

The withdrawal of the UK from the European Union

**Analysis by Charlie Elphicke MP and Martin Howe
QC of potential financial liabilities and of the
jurisdiction to enforce them**

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Summary

Formal negotiating guidelines issued by the European Commission to the United Kingdom on 12 June 2017 state that any financial settlement between the UK and the EU “should respect in full the financial obligations resulting from the whole period of the [UK’s] membership in the Union.”¹ The EU’s approach clearly represents the most extensive possible liabilities for the net bill. In fact there is no credible legal argument either for a liability on the UK to contribute to the EU’s pension fund deficit, or for any liability to contribute to the EU’s ongoing programmes after Brexit day on 29 March 2019. The following conclusions can be drawn:

- (1) The EU’s principal claim appears to be that the UK is obliged to contribute to the EU’s budget, including substantial elements of it representing forward commitments to ongoing programmes, for a period of roughly two years after withdrawal. This claim is devoid of merit as a matter of international law. For the EU’s “Own Resources Decision” and its “Multiannual Financial Framework” are legally subordinate to the EU treaties, have no binding force in law independently of the treaties, and therefore cease to impose any legal obligation on the UK on the date when the Treaties themselves cease to apply to the UK under Article 50 TEU.
- (2) The EU’s second claim relates to the large deficit of its staff pension scheme. The UK could not in any event be liable for a share of that without also having a claim on a corresponding share of the assets of the EU, if a process of valuing the EU’s assets and liabilities and then making or receiving a balancing payment on exit were to be undertaken. However, there is no general practice in international law of States making or receiving balancing payments representing the net assets or liabilities of an international organisation when the join or withdraw from the organisation. Moreover no such balancing payments have in fact been made when Member States (including the UK itself) joined the EEC/EC/EU. It is therefore difficult to see any credible basis upon which the UK could be said to be obliged to make any net payment when it leaves.
- (3) The European Investment Bank stands in a rather different position, since the Member States including the UK have paid up capital to this organisation which stands in its books. There is a compelling argument that the UK on EU exit is entitled to the return of its paid up capital and to a corresponding share of the accumulated reserves of the EIB.
- (4) The adjudication of these claims does not fall under the jurisdiction of the ECJ under the EU treaties, or under the jurisdiction of the ICJ under its Statute. However, in view of the strength of its legal position, there would be no disadvantage in the UK agreeing that these claims (and the UK’s cross-claims) be referred to adjudication in front of a neutral international tribunal. This might be a possible way of unblocking any impasse which might otherwise arise in the negotiations with the EU if these

¹ EU Commission, ‘Position papers transmitted to the UK “Essential Principles on Financial Settlement”’ (12 June 2017) available at: <https://ec.europa.eu/commission/sites/beta-political/files/essential-principles-financial-settlement-en-2.pdf>

claims cannot be resolved by agreement, as well as demonstrating the good faith of the UK in being willing to pay sums that may be legally owed.

It should be borne in mind that this analysis only looks at the principal items of the EU's claim and there could be other claims and liabilities, or indeed other assets potentially claimable by the UK, arising out of the complex finances of the EU and the complex organisation of its many subsidiary bodies and agencies. However, looking at the headline items, it would seem that overall the UK should be entitled on exit to a net payment in its favour, corresponding approximately to the value of its capital invested in the EIB.

Introduction

The withdrawal of the United Kingdom (UK) from the European Union (EU) raises a wide array of questions under national, international and EU law. The EU has limited experience of withdrawals and there is no precedent for a Member State leaving the Union under the current legal framework. The example of Greenland's secession in 1985 - as a result of increased home rule away from Denmark - provides some comparison.² But the withdrawal of the UK from the Union will be significantly more intricate, both in terms of scale and complexity. The withdrawal process is governed by Article 50 of the Treaty on European Union ("TEU"). Important legal questions remain about the withdrawal process set out in Article 50 TEU, particularly regarding any financial liabilities owed by the UK towards the EU, or claims of the UK on the EU, once it has left.

Although the Commission and the EU27 Member States took the position that there would be no negotiations or discussions with the UK about the terms of withdrawal until Article 50 was formally triggered, this did not inhibit the Commission or its President from engaging in a media campaign whose purpose seemed to be to build a case that the UK would owe a very large net amount to the EU upon its withdrawal.³

Indeed, wide-ranging speculation around the potential exit bill has escalated in recent months. The Financial Times in November 2016 originally reported that the European Commission was seeking an exit bill of €60 billion, based on comments by Michel Barnier, the EU's chief negotiator on Brexit.⁴ In February 2017, the same author writing for the Centre for European Reform (CER) estimated that the bill could range from €25–73 billion.⁵ The economic think-tank, Bruegel, have given a similar range for the bill, at €25.4–€65.1 billion.⁶ Recent research by the Institute of Chartered Accountants in England and Wales estimates that the bill may be

²In a referendum on 23 February 1982, Greenland decided – by 53% to 47% – to leave the then European Communities (EC). However, the 1985 withdrawal of Greenland from the EC is, legally speaking, not a withdrawal - Greenland was not a Member State of the EU but was, and remains, part of an EU Member State, Denmark. This is why its 'withdrawal' from the EC took place in the form of a reduction of the territorial jurisdiction of the Treaties through a Treaty change ratified by all Member States. Greenland therefore became an 'associated overseas territory' with special arrangements with the EU, particularly with regard to fisheries.

³The European Commission's Chief negotiator, Michel Barnier, was reported to be pursuing a gross upper estimate of UK liabilities of between €50 - €60 billion, citing unpaid budget commitments, pension liabilities, loan guarantees and spending on UK-based projects as part of Brexit negotiations. See Financial Times, 'Brussels focuses on UK's €60bn exit bill before trade talks' (19 February 2017) available at: <<https://www.ft.com/content/4466ffbc-f6aa-11e6-bd4e-68d53499ed71>> (last accessed 20 February 2017); and 'UK faces Brexit bill of up to €60bn as Brussels toughens stance' (15 November 2016) available at: <<https://www.ft.com/content/480b4ae0-aa9e-11e6-9cb3-bb8207902122>> (last accessed 7 February 2017). The President of the European Commission, Jean-Claude Juncker, has also stated that the UK's withdrawal will not come "at a discount or at zero cost" and that the 'Brexit bill' will be "very hefty". See BBC News, 'Jean-Claude Juncker: UK faces hefty Brexit bill' (21 February 2017) available at: <<http://www.bbc.co.uk/news/uk-politics-39042876>> (last accessed 21 February 2017).

⁴A. Barker & D. Robinson, *The Financial Times*, 'UK faces Brexit bill of up to €60 billion as Brussels toughens stance' (14 November 2016) available at: <<https://www.ft.com/content/480b4ae0-aa9e-11e6-9cb3-bb8207902122?mhq5j=e1>> (accessed 18 July 2017).

⁵A. Barker, Centre for European Reform, 'The €60 Billion Brexit Bill: How to Disentangle Britain from the EU Budget' (6 February 2017) available at: <<http://www.cer.eu/publications/archive/policy-brief/2017/%e2%82%ac60-billion-brexit-bill-how-disentangle-britain-eu-budget>> (accessed 18 July 2017).

⁶Z. Darvas *et al.*, Bruegel, 'Divorce settlement or leaving the club? A breakdown of the Brexit bill' (30 March 2017) available at: <<http://bruegel.org/2017/03/divorce-settlement-or-leaving-the-club-a-breakdown-of-the-brexit-bill/>> (accessed 18 July 2017).

as little as £5 billion.⁷ However, according to a report in the Financial Times on 2 May 2017, the gross Brexit ‘bill’ had been hoisted to €100 billion, allegedly with the support of France and Germany.⁸ It seems that the increased amount was largely attributable to a demand that the UK should cover post-Brexit farm payments and EU administration fees in 2019 and 2020.

The approach in the Financial Times’s May 2017 article has been confirmed by formal negotiating position paper issued under Article 50 TEU which was published by the European Commission and sent to the UK Government.⁹ This paper does not specify the precise amount the EU expects the UK to pay, but does provide further detail about the bodies and funds the EU considers ought to be included in the financial settlement. It states that the UK’s burden should be based on its percentage share of payments into the EU budget – the EU’s ‘own resources’ – over the most recent, full five-year period leading up to the UK’s expected 2019 withdrawal. But the paper also lays out variables that could shift the final outcome. This includes crucial details, such as a demand that all obligations be calculated and paid in euros – effectively putting onto the UK any risk from exchange-rate fluctuations. It should be noted that if the UK had remained a member, most of its obligations to pay into the EU budget would automatically adjust to follow the pound-euro exchange rate since the UK’s GNP is measured in pounds.

In her Article 50 notification letter, Mrs May said that the UK wanted to remain on good terms after Brexit.¹⁰ However, Michel Barnier has stated that the UK’s obligation to pay a multibillion pound bill on leaving the EU is “incontestable.”¹¹ By continuing to demand ever-increasing large sums of money while failing to provide a clear and, most importantly, fully costed, outline of any financial settlement, the EU is acting in such a way as to scupper a meaningful agreement.

