

The UK's Liability for Financial Obligations Arising out of Its EU Membership

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As has been widely reported in the media, the House of Lords reached two main legal conclusions in its March 2017 report on Brexit and the EU budget:

1. "Article 50 TEU allows the UK to leave the EU without being liable for outstanding financial obligations under the EU budget and related financial instruments, unless a withdrawal agreement is concluded which resolves this issue." (para. 135).
2. "The jurisdiction of the CJEU over the UK would also come to an end when the EU Treaties ceased to have effect. Outstanding payments could not, therefore, be enforced against the UK in the CJEU." (para. 133).

These two conclusions undercut the EU Commission's claim that the UK owes around €60 billion as a result of its EU membership since 1973. The House of Lords rightly noted the considerable uncertainty about this figure, and about the calculation of the UK's share. Like other aspects of their past and future relationship, the UK's financial obligations are primarily a matter for negotiations between the EU27 and the UK.

However, in case agreement between the EU 27 and the UK is elusive on this point, the legal position matters. The EU 27 and the UK will also bargain about the UK's financial obligations in the shadow of the UK's legal obligations.

This blog post shows that both conclusions of the House of Lords are likely erroneous. It argues first that the UK is liable in principle for a share of the EU's budget commitments and pensions of EU officials. Second, the European Court of Justice may well have jurisdiction over the UK's financial obligations arising out of its membership in the EU. It first considers the UK's liability, and then the jurisdiction of the Court of Justice.

The UK's liability in principle

The House of Lords relies on Article 50 TEU for its conclusion that the UK is not liable for financial obligations arising out of the UK's EU membership. Article 50 provides

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

Article 50 TEU is an example of a withdrawal clause. Such clauses are found in many treaties. Withdrawal clauses allow states to evolve from a party to a non-party without breaching the treaty. They allow a unilateral, voluntary departure from the treaty. Upon withdrawal, the treaty is no longer binding on the withdrawing party. It brings treaty relationships to an end.

The House of Lords' report takes the view that Article 50 contracts out of customary international law on withdrawal (the report refers specifically to Article 70 of the Vienna Convention on the Law of Treaties, 'VCLT'). Article 70 (1), which is customary international law, provides

Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:

- (a) releases the parties from any obligation further to perform the treaty

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

A preliminary question – which the House of Lords’ report correctly answered in the affirmative is – is whether international law, and specifically the VCLT, applies to the EU treaties. While EU law is a new legal order of international law, this order still exists against the background of general international law, particularly regarding basic questions of treaty law. International law serves as a fall-back for particular issues that the EU treaties do not regulate, or regulate only incompletely. This is the position with respect to Article 50 TEU, as the paragraphs below show.

Crucially, the House of Lords’ report concludes that Article 50 TEU is *lex specialis*, or an exception, expressly mentioned in the first part of Article 70 (1) VCLT. In other words, because the TEU contains a specific provision on withdrawal, Article 70 is irrelevant to the UK’s financial obligations arising out of its EU membership.

In reality, however, Article 50 TEU only partly contracts out of relevant customary international law. For the most part, Article 50 TEU lays down a specific *procedure* (the timeline and notification requirements) for a member state to withdraw from the complex edifice of the EU treaties. It also confirms the default rule in Article 70 VCLT that the EU treaties cease to apply from the critical date (Article 70(1)(a) speaks of “releases the parties from any obligation further to perform the treaty”).

That said, the contracting out is only *partial* because the VCLT has three provisions that deal, in part, with withdrawal, rather than just one. In addition to Article 70 VCLT, there are Articles 56(2) and 65-68 VCLT. Article 56 (1) is about the possibility of withdrawal in the absence of a withdrawal provision. Given the presence of Article 50 TEU, it is not relevant for present purposes. Article 56 (2) establishes a default notice period of 12 months. Article 65-68 provides for default procedural steps for, among others, withdrawal from a treaty (the same default steps also apply to invalidity, termination or suspension).

Contrary to the House of Lords’ report, Article 50 is no exception to Article 70 (1) (b) VCLT. All that Article 50 does is depart from the default procedural rules set out in Article 56 (2) and Articles 65-68. For instance, Article 56(2) TEU lengthens the notice period to 2 years (rather

than the default period of one year). It also confirms the release from obligations under treaties going forward under Article 70 (1)(a).

The House of Lords' report errs in taking the more specific procedural steps for withdrawal in Article 50 TEU as evidence that Article 50 contracted out of all *other* rules of international law on treaty withdrawal. Article 70(1) is the decisive provision for the UK's financial obligations arising out of its EU membership because it expressly states that withdrawal does not affect these rights and obligations ("does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination").

Importantly, the general rule is that silence of the treaty parties does not mean contracting out of customary international law. In other words, there is a presumption that there is no contracting out – but like other aspects of the law of treaties, this is ultimately a matter for interpretation. The UK may be able to rebut the presumption – for instance by adducing *travaux préparatoires* that show that member states intended to contract out of the VCLT's provisions on withdrawal in their entirety. But this is likely to be a long shot.

In sum, Article 50 is *lex specialis* only as regards the *procedure* for withdrawal. It preserves the customary international law rule in Article 70 VCLT (1) (b) that the rights and obligations of the treaty parties prior to withdrawal are untouched. And importantly, this includes the UK's financial obligations arising out of its EU membership.

2. Whither the CJEU's jurisdiction?

What is uncontroversial is that once the UK leaves the EU, the European Court of Justice will no longer have jurisdiction over the UK in respect of the EU treaties (unless the EU27 and the UK otherwise agree). Conversely prior to the critical date, the EU treaties continue to apply to the UK and the UK remains subject to the European Court's jurisdiction. Under Article 50 TEU, the critical date is either March 29 2019, unless the UK and the EU27 unanimously extend this period, or the date of the entry into force of the withdrawal agreement.

However, there is an important temporal caveat. Neither Article 259 TFEU (infringement proceedings) nor Article 267 TFEU (preliminary rulings) contain any temporal limitation. Article

259 TFEU merely refers to a situation in which “another Member State has failed to fulfil an obligation under the Treaties”, and Article 267 TFEU refers to “the interpretation of Treaties”.

First, the CJEU could be requested to give a preliminary ruling on the UK’s financial liability prior to the critical date. Second, with respect to infringements proceedings, the central question is whether the UK “has failed to fulfil an obligation under the Treaties”. Arguably, a dispute concerning whether the UK has discharged its financial obligations arising prior to the critical date fall within the CJEU’s jurisdiction under Article 259 TFEU. Moreover, the dispute on the UK’s exit bill due to its EU membership would likely have arisen before the critical date.