scenario as things stand. The Prime Minister clearly has greater room for manoeuvre on customs and the movement of goods than the single market, with its implications for the free movement of people, which the Prime Minister sees as an immovable red line under all circumstances. However, there is a note of caution to be sounded on the possibility of customs union membership as well: many of the concessions on goods trade that were included in the government’s white paper were designed principally to avoid the implementation of the EU’s interpretation of the Irish backstop. Following the Salzburg summit, there will likely be a shift in the government’s approach to engage more in designing a workable backstop than a future relationship to render it obsolete. If a workable solution can be found on that aspect, this may well mean that the government doesn’t feel the need to make further concessions on goods and move closer to customs union membership.

This is part of a broader debate which has yet to gain public prominence about which regulatory sphere the UK wants to be located in in future, the EU or the US. The government’s July white paper on the future relationship suggests that there is currently a majority in the Cabinet for the former. Not least, if the UK signs to up to the EU’s rules on agri-food standards, or a ‘common rulebook’, this would in practice rule out a future trade agreement with the US, as many US food products would still face similar barriers to entry into the UK market.

This could of course shift dramatically with a change of leadership in the Conservative party, with many on the Eurosceptic side seeing the main prize of Brexit, and the most rewarding opportunities, as being opening up to major markets and the US in particular. It should be noted, however, that it is not clear that there is political backing for such a move, including unilateral implementation of zero tariffs on food imports and the removal of government subsidies to the agricultural sector. Modelling work by The UK in a Changing Europe’s shows that livestock farmers in particular would be badly hit in such a scenario, with consumer prices remaining little changed.¹ The modelling also demonstrated that Scotland would be worst affected in a scenario of unilateral tariff removal, particularly if direct payments were removed as well. This is not least because of the effect that such a scenario would have on beef farmers’ income.