The EU has much to lose financially from our withdrawal from the Union. During a news conference in June, Michel Barnier urged the UK to acknowledge its obligations, rebuking British officials who have described the financial settlement as a ransom. “*It’s not a ransom,*” he said. “*It’s not an exit bill. It’s not a punishment. It’s not a revenge.*”¹² However, the UK is currently paying some £10.8 billion a year net into the EU budget, a figure that, were Britain

⁷ Institute of Chartered Accountants in England and Wales, ‘Analysing the EU Exit Charge’ (May 2017) available at: <http://www.icaew.com/technical/economy/brexit/analysing-the-eu-exit-charge?cmpid=BBBXT051817_BIZ&utm_medium=email&utm_source=newsletter&utm_term=170518&utm_campaign=brexit> (accessed 17 July 2017).

⁸ A. Barker, *The Financial Times*, ‘Brussels hoists gross Brexit ‘bill’ to €100bn’ (2 May 2017) available at: <<https://www.ft.com/content/cc7eed42-2f49-11e7-9555-23ef563ecf9a>> (accessed 17 July 2017).

⁹ EU Commission, ‘Position papers transmitted to the UK “Essential Principles on Financial Settlement”’ (12 June 2017) available at: https://ec.europa.eu/commission/sites/beta-political/files/essential-principles-financial-settlement-en_2.pdf

¹⁰ Department for Exiting the European Union, ‘Prime Minister’s letter to Donald Tusk triggering Article 50’ ((29 March 2017) available at: <<https://www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50>> (accessed 18 July 2017).

¹¹ D. Boffey et al., *The Guardian*, ‘UK’s financial obligations to EU will be ‘incontestable’, says Barnier’ (3 May 2017) available at: <<https://www.theguardian.com/politics/2017/may/03/brexit-talks-will-not-be-quick-or-painless-says-eu-chief-negotiator>> (accessed 18 July 2017).

¹² BBC News, ‘Michel Barnier: Brexit payment from UK ‘not a ransom’ (12 July 2017) available at: <<http://www.bbc.co.uk/news/av/world-europe-40580452/michel-barnier-brexit-payment-from-uk-not-a-ransom>> (accessed 18 July 2017).

staying a member, would have continued to rise.¹³ That makes the UK the second largest net contributor to the EU after Germany. It is therefore unsurprising that the Union should seek to maintain the inflow of funds for as long as possible.¹⁴ The EU itself recognises that the UK's withdrawal will lead to a gap in its finances, proposing an EU-wide tax to fill the post-Brexit black hole.¹⁵

The formal negotiating guidelines published by the European Council outline that the following should be included in the Article 50 withdrawal agreement:

“10. A single financial settlement - including issues resulting from the MFF as well as those related to the European Investment Bank (EIB), the European Development Fund (EDF) and the European Central Bank (ECB) - should ensure that the Union and the United Kingdom both respect the obligations resulting from the whole period of the UK membership in the Union. The settlement should cover all commitments as well as liabilities, including contingent liabilities.”

What is particularly notable is the phrase “*all commitments as well as liabilities*”. It appears that the distinction is that “liabilities” means liabilities incurred for past activities up to the date of exit, while “commitments” refers to commitments undertaken for the future. The question therefore is what forward commitments, if any, will be legally binding on the UK once it leaves the EU at the end of March 2019.

It is of course possible that the word “commitments” in the guidelines is not being used in a sense which restricts it to commitments which will continue to be legally binding after the UK exits from the treaties. From the EU's point of view it may include “commitments” which in their opinion the UK ought morally or politically to continue to pay – something perhaps analogous to a “gentleman's agreement”. The question of whether a moral or political commitment to pay money exists is obviously less capable of being clear-cut than whether a legal obligation exists, and therefore open to more extensive argument one way or the other.

The House of Lords European Union Committee reached two main legal conclusions in its March 2017 report on Brexit and the EU budget:¹⁶

1. “Article 50 TEU allows the UK to leave the UK without being liable for outstanding financial obligations under the EU budget and related financial instruments, unless a withdrawal agreement is concluded which resolves the issue.” (para. 135).

¹³ HM Treasury, ‘Public Expenditure Statistical Analyses 2016’ (21 July 2016), Table C.1 available at: <<https://www.gov.uk/government/statistics/public-expenditure-statistical-analyses-2016>> (accessed 18 July 2017).

¹⁴ Both Michel Barnier and Jean-Claude Juncker were reportedly alarmed when the Prime Minister argued at a dinner in late April that Britain had no legal obligation to settle financial matters when it left the Union.

¹⁵ See European Commission, ‘Reflection paper on the future of EU finances’ (28 June 2017) at page 28, available at: <https://ec.europa.eu/commission/sites/beta-political/files/reflection-paper-eu-finances_en.pdf> (accessed 18 July 2017).

¹⁶ House of Lords European Union Committee, ‘Brexit and the EU budget’ HL Paper 125 (March 2017) available at: <<https://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/125/125.pdf>> (accessed 18 July 2017).

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).

This paper builds on the work by the House of Lords and examines the legal framework applicable to the principal claimed financial liabilities under both EU law and public international law. Section 1 outlines the current financial and budget revenue framework of the EU. Section 2 examines the scope and applicability of this framework to the UK’s withdrawal from the EU. Section 3 examines the broader question of the distribution of assets and liabilities and international practice when a State withdraws from an international organisation. Section 4 briefly considers the question of whether the UK owes moral or political “commitments” over and above its legal obligations. Section 5 assesses the issue of jurisdiction, particularly possible jurisdiction of the ECJ, the compulsory jurisdiction of the ICJ, and other possibilities.

1. The financial and budget revenue framework of the European Union

The financial and budget revenue framework of the EU has been, and remains, an evolving system reflecting the changing structure, priorities and challenges of the organisation over its history. The founding treaties of the European Communities foresaw that the budget would be financed through Member States' contributions¹⁷ with the possibility later of developing a system of own resources.¹⁸ The distinction between these two sources of funding was therefore clearly envisaged, with the move to the own resources system ensured by a Council Decision of 21 April 1970.¹⁹ This marked the transition from assessed national contributions, through which the Member States exercised control over the policies initiated by the Communities, to an independent, stable system of financing for the Communities.²⁰ 'Own resources' are understood to represent "*a source of finance separate and independent of the member states*"²¹ which accrue to the EU budget "*without the need for any subsequent decision by national authorities.*"²² They include 'traditional' own resources (agricultural levies and customs duties); a resource based on value added tax (VAT); and a resource derived from the Gross National Income (GNI) of each Member State. This form of revenue remains controversial because of both its complexity and opaqueness.²³

Under the current EU treaty framework, Article 3(6) TEU stipulates that the Union "*shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties*". Article 311 of the Treaty on the Functioning of the European Union (TFEU) further clarifies that the Union "*shall provide itself with the means necessary to attain its objectives and carry through its policies*" and that "*the budget shall be financed wholly from own resources*". Articles 310 to 325 of the TFEU set out the legal basis for the EU financial and budget revenue framework. The exercise of budgetary powers consists in establishing both the overall amount and distribution of annual EU expenditure

¹⁷ Article 200 Treaty of Rome.

¹⁸ Article 201 Treaty of Rome.

¹⁹ Council Decision of 21 April 1970 on the Replacement of Financial Contributions from Member States by the Communities' own Resources (70/243 ECSC, EEC, Euratom) OJ L 94, 28.4.1970, p. 19–22 available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31970D0243&from=EN> (last accessed 3 February 2017).

²⁰ For an overview of the development of the own resources system see L. Maufort, 'The development of the Communities' and the Union's own resources' (2016) available at: http://www.cvce.eu/content/publication/2005/4/5/cc05b5ce-8f83-4443-8328-9922fc7bc07a/publishable_en.pdf (last accessed 29 January 2017). In practice, the adjective "own" before resources is misleading, given that it merely indicates the member states' obligation to finance the budget through national contributions, not the autonomy of the EU to fix and manage its financial resources.

²¹ European Parliament, *Annexes to the Explanatory Statement Working Document No.1 on the European Communities Own Resources*, A6-0066/ 2007, 13 March 2007(a), page 20.

²² European Commission, *Updated check-list of administrative conditions in the area of the European Communities' own resources* (21 January 2011) page 5, available at: http://ec.europa.eu/budget/library/biblio/documents/financing/Checklist_admin_conditions_en.pdf (last accessed 1 February 2017).

²³ See, for example, European Parliament, 'Draft Report on negotiations on the MFF 2014-2020: lessons to be learned and the way forward' (16 January 2014) available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-527.841+01+DOC+PDF+V0//EN&language=EN> (last accessed 30 January 2017) page 5, in which the Co-rapporteurs Jean-Luc Dehaene and Ivailo Kalfin advocate "an in-depth reform of the financing of the EU budget that should return to a system of genuine, clear, simple and fair own resources."

and the revenue necessary to cover it, and in exercising control over the implementation of the budget.²⁴ The existing financial and budget revenue framework involves three component parts:

(i) The Multiannual Financial Framework (MFF)

The MFF acts as the binding medium-term financial planning instrument for the EU budget, setting out expenditure limits (“ceilings”) for major categories (“headings”) of EU spending.²⁵ It also sets an overall ceiling for the EU budget, which should not currently exceed 1.23% of the EU’s overall Gross National Income (GNI) in payments. The framework takes the form of an EU regulation – proposed by the European Commission, adopted by the Council of Ministers by unanimity after obtaining consent from the European Parliament. In practice, the MFF is adopted for a period of 7 years²⁶ and the current MFF covers the period 2014-20.²⁷ The total pre-allocation of UK expenditure assigned to the UK for use in certain kinds of EU programmes across the seven years total €39.6 billion.²⁸ The MFF Regulation requires the Commission to present a proposal for the next MFF, covering 2021-27, by 1 January 2018.²⁹ Article 17 of the MFF Regulation provides for the possibility of revising the MFF “in the event of unforeseen circumstances”, while Article 21 provides for revision in the event of an enlargement of the Union.

