

The LSE Continental breakfasts are one element of a wider academic programme that aims to understand and inform the process of agreeing Britain's future relationship with the rest of Europe. The breakfasts are private, off-the-record meetings for a select group of distinguished individuals from around the world. They bring together LSE's most renowned academic experts with a diverse group of insightful and influential people to explore key issues shaping the European political landscape.

Meetings are held under Chatham House rules, so that opinions expressed may be reported but not attributed. These seminar-style events typically open with short presentations from two experts, one of which is usually a member of the LSE faculty, followed by open discussion among the group.

In these write-ups, issues raised in the discussions are collected into an essay including references to relevant research and exploring some questions in more depth. The authors are encouraged to elaborate and reflect, so they should not be read as an unvarnished record of the discussion.



Britain's Financial Obligations to the EU

London, 5th October 2017

Written up by Sebastian Diessner

Among all the thorny issues in the ongoing negotiations between the UK and the EU, the settlement of Britain's residual financial obligation to the EU (often referred to as the UK's 'divorce bill') is one of the most politically difficult. Unfortunately, under the terms of the European Commission negotiating team's [mandate](#), it also has to be agreed before negotiations can proceed on any other matters. The mandate, which is given to the Commission by the European Council of heads of state and government of the EU-27, stipulates that the 'divorce bill' is one of three issues, the others being a plan for the Irish border, and the questions of reciprocal citizenship rights, that require 'sufficient progress' in order to advance to negotiating the transition and the long-term future relationship (Council of the EU, 2017)¹.

As became clear from a discussion among an influential group of participants with a wide range of opinions and perspectives, what might at first sight appear to be a narrow and technical legal matter quickly reveals itself to be connected to broader political, economic and other questions. This essay is broadly organized along these three themes (legal, political and economic) and tries to tie together the points raised in the discussion, and explore some of them further.

1) Legal provisions and questions within and beyond the EU framework

The legal position of Britain's financial obligations is a mixture of international law and provisions in the European treaties, and is dependent on the legal implications of different Brexit scenarios.

¹ With regards to terminology, the idea of a set of priorities requiring sufficient progress appears somewhat reminiscent of the lists of '[prior actions](#)' to be completed by recipients of macroeconomic adjustment programmes in the Eurozone, most notably in the ongoing third programme in Greece, as set out by the Commission-ECB-IMF 'troika' of institutions (European Commission, 2017).

In terms of international law (i.e., beyond the EU), the Vienna Convention on the Law of Treaties comes to the fore, of which Article 70 stipulates the consequences of the termination of a treaty. However, although most European Union member states are a signatory to the Convention, there are no precedents in Europe regarding the use of Article 70, and there are additional doubts about whether EU member states could take recourse to the provision on behalf of the EU as a whole (which is, after all, a separate legal entity). More importantly, Article 70 itself specifies that these consequences do not come into play if "the treaty otherwise provides or the parties otherwise agree", which seems to invoke the EU's own provisions for the termination of membership – i.e., the oft-referenced Article 50 of the Treaty on European Union (TEU). Waibel (2017: pp. 3-4), however, notes that while Article 50 may allow for contracting out of the Vienna Convention's *procedural* steps for terminating a Treaty, it does not necessarily enable the counterparties to contract out of all *other* provisions specified in the Convention, including other parts of Article 70. The Convention may thus not be off the table entirely.

Beyond this, Article 50 contains no direct reference to any "right, obligation or legal situation" of the parties involved (in contrast to the Vienna Convention²) – let alone makes specific mention of *financial* obligations –, which may be taken to imply that there is no particular obligation for the UK to pay. However, the devil may be in the detail, as much appears to depend on the different scenarios under which Brexit could potentially play out, most importantly the question of whether a deal can be reached or not. Any conceivable no-deal scenario – e.g., either the parties not being able to agree on divorce, transition and future relationship by 29th March 2019, or the UK walking out from negotiations before that date – would most certainly entail no bill to be paid: Article 50 simply contains no provisions for this scenario. In contrast, both of the potential versions of a Brexit agreement – i.e., an Article 50 deal with or without transition – leave room for discussion. In particular, clause 2 of the all-important article specifies that "(...) the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal", which might perhaps be interpreted as legally equivalent to the mention of "right, obligation or legal situation", thus also circumscribing potential financial obligations to be honoured by the UK.

Of course if the UK simply refused to pay, whatever legal obligation it might have, there is no mechanism for enforcement, particularly once the jurisdiction of the Court of Justice of the European Union (CJEU) over the UK comes to an end (House of Lords, 2017: pp. 37-38).³ On

² Article 70, [Vienna Convention on the Law of Treaties](#): "CONSEQUENCES OF THE TERMINATION OF A TREATY 1. 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. 2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect."