(ii) The Own Resources Decision (ORD)

Own resources decisions are conceived in principle to cover the same period as, and to be complementary to, the respective MFF. With a view to ensuring the financial autonomy of the Union, the own resources requirement set out in Article 311 TFEU is implemented through legislation under the Treaty. This is achieved by adopting a legislative package including both the Own Resources Decision (ORD)³⁰ whose measures are implemented

²⁴ Article 310 TFEU: “The revenue and expenditure shown in the budget shall be in balance.”

²⁵ The six categories include (i) Smart and Inclusive Growth; (ii) Sustainable Growth: Natural resources; (iii) Security and citizenship; (iv) Global Europe; (v) Administration; and (vi) Compensations. The framework also sets up ceilings for a number of instruments established outside the general headings known as the Flexibility and Special Instruments. These instruments enable to EU to mobilise the necessary funds in the event of unforeseen developments and include: (i) the Emergency Aid Reserve; (ii) the European Union Solidarity Fund; (iii) the Flexibility Instrument; (iv) the European Globalisation Adjustment Fund; (v) the Contingency Margin; and (vi) the Global Margin for commitments for growth and employment. The European Development Fund (EDF) is managed outside the framework of the MFF and is governed by its own set of rules: see below.

²⁶ Article 312(1) TFEU requires that the MFF is adopted for a period of at least five years.

²⁷ See Council regulation no.1311/2013 of 2 December 2013 laying down the multiannual financial framework for the years 2014-2020, available at: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:347:0884:0891:EN:PDF>> (last accessed 31 January 2017).

²⁸ More detailed pre-allocation figures available at:

<http://ec.europa.eu/budget/mff/preallocations/index_en.cfm> (last accessed 3 February 2017). Programmes include the EU cohesion policy funds; direct payments within the common agricultural policy; the European Agricultural Fund for Rural Development; the European Fisheries Fund; and the nuclear decommissioning assistance programme.

²⁹ Article 25, Council regulation no.1311/2013 (n 13). Article 25 further outlines: “If no Council regulation determining a new multiannual financial framework has been adopted before 31 December 2020, the ceilings and other provisions corresponding to the last year of the MFF shall be extended until a regulation determining a new financial framework is adopted.”

³⁰ Council Decision of 26 May 2014 on the system of own resource of the European Union (2014/335/EU, Euratom) OJ L 168, 7.6.2014, p. 105–111 available at: <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014D0335>> (last accessed 8 February 2017).

through a series of regulations.³¹ The ORD is decided by the Council of Ministers by unanimity, after consulting the European Parliament. Member States must then approve this decision, in accordance with their respective constitutional requirements, before it can enter into force.³² Once this is achieved, the ORD establishes a legal entitlement of the Union to certain revenues which accrue to the EU budget without being conditional on the decisions of Member States' national authorities.³³ Own resources are therefore not discretionary; they belong to the EU in compliance with the provisions of the ORD, and are called on in the course of EU budget implementation.³⁴ The existing ORD (Council Decision 335/2014) is not time-limited and therefore remains in force until it is replaced by a new ORD which must be agreed by unanimous vote in the Council.³⁵

(iii) **The Annual Budget**

Every year, the Council and the European Parliament must agree on an annual budget in which detailed amounts for specific items of EU expenditure are settled, provided that the expenditure remains within the ceilings set out in the MFF.³⁶ Ceilings for authorised expenditure amounts in both the MFF regulation and the annual budget are expressed as follows:

- ***Commitment appropriations*** – the total cost of legal obligations (e.g. contracts, grant agreements) that may be signed in a given financial year of the MFF; and
- ***Payment appropriations*** – expenditure due in the current year, arising from legal commitments entered into in the current year and / or earlier years of the MFF.

‘Outstanding commitments’ (or RAL from the French, *reste à liquider*) is a term used to refer to commitments agreed to but that have not yet translated into payments. Long term budgetary commitments lead to the existence of amounts of commitments remaining to be paid out in future years. The phenomenon is similar to when a contract is signed, e.g. to build a house - the commitment is being made, but the construction company will only be paid according to the progress of the work. According to the Commission’s most recent *Report on Budgetary and Financial Management*, the figure of outstanding commitments totals just

³¹ Regulation No 608/2014 laying down implementing measures is based on Article 311(4) TFEU (introduced by the Lisbon Treaty) and currently contains rules on calculation and budgeting of the annual balance, and on control and supervision measures. Regulation No 609/2014, which is based on Article 322(2) TFEU deals with the rules on making own resources available and the measures to meet cash requirements.

³² Article 311 TFEU. In the UK’s case, approval requires an Act of Parliament (most recently, the European Union (Finance) Act 2015): see further below.

³³ Traditional own resources, which result directly from the existence of a unified customs area and are not attributable to the Member States for legal – and practical – reasons; these resources are sugar levies and customs duties; VAT-based own resources, derived from application of a call rate to a notionally harmonized VAT base determined uniformly for the Member States in accordance with EU rules; GNI-based own resources, resulting from the application of a uniform call rate to total EU GNI, to match the total volume of resources to the total volume of expenditure; Correction mechanisms, which grant particular Member States a reduction of their contribution to the EU budget.

³⁴ The Court of Justice has confirmed the automaticity of own resources, ruling that delays by Member States in making available such payments are unlawful. See Case 93/85 *Commission v. United Kingdom* [1986] ECR 4011, ECLI:EU:C:1986:499.

³⁵ See High Level Group on Own Resources, ‘First Assessment Report’ (17 December 2014) available at: <http://ec.europa.eu/budget/mff/hlgor/library/reports-communication/FirstAssessmentReport-December2014.pdf> (last accessed 3 February 2017).

³⁶ Article 310(1) and (4) TFEU.

over €217.1 billion.³⁷ Media articles have claimed that the UK's share of this total amounts to €25 billion,³⁸ although the figure has not been confirmed by EU or UK government officials.³⁹

Failure to adopt an annual budget means a system of 'provisional twelfths' is put into place, meaning that not more than one twelfth of the budget appropriations for the previous year or of the draft budget proposed by the Commission (whichever is less) may be spent each month for any chapter of the budget.⁴⁰ The EU budget for 2017 was adopted on 1 December 2016, when the European Parliament confirmed its agreement with the Council. The 2017 budget sets the total level of commitments at €157.86 billion and the total level of payments at €134.49 billion.⁴¹

³⁷European Commission, 'Report on budgetary and financial management for Financial Year 2015' (2015) page 23 available at:

<http://ec.europa.eu/budget/library/biblio/documents/2015/2015_report_budgetary_financialmanagement.pdf> (last accessed 30 January 2017).

³⁸ See for example the article published in the German magazine, *Wirtschaftswoche*, on 4 August 2016 available at: <<http://www.wiwo.de/politik/europa/brexit-grossbritannien-soll-25-milliarden-euro-an-bruessel-zahlen/13969012.html>> (last accessed 29 January 2017).

³⁹ A breakdown of the total RAL by each EU Member State is not available.

⁴⁰ Article 315 TFEU.

⁴¹ See 'EU Budget for 2017' available at: <<http://www.consilium.europa.eu/en/policies/eu-annual-budget/2017/>> (last accessed 8 February 2017).

2. Application of the financial and budget revenue framework of the European Union to the United Kingdom after withdrawal

The withdrawal of a Member State from the EU is provided for in Article 50 TEU. However, Article 50 does not set down any substantive conditions for the withdrawal of a Member State; rather it includes only procedural requirements. Article 50(1) TEU states that, in the event of a Member State withdrawal: “*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.*” EU treaty law is therefore silent as to the nature of the UK’s obligations (if any) to finance the EU budget once it has withdrawn from the Union.

The UK acceded to the EU (then known as the European Communities⁴²) on the 1st January 1973 following the signing and ratification⁴³ of the 1972 Accession Treaty.⁴⁴ An Act annexed to the 1972 Treaty set out the conditions of accession and gave effect to the obligation to finance the European Communities through its “own resources”.⁴⁵ International law is clear that the foundation of a treaty obligation is consent, coupled with the fundamental principle that consent gives rise to obligations.⁴⁶ The customary international law rule, *pacta sunt servanda*, also states that a provision of a treaty is only binding on the parties once they have consented to it.⁴⁷ It is clear therefore that the UK consented to a binding treaty obligation to finance the European Communities when it became a signatory to and then ratified the 1972 Accession Treaty. That has now been replaced by a legal obligation which applies to the UK today under Article 311 TFEU.

The MFF and the ORD are devised and negotiated as a package. This aims not only to eliminate the need for continuous bargaining between Member States over successive annual budgets, but also offers the advantage of guaranteed funding for EU policies over a given number of years. Moreover it is clear that the current MFF and ORD were negotiated on the assumption that the UK (and indeed all other Member States) would remain members of the Union for the complete period up to 2020. Therefore the assumption was that the UK would both continue to pay in, and continue to receive from, the EU budget over this period.

(i) Nature of the rights and obligations created by the ORD and MFF

⁴² The ‘European Communities’ is a collective term that was used for the European Coal and Steel Communities, the European Economic Community and the European Atomic Energy Community.

⁴³ The 1972 Treaty was ratified by the Crown following the passing of an Act of Parliament – the European Communities Act 1972, which allowed legal rights and obligations under the Treaties to be given effect under UK domestic law, either directly under section 2(1) or via statutory instruments under section 2(2).

⁴⁴ 1972 Accession Treaty OJ L 73, 27.3.1972 available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:11972B/TXT&from=EN> (last accessed 25 January 2017). Admission to full membership of the Community was governed by Article 237 of the European Economic Community (EEC) Treaty (popularly referred to as the Rome Treaty); Article 205 of the European Atomic Energy Community (Euratom) Treaty; and Article 98 of the European Coal and Steel Community (ECSC) Treaty.

⁴⁵ Article 1(2) of the 1972 Accession Treaty states that the provisions of the Act form an integral part of the Treaty. Article 2 of the Act annexed to the 1972 Treaty binds the UK to the provisions of the Communities’ original Treaties and to the institutions of the Communities, which includes the provisions to finance the organisations.

⁴⁶ Article 14, 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331.

⁴⁷ *Ibid.*, preamble.

What is critical to the analysis is the nature in law of the rights and obligations created by the ORD and the MFF.

The hierarchy of norms in EU law

The ‘hierarchy of norms’ is a legal concept used to describe the vertical ordering of legal acts within the EU legal system, with those at the bottom of the hierarchy being subject to those of a higher status. The five principal tiers to the hierarchy of norms in EU law, which are in descending order are: (i) the constituent Treaties and the Charter of Rights; (ii) general principles of law; (iii) legislative acts; (iv) delegated acts; and (v) implementing acts. These are outlined clearly in EU treaty law. A hierarchy therefore exists between norms of fundamental character, such as those set out in the Treaties, and implementing norms i.e. between primary EU law and secondary EU law.

It is important to appreciate that the ORD and the MFF are legislative acts under the TFEU. They are not treaties. The procedure by which the ORD was adopted does resemble to a considerable degree the procedure by which treaties are adopted, in that Article 311 TFEU states that the Council must act unanimously in adopting the decision, and in addition imposes the requirement that the decision must be “*approved by the Member States in accordance with their respective constitutional requirements.*” That resembles the process by which treaties are first signed and subsequently ratified on behalf of States.

In the United Kingdom, the required constitutional approval of the ORD was given by the European Union (Finance) Act 2015.⁴⁸ That Act amended the European Communities Act 1972 by inserting the ORD into the list of “EU Treaties” within section 1(2)(e) of the 1972 Act. The legal effect of causing the ORD to become an “EU Treaty” under the 1972 Act was that obligations to pay money to the EU institutions under the ORD then became payable out of the Consolidated Fund of the United Kingdom under section 3(1) of the 1972 Act without the need for further approval by an Appropriation Act.⁴⁹

The EU argues that approving the ORD in this way binds the UK to a concrete obligation to finance the EU budget for the duration of the 2014-20 MFF financial cycle.⁵⁰ This would presently include a period of 21 months (the ‘Stub Period’) after the UK’s expected withdrawal from the Union in March 2019.

However, and despite it being described as a “treaty” within the 1972 Act and despite the process by which the UK and the other Member States came to approve it, it is clear beyond

⁴⁸ European Union (Finance) Act 2015 available at:

<<http://www.legislation.gov.uk/ukpga/2015/32/contents/enacted/data.htm>> (last accessed 8 February 2017).

⁴⁹ Section 3(1) of the European Communities Act 1972 is a so-called “direct charge” provision which states that EU Obligations as defined “shall be charged on and issued out of the Consolidated Fund”. Such direct charge provisions are very rare indeed since they authorise payment of money by officials by-passing the need for Parliamentary approval. For example, since the Act of Settlement 1701, the salaries of the senior judiciary have been directly charged on the Consolidated Fund in order to preserve their judicial independence.

⁵⁰ See, for example, oral evidence given by Sir Ivan Rogers to the European Scrutiny Committee on 1 February 2017, Q.11 available at:

<<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/european-scrutiny-committee/euuk-relations-in-preparation-for-brexit/oral/46706.pdf>> (last accessed 5 February 2017): “Equally, it is important that you understand that from an EU perspective, however much we dispute this and would not view it this way—and I understand exactly what you are saying about financial liabilities stopping when you leave the club—they will, and do, think, “You have exploded a bomb underneath the Multi-Annual Financial Framework”. Many have said that to me.”

doubt that the ORD is not a treaty for the purposes of EU law or international law generally. Article 311 TFEU describes it as being reached under a “*special legislative procedure*”. It is an act of an institution of a supranational organisation, namely the Council of Ministers. It is described in its text as a decision “by the Council”, and is authenticated by the signature of the President of the Council of Ministers alone. Unlike a treaty, it does not feature the signatures of the individual states. On rare occasions, international agreements between the States are reached within meetings of the European Council or the Council of Ministers but care is always taken to describe them as such and to distinguish them from supranational institutional acts.⁵¹ The agreement relating to the European Development Fund (EDF) which is considered further below falls into this category – it is an agreement between the Member States, although concluded within the framework of the EU institutions.

The important point for present purposes is that the ORD, in common with other legislative acts under the Treaties, only creates obligations binding upon the Member States by virtue of, and which are legally derived from, the Treaties themselves. The UK is bound by the ORD only because the TFEU says that Member States are bound by decisions reached under Article 311. The ORD does not create obligations which are independent of the Treaties. Therefore the effect of Article 50 TEU will be that when the Treaties (i.e. the TEU and TFEU) cease to apply to the United Kingdom, so will the ORD in common with all other secondary legislation adopted under the numerous other provisions of the Treaties.

Article 50(3) TEU stipulates that the EU 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 [of withdrawal submitted to the European Council] unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.*” Article 50(3) is therefore unambiguously clear – in the absence of a unanimous decision by the European Council to extend the period of withdrawal, a valid withdrawal from the Union will enter into force upon (i) the date of entry into force of the withdrawal agreement; or (ii) once two years from the date the Member State notified the European Council of its intention to withdraw from the Union.

Accordingly, the fact that the UK has voted for the ORD in the Council of Ministers and approved it for the purposes of Article 311 TFEU **does not give rise to any obligation on the UK which extends beyond the date when the treaties cease to apply to the UK**, which will be at midnight on 29 March 2019 unless a different date is agreed. After that date, the UK will be neither required to pay, nor entitled to receive, any sums under the ORD, MFF or annual budget then in force.

The EU hierarchy principle means that Article 50(3) takes priority over the legal obligations imposed on the UK by the MFF Regulation and the current ORD. Once the treaties themselves cease to apply to the UK, secondary EU law including the 2014-20 MFF Regulation and the current ORD will also cease to apply because their binding force on Member States only arises under and by virtue of the EU treaties. Further, as a matter of substance, a continuing obligation to pay into and receive funds from the budget is incompatible with withdrawal from the EU as an international organisation. The unlimited duration of the obligation to finance the EU under the ORD also gives rise to an absurdity if it

⁵¹ For example, the former Prime Minister’s February 2016 “renegotiation” of the terms of the UK’s membership was in form an international agreement (interpreting the primary treaties) between the Member States and not an act of the European Council. It was therefore carefully described as “*a Decision of the Heads of State or Government, meeting within the European Council*” and not as an act of the Council itself.

were to continue after withdrawal. **Unless the terms of the UK’s withdrawal agreement explicitly provide, the UK will not legally be required to finance the EU under the terms of the 2014-20 MFF or the current ORD once it has withdrawn from the Union.**

European Development Fund (EDF): The financing of the EDF (mentioned specifically in the European Council’s negotiating guidelines quoted above) is done on a different basis from the EU budget. EDF funding runs for the same multiannual time period, but funds are contributed by the Member States outside of and in addition to the EU budget. The legal basis for the payment of these funds is an “*Internal Agreement between the Representatives of the Member States of the European Union, meeting within the Council*”.⁵² It is interesting to compare and contrast this instrument with the ORD and the MFF Regulation. It is signed individually by the representatives of all the Member States and is subject to “ratification”. It is clear therefore that it is an international treaty in its own right concluded between the Member States, even if the occasion when they met together and agreed it was a Council of Ministers meeting.

It provides for a funding framework totalling €30.5bn, of which the UK’s share is 14.7% or €4.478bn over the period from 2014 to 2020. This would amount to about €1.3bn during the “stub period” from EU exit in March 2019 until the end of 2020.

Whether the obligations under this international agreement continue to bind the UK after EU exit is far from clear. The administration and control of the spending of the money is via the EU institutions of the Council, the Commission, and a European Development Fund Committee on which the Member States are represented and have weighted votes as set out by Article 8 of the Agreement. Since the UK will cease to be a Member State and so on the wording of the agreement apparently cease to have any say or vote in these institutions after exit, there is a strong argument that the obligation to pay is inextricably linked to the right to have the agreed say in the spending of this money, so that because of the nature of this agreement it will automatically cease to bind the UK from EU exit.

On the other hand, the argument that the UK has a continuing obligation to pay under the EDF Internal Agreement to the end of 2020 is considerably stronger than any argument that the UK has continuing obligations to pay towards the EU general budget under the ORD or MFF. It is not difficult for it to be stronger, because the argument on the general EU budget is vanishingly weak to non-existent.