³ Importantly, however, the CJEU will retain jurisdiction at least until the deadline of 29th March 2019, and possibly beyond that date in case of an agreed transition period. Also, see Waibel (2017: pp. 4-5) who suggests that the relevant EU Treaty articles in case of non-payment (Article 259 TFEU on infringement proceedings and

a different level, however, the issue of 'honouring one's commitments' is important for demonstrating good faith – both in terms of avoiding a 'hostile Brexit' (Begg, 2017a) and in negotiating with future counterparties, e.g. when it comes to prospective trade deals. This leads us further into the terrain of politics and international negotiations.

2) The EU's (political) mandate for Brexit negotiations

A vital issue concerns the possibility of negotiating the three major elements of a Brexit deal – divorce, transition, future relationship – more in parallel (or, in other words, the extent to which talks on transition and future trade deal arrangements can be brought forward to earlier stages of negotiations).

Article 50 makes clear reference to "taking account of the framework for its future relationship" and, somewhat common-sensically, some argue that any bridge or transition to a certain destination can only be envisaged given some clarity about what that destination will look like. Doubts were expressed about whether the Commission's negotiation positions were sufficiently reflective of this, and, more generally, about the practicality of its mandate given a fairly short two-year window of opportunity for reaching a set of comprehensive agreements. This raised the paradoxical prospect of whether it would be possible for the UK to take the European Commission to the CJEU if its mandate were not deemed in line with EU Treaty provisions. Given the UK government's objections to future involvement of the CJEU in UK affairs, however, this appears to be politically awkward (to say the least). Another difficulty in the negotiating process is the underlying issue that the Commission's mandate is conferred by the European Council, and any views on its appropriateness and the flexibility of its provisions are thus to be directed at the governments of the EU-27 and not the Commission and its chief negotiator Barnier, as EU officials point out themselves (Boffey and Rankin, 2017).

Finally, an additional barrier to negotiating the interlocking stages of withdrawal in parallel are the important distinctions between the terms of their completion and ultimate ratification. While completing an Article 50 divorce deal will 'only' require a qualified majority of 72% of continuing EU member states (i.e., 20 states) that represent at least 65% of the EU-27's population, a deal on the future relationship between the EU and the UK as a third country legally constitutes a so-called 'mixed agreement', as specified in [Articles 207, 217 and 218 TFEU](#) (the latter then likely becoming as pervasive in political and media commentary as Article 50 is today) (Barnard, 2017: p. 57). A mixed agreement necessitates not only the unanimous agreement of all 27 remaining EU member states and the consent of the European Parliament, but also the involvement of an even higher number of national and regional parliaments (currently at 38). Theresa May arguably conceded the status of the UK as a third country and the need for a mixed agreement in her [Florence speech](#),

Article 267 on preliminary rulings, in case the CJEU formulates one before the deadline) do not specify any temporal limitations to their applicability. They may thus be relevant even beyond the exit of a member state.

suggesting that 'such an agreement on the future partnership will require the appropriate legal ratification, which would take time'.

3) Economic and further aspects

The supposedly narrow question of the UK's financial commitments and potential obligations to the EU seems impossible to disentangle from wider issues such as current and future trade opportunities, regulations, costs and prices, and more. The focus on concrete, tangible amounts of financial obligations, although without doubt significant and worthy of reflection and contestation, may thus mask wider important debates about some of the more intangible aspects of the UK's divorce and new relationship with the union. While the price tags attached to financial obligations or future savings from obsolete EU membership fees are directly measurable and visible, the prospective 'costs of no deal' (cf. LSE, 2017) are harder to pin down and allude to with confidence in political debates (not least given recent scepticism about the accuracy of forecasts or even the value of expert judgment altogether).

Actual figures of expected payments to be made diverge substantially in public debates and across political circles on both sides of the channel. While the UK currently appears to be willing to offer €10 billion per year during a possible transition period of a maximum of two years, many in the UK are still questioning whether and under what circumstances to pay at all. They point to the fact that membership organizations are based on the principle that members are only obliged to pay into the club for as long as they form part of it. By analogy, the pensions of club members, for example, shall also be settled on a pay-as-you-go basis only.

To be sure, even if the issue of whether the UK should be paying at all is settled (which appears to be the case after the Florence speech), much room for discord on the sum of overall payments remains. In contrast to Theresa May's offer of €20 billion, some have estimated the obligations to total €60 billion or more (leaving aside more intricate arithmetic exercises such as offsetting the divorce bill against Britain's share in European Union assets) (Barker, 2017; Darvas et al., 2017). Unresolved questions include the UK's called up capital and equity share in the European Investment Bank, which it could be entitled to reclaim once it ceases to be a member of the EU (House of Lords 2017: 26-27). Further, Britain and the EU may want to agree on the continued participation of the UK in a number of joint programmes such as Erasmus, which is open to non-EU member states as well. Realistically speaking, the net financial obligations that will ultimately be agreed upon will probably range somewhere between the two extremes of the above spectrum (Begg, 2017b).