A pragmatic solution for the UK may be to offer to continue to pay into the EDF up to the end of 2020, in return for retaining its voting rights on the spending of this fund until the end of that period. The UK after exit will not be wanting to stop spending this money on international development – although it will be wanting to spend the part of its development spending now channelled through the EU in accordance with its own national priorities. But the worst case scenario here seems to be that this element of the UK’s international development funding may need to be channelled through the existing EU arrangements for an additional 21 months after exit. If that is the case it should be possible for the UK to adjust the budgeting of the Department for International Development accordingly so that overall spending on international development by the UK remains at 0.7% of GNI (if that overall spending commitment is to be maintained).

⁵² https://ec.europa.eu/europeaid/sites/devco/files/internal-agreement-11edf-2013-2020_en.pdf

(ii) **Position under public international law**

It has been argued that liabilities might apply to the UK under principles of public international law. Article 70(1)(b) of the 1969 Vienna Convention on the Law of Treaties (‘the Vienna Convention’) provides that termination of a treaty “*does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination*”. This Article relates to situations when treaties are “terminated”, as both its heading and its text clearly state. There is no question of the TEU or TFEU being terminated: they will continue in force although the UK will withdraw from them.

The Vienna Convention is generally regarded as simply codifying pre-existing principles of customary international law, and there is no doubt that the general principle stated in Article 70(1)(b) – which distinguishes between rights and obligations accrued at the date when a treaty ceases to apply, and rights and obligations yet to arise through future operation of the treaty – is applicable to a situation where a treaty ceases to apply to one state as a result of its withdrawal but continues in force between other remaining states.⁵³ Indeed, this same principle is applicable in private law situations, where a party withdraws from e.g. a long term supply agreement or a lease. Such a withdrawal does not release the party from accrued obligations to pay for goods already delivered under the supply agreement, or to pay rent incurred but not yet paid under the lease in respect of the period of occupation.

The key point therefore is to distinguish between what rights and obligations of the UK will at 30 March 2019 count as **already accrued rights and obligations**, and what will be **future obligations** which would have arisen under the Treaties had the UK not withdrawn from them, but in the event do not arise. Clearly, the obligations to contribute own resources under the ORD up to the date of termination, and the right to receive sums payable by that date under the budget, will be accrued.

The Commission’s argument would appear to be based on an assertion that the presence in the MFF and the budget of longer term commitments (RALs) means that the UK’s obligations to contribute towards such RALs will be accrued before the date of termination. The wider argument apparently endorsed by some Member States according to the Financial Times report of 2 May 2017 is apparently not limited to RALs but extends to other budget items as well, on a legal basis which is not clear at all. However, even the Commission’s narrower argument relating to RALs would appear to be unsustainable for a number of reasons:

- (1) The European Union has its own legal personality, separate from the legal personalities of the Member States. The commitments under the MFF to fund long term programmes are **commitments resting on the Union itself**, not on the Member States either collectively or individually. The contributions of the Member States under the ORD are specifically and intentionally not allocated to or hypothecated to any specific part or parts of the EU’s expenditure.
- (2) To say that an accrued legal obligation exists on a particular Member State to fund forward programmes in the budget would involve having to hypothecate to that

⁵³ See, for example, ‘XI Termination’ in R. Kolb, *The Law of Treaties: An Introduction* (Edward Elgar: Cheltenham, 2016) at page 206: “The ‘termination’ of treaties includes the extinction of the treaty as a whole, the suspension of a treaty as a whole or between some parties, and also the withdrawal of one or more than one State party from a treaty.”

Member State a particular share of that expenditure. If the obligation is accrued at the latest at the date of withdrawal that must mean that there is certainty in the basis of allocation of the partial liability to that State. But that is inherently impossible to achieve, since own resource contributions are dependent upon uncertain amounts of customs receipts and of VAT base and GNI contributions. A withdrawing Member State is entitled to change completely its system of customs or VAT in which case such figures would become meaningless. This clearly demonstrates that any such obligation would not be an accrued obligation at the date of withdrawal, but rather an obligation which could arise only in the future on the basis of continued operation of the Treaties.

- (3) Any such argument that the obligations of Member States to contribute to own resources are accrued by the date of withdrawal would need to recognise that corresponding rights to receive expenditure are similarly accrued. The basis of valuing at the date of withdrawal a notional programme of continuing expenditure within the withdrawing State after withdrawal is completely unclear.
- (4) More fundamentally, the EU's commitments under the MFF are not fixed as a matter of legal obligation on the EU. The EU has the power to vary or reduce them under EU law if it so chooses, as is explained below. Therefore the ORD and MFF cannot be regarded as the same as or even as analogous to a contract which commits parties to incurring expenditure over a period of time.

Revision of the MFF

The MFF Regulation provides for the possibility of revising the 2014-20 MFF in a number of ways.⁵⁴ Specifically, Article 17 of the Regulation states that the MFF may be revised “in the event of unforeseen circumstances.” Such a provision acts as a flexibility mechanism, aiming to ensure that the Union is able to respond to evolving priorities and crises through the effective allocation of financial resources.

The importance of the 2014-20 MFF's ability to “*adjust swiftly to changing priorities and unforeseen events and to deliver rapidly on the ground*”⁵⁵ was emphasised in a 2016 Communication from the European Commission to the Council and the Parliament:

“The EU is facing a range of significant long-term challenges: strengthening Europe's economy and social fabric; ensuring security inside the EU and at its external borders; managing migration; and addressing the causes and consequences of climate change. Addressing these and other challenges requires comprehensive medium- to long-term policies and strategies, underpinned by adequate financial support at both European and national level.”⁵⁶

⁵⁴ Revision may take place, for example, in the

⁵⁵ European Commission, Communication from the Commission to the European Parliament and the Council, ‘Mid-term review/revision of the multiannual financial framework 2014-2020: An EU budget focused on results’ COM(2016) 603 (14 September 2016) page 2, available at: <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-603-EN-F1-1.PDF> (last accessed 7 February 2016).

⁵⁶ *Ibid.*

Generally accepted examples of “unforeseen circumstances” by the EU institutions include the refugee and migrant crisis; the Russian embargo on agricultural products; and the high level of unemployment (particularly youth unemployment) within the Union. The nature and scope of such events may be said to be characterised by both their unpredictability and their severity. The withdrawal of the UK from the EU clearly represents such an unforeseen circumstance. The withdrawal of a Member State from the EU is unprecedented. The Attlee Professor of Contemporary British History at Queen Mary University, Lord (Peter) Hennessey, has described the vote as an extraordinary “huge geopolitical shift” akin to the end of the British Empire.⁵⁷ A joint statement by EU leaders and the Netherlands Presidency described the outcome of the UK referendum as “an unprecedented situation.”⁵⁸ President of the European Council, Donald Tusk, has referred to the “crisis” of the UK’s withdrawal⁵⁹ as well as to the status of Brexit as a serious and dramatic political event.⁶⁰ At the very least, therefore, there are serious substantial grounds for revision of the 2014-20 MFF based on the withdrawal of the UK from the EU.

The UK’s position is analogous to that of a member of a club which has an ongoing expensive programme of refurbishing its premises. The member resigns and his membership dues are then no longer available to fund the expensive programme. Instead of revising its budget to take account for its reduced membership dues or increasing the subscriptions of the other members to cover its activities, the club chooses to keep spending at the same level and not to ask for increased dues from other members. The club argues that the ex-member should carry on paying because the expenditure was in its forward plans at the date of withdrawal, even though the ex-member derives no benefit from the refurbishment programme.

The Commission’s claims are equally weak as those of the club. Liabilities which will arise in the future under forward programmes are simply not accrued rights or obligations at the date of withdrawal. The apparent attempt by certain Member States to expand this claim beyond RAL “committed” funds to general programmed expenditures takes the argument beyond even the absurd.

⁵⁷ BBC News, ‘Brexit: ‘An unprecedented geopolitical shift’ (25 June 2016) available at:

<<http://www.bbc.co.uk/news/uk-politics-eu-referendum-36625209>> (last accessed 7 February 2016).

⁵⁸ <http://www.consilium.europa.eu/en/press/press-releases/2016/06/24-joint-statement-uk-referendum/>

⁵⁹ European Policy Centre Conference in October 2016 <http://www.consilium.europa.eu/en/press/press-releases/2016/10/13-tusk-speech-epc/>

⁶⁰ <http://www.consilium.europa.eu/en/press/press-releases/2016/06/24-tusk-statement-uk-referendum/> : “I am fully aware of how serious, or even dramatic, this moment is politically. And there's no way of predicting all the political consequences of this event, especially for the UK. It is a historic moment but for sure not a moment for hysterical reactions. I want to reassure everyone that we are prepared also for this negative scenario.”

3. Distribution of assets and liabilities on withdrawal

The effective withdrawal of a Member State from an international organisation

The ability of a State to withdraw from an international organisation in the absence of a specific provision for withdrawal (or ‘exit clause’) continues to cause uncertainty and debate among legal experts. It is also widely accepted that withholding membership dues from international organisations is unlawful under international law⁶¹ and that “the payment of contributions is a fundamental obligation of membership.”⁶²

However, the case of the UK’s withdrawal from the EU may be distinguished on the basis that the country’s ability to withdraw is specifically provided for in the EU treaty framework. Article 42(2) of the Vienna Convention states that withdrawal from a treaty may take place “as a result of the application of the provisions of [a] treaty.” Article 50 TEU acts as an exit clause, creating a lawful, public mechanism for the UK to terminate its treaty obligations and to withdraw from the EU.⁶³ The provision fulfils the requirements for a valid withdrawal set out in Article 42(2) of the Vienna Convention. The withdrawal terminates *ex nunc* the legal rule, abolishing for the future the legal regime established by the treaty.

Article 50 TEU, as already discussed, provides that in the absence of a withdrawal agreement the Treaties will cease to apply to the withdrawing State on the second anniversary of notification of withdrawal. This is entirely unconditional – it is not dependent upon the withdrawing state having fulfilled its financial or any other obligations towards the EU, or even on reaching agreement on what those obligations might or might not be. In this respect, Article 50 TEU differs from a condition sometimes attached to withdrawal from international organisations that outstanding obligations must be fulfilled before withdrawal is effective. Such provisions sometimes suspend the effectiveness of withdrawal until financial obligations have been fulfilled.⁶⁴ The constituent instruments of some international organisations, mostly financial institutions, also include provisions that limit or completely exclude the responsibility of the member states for the debts of the organisation.⁶⁵

⁶¹ See, for example, *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion (1962: 151) in which the International Court of Justice stressed that the power to apportion expenses among parties also creates the obligation of each State to bear that part of the expenses apportioned to it. Despite the judgment, the relevant states in this case did not comply with the advisory opinion. Plenty of examples also exist where States have affirmatively withheld their payments in protest to an act taken by the organisation. For example, throughout the early 1960s, the Soviet Union and France refused to pay their allocated dues pertaining to the UN Emergency Fund and the UN Operation in the Congo. Since the 1970s, the US has threatened to withhold – and has withheld – payments to the UN in protest against certain expenditures that it considered ultra vires (such as support for Palestinian rights or the Law of the Sea preparatory Commission).

⁶² T. Ingadottir, ‘Financing International Institutions’ in J. Klabbers & A. Wallendahl, *Research Handbook on the Law of International Organisations* (Edward Elgar: London, 2011) 108-131, 119.

⁶³ On exit clauses, see L. Helfer, ‘Exiting Treaties’ (2005) 91 *Virginia Law Review* 1579, 1582

⁶⁴ See for example Article 9, Food and Agricultural Organisation Constitution; Article 5, International Labour Organisation Constitution; and Article 9(3) Covenant of the League of Nations.

⁶⁵ Some constituent treaties set a principle of non-responsibility for the member states. Article 3(4) of the 1976 Agreement Establishing the International Fund for Agriculture Development provides that “[n]o Member shall be liable, by reason of its membership, for the acts or obligations of the Fund.” Others, such as the constitution of the World Bank limit the responsibility of the member states to the unpaid portion of the issue price of shares. Article II (1)(6) of the 1945 Articles of Agreement of the International Bank for Reconstruction and Development (the World Bank) provides that the “[l]iability on shares shall be limited to the unpaid portion of the issue price of the shares.” Few constituent treaties envisage the possibility of a deficit at the time of their dissolution and provide that such a deficit must be met by the member-states in proportion to their contribution to the organisation. Thus, for example, Article XXV (3) of the 1975 Convention for the Establishment of a

Article 50 TEU sets out the procedural requirements for EU withdrawal. However, it remains silent about the substantive requirements necessary for effective withdrawal. But it is clear from the wording of the provision that, once two years has elapsed from the date a notice of withdrawal is lodged with the European Council, the Treaties, and therefore EU law under the Treaties, no longer applies to the UK. International legal practice also demonstrates that effective withdrawal does not rest on the fulfilment of financial obligations prior to withdrawal. The withdrawal of France from the full structure of NATO in 1966; the UK's departure from UNESCO in 1985; the withdrawal of the USA from the International Labour Organisation; and the 1953 London Agreement on Germany's debts all provide some guidance on this issue. The clearest example, however, may be seen in the withdrawal of member States from the League of Nations:

The League of Nations⁶⁶

The relationship between the non-payment of financial contributions and effective withdrawal from an international organisation was evaluated when Honduras, Nicaragua and Paraguay all gave notice of their intention to leave the League of Nations. Article 1(3) of the League's Covenant provided that: "*any Member of the League may, after two years' notice of its intention to do so, withdraw from the League, provided that all its international obligations and all its obligations under this Covenant shall have been fulfilled at the time of its withdrawal.*"⁶⁷ The financial contributions of the League's member states were based on Article 6(5) of the Covenant, which stipulated that the Assembly was to decide the proportion of the expenses of the League to be borne by each member. Such contributions were generally accepted to include the financial obligations of Member States.⁶⁸

When Brazil, Costa Rica, Germany and Japan withdrew from the League, each had met the obligation of contributing to the budget before the expiration of the two years' period of notice. It should be noted that (in common with international practice generally) the withdrawing States were not expected to contribute to the expense of the forward programmes of the League after they left, nor was an exercise carried out of valuing the League's assets and liabilities and making or requiring balancing payments by or to the withdrawing States.

In 1937, the Fourth (financial) Committee of the 18th Assembly of the League was asked to consider whether a state that had not completed its financial obligations could remain a member of the League. The Fourth Committee referred the three cases to the First (legal) Committee which, rather than requesting an advisory opinion from the Permanent Court of International Justice (PCIJ) on the proper interpretation of Article 3(1), decided to deal itself with all three cases.

European Space Agency regulates the possible dissolution of the organisation and provides as follows: "In the event of a deficit, this shall be met by the same [member] states in proportion to their contributions as assessed for the financial year then current."

⁶⁶ For a more in-depth analysis of the following issues see K. Magliveras, 'The Withdrawal from the League of Nations Revisited' (1991) available at:

<http://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1281&context=psilr> (last accessed 29 January 2017).

⁶⁷ The League of Nations, *Covenant of the League of Nations* (28 April 1919) available at:

<http://www.refworld.org/docid/3dd8b9854.html> (last accessed 29 January 2017).

⁶⁸ See for example the comments of the Secretary General of the League: "Where a principal purpose of the agreement is to maintain an organisation out of funds contributed by the parties, persistent failure to contribute would be a breach of material obligation." (1928) 8 League of Nations O.J. 506.

The Legal Committee had little difficulty in deciding the cases of Honduras and Nicaragua. The Committee stated that if an arrangement for paying the debt in instalments was concluded with the state in question, withdrawal would become effective if that state was not in default with respect to any of the instalments due before withdrawal. The fact that the debt was still not paid in full was irrelevant because under the arrangement which regulated the relationship between that state and the League, the only financial obligation to be fulfilled was the proper payment of instalments.

The case of Paraguay was however a little more complex. On 23 February, 1937 (the date of the expiration of the two years' notice period) Paraguay was in default on a consolidated debt agreement, on nine entire years in arrears and on budget year 1937. The question was therefore raised: "Was the withdrawal effective or did Paraguay continue to be a member of the League and to incur liability for additional contributions until it regularized its financial position?" The generally held view during the First Committee's deliberations was that a literal interpretation of Article 1(3) was inappropriate. To say that a state remained a member of the League if its financial obligations had not been met was against the League's interest; it was illogical that a defaulting State could remain in the League as a Member State enjoying all the advantages and privileges of its membership and all the obligations of the League towards it, while the deficit of the League's budget increased year after year. The result was that Paraguay ceased to be a member of the League, notwithstanding its outstanding financial obligations. Paraguay would remain liable for the debt, and the League was free to recover it by all the means at its disposal. Although the League Assembly refrained from declaring that Paraguay had legally withdrawn from the organisation, it made clear that in all circumstances Paraguay owed to the League the full amount of its arrears of contributions until the date of withdrawal. After 1940, all three States - Honduras, Nicaragua and Paraguay – failed to keep up their annuities under the consolidated arrears contracts. The League did not seek to recover these outstanding amounts under international law.

Assets and liabilities

The examples given above have all involved payment of annual membership dues, rather than the assets or liabilities of the international organisation. A withdrawing state is obliged to pay its annual subscriptions up to the date of withdrawal, but there is no general state practice either that it is entitled to take away a share of the assets of the organisation when it leaves or obliged to shoulder a share of the organisation's liabilities.

The EU's consolidated annual accounts for 2015 show EU assets of approximately €153.7 billion and liabilities of €226 billion as of 31 December 2015.⁶⁹ The shortfall of €72 billion is noted within the consolidated accounts as: "Amounts to be called from Member States".⁷⁰

⁶⁹ European Commission, 'Consolidated Annual Accounts of the European Union: Financial Year 2015' (2015) page 32, available at:

http://ec.europa.eu/budget/library/biblio/documents/2015/EU_AnnualAccounts2015_EN.pdf (last accessed 7 February 2017).

⁷⁰ *Ibid.*

The pensions of EU officials

The Pension Scheme of Officials and Other Servants of the European Union ('PSEO') functions as a notional fund with defined benefits.⁷¹ The scheme is financed on a 'pay as you go' unfunded basis where contributions to the scheme are not invested in a pension fund but are counted as revenue in the EU budget (these are recorded as part of the EU's 'administrative costs'). Member States jointly guarantee the payment of these benefits pursuant to Article 83(1) of the Staff Regulations⁷² and Article 4(3) TEU. A 2016 study by Eurostat (ordered by the European Commission) on the long-term budgetary implications of pension costs outlines in more detail the type of pension plan in place.⁷³ Under Article 83(2) of the Staff Regulations, EU officials contribute one-third of the expected cost of their future benefits, amounting to 10.1% of their salary. This totalled an estimated €426 million in 2016.⁷⁴ An analysis of the number of UK nationals within the retired and current workforce of EU institutions shows approximately 3,000 people in total – 1,730 of whom are retired and 1,270 of whom are currently employed by the EU. According to the EU's Consolidated Annual Accounts for 2015, the total pension liability for the EU as of 31st December 2015 stood at €63.8 billion⁷⁵

One aspect of the Commission's demands would appear to be a suggestion that the UK should contribute towards the unfunded pension deficit upon withdrawal. This gives rise to a number of considerations.