On the whole, side discussions that at first sight appear to be diversions from the neatly-circumscribed matter of financial obligations in fact show that it cannot be contained within narrow legal questions. The high inter-connectedness of the different aspects of Brexit negotiations are a major factor in the gridlock in the process. Hence, a rare point on which many would agree is that if issues are interconnected and to be negotiated under an ostensibly tight schedule, a neat separation and sequencing of subjects may not always be

feasible, and the setting of priorities requiring sufficient progress before 'anything else' is officially discussed may be a difficult path to pursue in the first place. Apart from this, however, progress on the most sensible way to settle Britain's Brexit bills remains intractable.

Bibliography

- Barker, Alex (2017): 'The €60 billion Brexit bill: How to disentangle Britain from the EU budget', Centre for European Reform (CER), accessible online at: http://www.cer.eu/sites/default/files/pb_barker_brexit_bill_3feb17.pdf
- Barnard, Catherine (2017): 'Law and Brexit', Oxford Review of Economic Policy, Volume 33 (1), pp. S4–S11, accessible online at: ukandeu.ac.uk/wp-content/uploads/2017/04/Law-and-Brexit.pdf
- Begg, Iain (2017a): 'Britain's got bills – but will it pay? Settling the UK's EU budget obligations', London School of Economics and Political Science Brexit blog, accessible online at: <http://blogs.lse.ac.uk/brexit/2017/02/23/britains-got-bills-but-will-we-pay-settling-our-eu-budget-obligations/>
- Begg, Iain (2017b): 'The gaffe that keeps on taking: How to break the deadlock over Britain's EU divorce bill', LSE EUROPP – European Politics and Public Policy blog, accessible online at: <http://blogs.lse.ac.uk/europpblog/2017/10/20/the-gaffe-that-keeps-on-taking-how-to-break-the-deadlock-over-britains-eu-divorce-bill/>
- Boffey, Daniel and Rankin, Jennifer (2017): 'Brussels trip by PM fails to unblock stalemate as both sides harden stance', The Guardian online edition, accessible online at: <https://www.theguardian.com/politics/2017/oct/16/brussels-trip-by-pm-fails-to-unblock-stalemate-as-both-sides-harden-stance>
- Council of the European Union (2017): 'Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union', accessible online at: http://www.consilium.europa.eu/en/meetings/gac/2017/05/Directives-for-the-negotiation-xt21016-ad01re02_en17_pdf/
- Darvas, Zsolt, Konstantinos Efstathiou and Inês Goncalves Raposo (2017): 'Divorce settlement or leaving the club? A breakdown of the Brexit bill', Bruegel Working Paper issue 03 2017, accessible online at: http://bruegel.org/wp-content/uploads/2017/03/WP_2017_03-.pdf
- European Commission (2017): 'Financial assistance to Greece', Brussels: European Commission, accessible online at: https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-financial-assistance/which-eu-countries-have-received-assistance/financial-assistance-greece_en
- House of Lords (2017): 'Brexit and the EU budget', House of Lords European Union Committee 15th Report of Session 2016–17, accessible online at: <https://publications.parliament.uk/pa/ld201617/ldselect/lducom/125/125.pdf>
- London School of Economics and Political Science (LSE) (2017): 'Report outlines costs of no Brexit deal', LSE – Latest news from LSE, 07 July 2017, accessible online at:

<http://www.lse.ac.uk/News/Latest-news-from-LSE/2017/07-July-2017/Report-outlines-costs-of-no-Brexit-deal>

Waibel, Michael (2017): 'The UK's Liability for Financial Obligations Arising out of Its EU Membership', University of Cambridge Judge Business School: Centre for Business Research blog , accessible online at: <http://www.blogs.jbs.cam.ac.uk/cbr/the-financial-cost-to-the-uk-of-leaving-the-eu/>

Introductory remarks:

The RT Hon John Redwood MP

Professor Catherine Barnard, Trinity College Cambridge

Other Participants:

Richard Bacon MP	House of Commons
Celia Barck	Swedish Embassy
Creon Butler	Cabinet Office
Sir Robert Cooper	London School of Economics
Bronwyn Curtis	JPMorgan Asian Investment Trust
Swati Dhingra	London School of Economics
Ian Dunt	Politics.co.uk
Phil Evans	Bank of England
H.E. Alexandre Fasel	Swiss Ambassador
Sir Simon Fraser	Flint Global
Tim Frost	Cairn Capital
Simon Hix	London School of Economics
Sara Binzer Hobolt	London School of Economics
Simon Jack	BBC
Stuart Lewis	Deutsche Bank
Baroness Ludford	House of Lords
Piers Ludlow	London School of Economics
H.E. Adrian O'Neill	Irish Ambassador
Norma Percy	Brook Lapping
Huw Pill	Goldman Sachs
Martin Sandbu	Financial Times
Tony Travers	London School of Economics
Gary Young	NIESR