First, at least in the media, there seems to be some suggestion of linkage between the UK's alleged liabilities and the nationality of the individuals involved. However, there is no legal basis for the UK being liable for pension payments because the pensioners concerned are UK nationals. Officials or employees of the EU institutions all owe their duties to the EU as a whole, not to their own Member State. It is true that at the highest levels (Commissioners and Judges of the ECJ) they are appointed on the basis of nationality and at senior levels there are informal national quotas in operation, but this does not mean that individual Member States are responsible for their employment or their pensions.

As noted above, the Member States jointly guarantee the payment of the unfunded pension liabilities. However the primary liability rests on the EU itself, and this guarantee would become relevant only if the EU were to collapse. Clearly, an argument would then arise about whether the UK after withdrawal had completely escaped this guarantee obligation, or whether it remained liable to guarantee pension obligations accrued up to the date of

⁷¹ A defined benefit plan is a pension plan that generally defines an amount of pension benefit that an employee will receive on retirement, usually dependent on one or more factors, such as age, years of service and remuneration.

⁷² Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community (OJ 45, 14.6.1962, p. 1385) available at: <<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1433861011292&uri=CELEX:01962R0031-20140701>> (last accessed 7 February 2017). Article 83(1) reads: "Benefits paid under this pension scheme shall be charged to the budget of the Communities. Member states shall jointly guarantee payment of such benefits in accordance with the scale laid down for financing such expenditure."

⁷³ Eurostat study on the long-term budgetary implications of pension costs available at: <http://www.u4unity.eu/document3/Pensions_en.pdf> (last accessed 7 February 2017).

⁷⁴ See A. Barker, Centre for European Reform, 'The €60 billion Brexit Bill: How to Disentangle Britain from the EU budget' (February 2017) page 7, available at:

<https://www.cer.org.uk/sites/default/files/pb_barker_brexit_bill_3feb17.pdf> (last accessed 7 February 2017).

⁷⁵ (n.25) page 32

withdrawal, which is a tenable argument. But the existence of this guarantee does not cast light on the distinct question of whether the UK upon withdrawal is obliged to incur *primary* liability for a share of accrued pension liabilities.

The argument that the UK is liable for pension liabilities accrued at the date of withdrawal is slightly more respectable than the (frankly absurd) argument based on future budget programme commitments, but it could only be so liable as part of a division of both the liabilities *and assets* of the EU. There is certainly no general rule or practice in international law that when a state voluntarily but lawfully ceases to be a member of an international body, it then makes or receives a payment to reflect some notional share of net assets. Indeed, the practice is generally that the state pays its membership dues up to the date of leaving and that is that, as can be seen in the League of Nations cases.

Logically, if a balancing payment were to be made to or from a Member State when leaving the EU, such an exercise should also take place when a Member State joins the EU. By this logic, when the UK joined the EEC in 1973, it should have paid towards buying into its share of the EEC's existing assets, and received a balancing payment from existing members in return for assuming a share of the unfunded pension liabilities of EEC officials at that date. However, no such payments were made, nor has it been the practice of the EEC/EC/EU to make such adjusting payments when new Member States join, or when Greenland withdrew.

The situation where a state withdraws from an international organisation is different from what happens if the constituting treaty is terminated and the organisation is dissolved. In that latter event, there is some state practice of the member States picking up liabilities, as in the case of the dissolution of the Western European Union in 2010. This nearly invisible organisation of European NATO members incurred staff pension liabilities and a liability to contribute to the European Union Satellite Centre, and its member states accepted joint responsibility for these liabilities after the WEU was formally dissolved. On the other hand, when the International Tin Council collapsed leaving behind huge liabilities under tin futures contracts, its member states refused to be held responsible,⁷⁶ so this practice cannot be said to be universal.

However, the situation where a state withdraws from membership of an ongoing international organisation is fundamentally different from one where the organisation is dissolved. In the latter case, something has to be done about its accrued assets and liabilities; where the organisation is ongoing, the normal practice is that there is no reckoning up of assets and liabilities either when new states join or when existing states leave; the assets and liabilities just stay with the organisation.

The European Investment Bank

So far this paper has covered the general assets and liabilities of the European Union. It is possible that there are specific instances where a different approach is warranted. The European Investment Bank (EIB) is subject of its own funding regime under its Statute. Under Article 4, the Member States agreed to subscribe a total capital of €243 billion in agreed shares, and to pay up about 9% of that amount.

⁷⁶ *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, House of Lords.

Article 3 of the Statute and Article 308 TFEU state that the members of the EIB “*shall be the Member States*”. It would appear to follow in the absence of some special agreement that the UK will automatically cease to be a member of the EIB when it withdraws from the EU. This then raises the question of what happens to the UK’s subscribed and paid-up share capital in the EIB. In view of the formal subscription of capital to this commercial or at least quasi-commercial organisation, there is a much stronger argument in this instance for “cashing up” of the assets and liabilities of the EIB upon the UK’s exit from the EU than in relation to the EU’s general assets and liabilities.

According to the EIB’s 2015 Financial Statements,⁷⁷ the EIB’s reserves consist of paid-up capital from Member States of €21.7bn, plus a further €41.6bn of accumulated profits, i.e. total “own funds” of €63.3bn. The UK’s share of this, according to the proportion of capital it has subscribed, is 16.1% of this, or €10.20bn. On the other hand, the UK is currently under a contingent obligation to pay if called upon to do so, up to the limit of its subscribed but unpaid share capital, a theoretical liability totalling just under €36bn. This “subscribed but unpaid” share capital is effectively a Member State guarantee which could be called upon if the EIB were for some reason to incur losses on its loan book which burnt through its accumulated reserves. The existence of these effective Member State guarantees means that the EIB can borrow more cheaply than it otherwise could in order to lend on.

Clearly, these Member State guarantees were very important when the EIB was first established, and had very thin net paid-up capital and no track record. Now that the EIB has an established track record and has built up a buffer of accumulated reserves, the implicit Member State guarantees are less important but presumably still have value. Since the UK’s paid-up shareholding is linked to the subscribed but unpaid capital, if the UK were “cashed out” of the EIB it would probably be correct to net off the value of being released from this effective guarantee (amounting to 16% of the total such guarantees given by the Member States) against the 16% share of the accumulated reserves. The computation of the net present value of such a guarantee obligation would require market expertise, and would be dependent upon assumptions about how likely or unlikely it is that this guarantee would ever be called upon, given the strength of the balance sheet of the EIB and the quality of its loan book.

While it is clear that the UK owns this 16% share of capital invested in the EIB, it does not necessarily mean that the UK is entitled either legally or as a matter of practice to immediate cash payment, so stripping the EIB of a big chunk of its working capital. In practice the UK would need to ask for payment of this sum over time, while the EIB procures substitute core capital from elsewhere, or alternatively the UK could remain an EIB investing member after leaving the EU under a special agreement. A further alternative is a demerger where the UK takes over a 16% chunk of the EIB’s assets and liabilities, including its loan book, which would neatly transfer to the UK a proportion of the loan book risk matching its subscribed but unpaid share capital. Only around 8% of the EIB’s accumulated lending is within the UK, so a demerger would entail transferring some loans outside the UK to the UK government – unless the EU preferred to make a net present value payment for the surplus capital.

⁷⁷ www.eib.org/attachments/general/reports/fr2015en.pdf

4. Are there moral or political commitments to pay, over and above any legal obligations?

This is necessarily a question which is more open to debate and differences of view than the legal question of whether a liability exists or not. The prevailing view on the Continent seems to be that the UK having committed itself to the MFF, and the spending plans in the EU budget having been based on the assumption that the money from the UK would come rolling in, the UK is under at least a moral or political obligation to pay up the sums which were agreed on its behalf by Mr Cameron and Mr Osborne.⁷⁸

But can that view really be correct? On 7 February 2017, Commission spokesman Margaritis Schinas told reporters: *“It is like going to the pub with 27 friends: You order a round of beer, but then you cannot leave while the party continues; you still need to pay for the round you ordered.”*⁷⁹ The problem with this homely analogy is that the EU doesn’t really operate anything like ordering rounds of beer. A Member State does not say *“OK it’s my round: this year I’ll pay for the CAP – it’s your round next year.”* In fact, on a round of drinks analogy, the UK has been paying for rounds of drinks for everyone else year after year with its large net budget contribution and it’s about time it was bought a round (or more) back.

The assumption underlying the MFF was that the UK would remain a Member State for the whole period until 2020. The UK’s obligation to contribute to the EU budget was linked to continuing membership not just as a matter of legal technicality but as a matter of obvious substance and reality. Not only was Article 50 in the treaty, but Mr Cameron’s Bloomberg speech in which he announced an In-Out referendum on membership was given in January 2013, whereas the current MFF and ORD run from the beginning of 2014 and were negotiated and agreed during 2014. So all the Member States knew when the ORD and MFF were agreed that it was all dependent on the UK voting to stay in the EU in the referendum.

No doubt the Commission, along with Mr Cameron himself, assumed that a Remain vote would win. But that does not justify an assumption on their part that the UK was under any moral or political commitment to carry on paying in the event that the British people voted to leave, which was clearly on the cards as a possibility whatever view might have been taken about how likely or unlikely it was. The argument is also logically incoherent. It would mean that a net contributor State like the UK could only leave without incurring huge financial liabilities at the end of each MFF period. But Article 50 gives Member States the right to leave at any time, not just at the end of each MFF cycle. And what if a net recipient State chooses to leave? The same logic would imply that the EU should keep sending money to the departed state for the remainder of the MFF period in which it left. One cannot really see the EU doing this, or thinking that it is under a political or moral obligation to do so.

In reality, there is no logical or intellectual coherence in the notion that the UK is obliged to keep on paying simply because it has paid in the past. While it is distressing to anyone in receipt of a generous and unearned income stream to have it cease, that factor does not imply

⁷⁸ See for example, House of Lords European Union Committee, ‘Brexit and the EU Budget’ at page 32. Peers found that many MEPs believed that the UK had a “moral, if not legal” obligation to meet its agreed commitments.

⁷⁹ Bloomberg Politics <https://www.bloomberg.com/politics/articles/2017-02-07/brexit-bill-just-like-paying-your-round-in-the-pub-eu-tells-may>

any obligation, whether political, moral or legal, on the UK to continue to act as a meal ticket for the furtherance of the European project.

Finally, there is the question of whether paying money would be justified for practical reasons, even if it is not owed legally and there is no moral obligation to pay. Obviously there could be an argument for some payment to sweeten an overall deal which is in other respects a good deal for the UK (and for the EU).⁸⁰ But this needs to be kept in proportion. A study by Civitas⁸¹ indicates that UK exports to the EU would face about £5.2 billion tariffs in the event of exit without an agreement, but on the assumption that the UK were to maintain the same tariff schedules as the current EU common customs tariff, EU exports would face about £12.9 billion because of the trade balance and because EU exports are more heavily concentrated in high-tariff sectors. If a UK-EU deal is to contain payments for market access then arguably the EU should be paying the UK, not vice versa. However it is not the practice for international trade agreements to contain payments for market access.

There may be no legal or moral basis to making a financial payment to the EU on departure. Nevertheless it may be that in order for the UK to leave the EU on a positive note and to focus on building deeper relationships with the rest of the World, making a payment would speed things along. There is value for the UK in achieving a departure with goodwill and to achieve that departure speedily so the UK can concentrate on trade with the rest of the world which will account for over 80% of future global growth - as opposed to getting stuck in a rut haggling over figures with an important trading partner. There is therefore likely to be value in making a payment – but clearly not of the kind of levels the EU Commission might like to imagine.

⁸⁰ See D. Herszenhorn & Q. Aries, *Politico*, 'Michel Barnier to UK: Build trust by showing flexibility on Brexit Bill' (12 July 2017) available at: <<http://www.politico.eu/article/michel-barnier-there-are-stark-differences-with-the-uk-in-brexit-negotiations/>> (accessed 17 July 2017) in which Michel Barnier suggested that settling the Brexit bill is of "major importance" as the basis for future discussions on trade post-Brexit.

⁸¹ Potential post-Brexit tariff costs for EU-UK trade, Justin Prottis, Civitas, Oct 2016: http://www.civitas.org.uk/reports_articles/potential-post-brexit-tariff-costs-for-eu-uk-trade/

5. The adjudication of a dispute between the UK and the EU regarding outstanding financial liabilities

Consideration should lastly be given to whether the Court of Justice of the European Union (ECJ) might play a role in the event of a dispute between the EU and the UK post-withdrawal.

Unlike the 1972 Accession Treaty, any withdrawal agreement concluded between the EU and the UK does not represent primary EU law. As an international agreement concluded by the EU, it would normally be subject to the ECJ's internal jurisdiction (i.e. internal within the EU) but not its external jurisdiction. For example, the Council decision to conclude the agreement could be challenged before the Court through an action for annulment under Article 263 TFEU.⁸² But a decision in that instance would only be binding on internal EU Member States. Others have argued for the possibility that the ECJ be requested to deliver an opinion on the draft withdrawal agreement's compatibility with EU law under Article 218(11) TFEU (agreements between the Union and third countries or international organisations).⁸³ Moreover, the domestic courts of remaining EU Member States may be able to refer questions regarding the interpretation of the withdrawal agreement for a preliminary ruling to the ECJ under Article 267 TFEU.⁸⁴

However, none of these heads of jurisdiction imply that the ECJ would have jurisdiction to interpret the withdrawal agreement so as to bind the UK, as a non-member State. The ECJ could be given such jurisdiction by agreement. However it would be unheard of for a non-member state to agree to binding adjudication by the ECJ in an international agreement with the EU. No counterparty to an EU trade treaty or other treaty would agree to such jurisdiction and plainly the UK should not do so.

This raises the question of whether the ECJ would have jurisdiction to adjudicate on any claims about financial payments if no agreement is reached about them, and hence the UK withdraws under Article 50(3) TEU without a withdrawal agreement in place. On the face of it, once the UK withdraws from the EU it is in principle no longer bound by the jurisdiction of the Court or its judgments, because the provisions of the Treaties conferring jurisdiction on the ECJ will no longer bind the UK.

There is no provision on the Treaties conferring jurisdiction on the ECJ to continue to rule after exit on matters arising before exit, unlike in some other treaties.⁸⁵ There might however be an attempt to argue that such a jurisdiction arises by implication and the ECJ might even be persuaded to assert such an extended jurisdiction, in a circular judgment which is

⁸² Article 263 TFEU: "The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties."

⁸³ Article 218(11) TFEU: "A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised."

⁸⁴ It is unclear whether this would include UK domestic courts up to the date of withdrawal.

⁸⁵ For example, Article 58(2) of the ECHR provides for the continued jurisdiction of the Strasbourg Court over a withdrawing state in respect of acts which take place before withdrawal.

dependent upon it having that jurisdiction in the first place. If so, it should be robustly ignored: no effective means of enforcement of such a judgment would exist.

Jurisdiction of the International Court of Justice

Options at the international level would be limited should a dispute between the EU and the UK arise *after* the UK has withdrawn from the Union. The EU is not a sovereign State and so lacks standing to bring a case before a majority of international courts and tribunals, including the ICJ. Article 34(1) of the ICJ Statute is clear: “*Only states may be parties in cases before the Court.*”

A further (minor) possibility is that an EU Member State, or a group of EU Member States, may ask the ICJ to adjudicate. This is similar to the *Case Concerning Legality of Use of Force*⁸⁶, in which Serbia and Montenegro lodged an application to the ICJ regarding the use of force by the ten NATO States on 29 April 1999 involved in air strikes against Serbia.⁸⁷ The problem with such an attempt to bring such a claim in the name of Member States rather than the EU itself is that the UK’s financial obligations (assuming they exist) are owed towards the EU itself, which has its own legal personality. Further, an ICJ action by Member States would be dependent on each of those States having themselves agreed to the compulsory jurisdiction of the ICJ without a reservation covering the matters in question. These declarations commonly contain exclusions and limitations which have the effect of limiting claims both *against* the declarant State and also *by* the declarant State. The UK’s own declaration submitting to the compulsory jurisdiction of the ICJ was last updated on 22 February 2017.⁸⁸

A more substantive problem with the ICJ as an arbiter of this particular potential dispute is the composition of the Court. In a dispute between States, a State which does not have a judge of its nationality on the Court may appoint an *ad hoc* judge. This means that the composition of the Court will be balanced as between nationals of the States which are parties. However, while one British national is a permanent member of the Court (Judge Christopher Greenwood), there are three nationals of the EU27 who are members of the Court, including the President who is French.

But it would be possible to refer the legal issues in the dispute to an international tribunal established by agreement. Conventionally such tribunals have three members with chair nominated by agreement of the parties or by a neutral third party.

The UK could therefore suggest that the EU’s financial claims be referred to binding international determination in an appropriate neutral forum. There are two different questions. One is whether, in the absence of an Article 50 agreement being reached, there is any effective method of enforcing a liability by the UK in favour of the EU. The second is

⁸⁶ *Case Concerning Legality of Use of Force (Serbia and Montenegro v. Belgium)*, 44 International Legal Matters 299 (2005).

⁸⁷ The Court unanimously decided that it lacked jurisdiction to entertain the claim against the remaining eight member states of NATO, on the ground that Serbia and Montenegro had no standing to pursue the claims before the Court. Serbia-Montenegro was not a member of the United Nations at the moment the alleged breach of international law took place and was therefore not a party to the ICJ Statute.

⁸⁸ This made only minor amendments to the UK’s previous declaration, which were explained by Sir Alan Duncan, Minister of State, in the House of Commons on 23 Feb 2017:

<https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2017-02-23/HCWS489/>

whether such a liability exists at all. For the reasons explained above, the UK is on very strong ground in saying that there is no net liability. The UK's public position is also that it will pay what it legally owes, if it owes anything. It would be consistent with the UK's position therefore to propose a method of adjudication in order to demonstrate its good faith. More importantly for practical purposes, it could also be a way of getting past the problem of the issue acting as a stumbling block against progress on other aspects of the negotiations with the EU, by having the disagreement off to international determination.

6. Conclusion

Ultimately the amount the UK will pay on or after its departure will be a matter of negotiation, if an agreement with the EU is reached. Because of the strength of the UK's legal position, any net payments made by the UK (over and above payments for the cost of ongoing programmes in which the UK wishes to remain involved) can be thought of in effect as a subsidy borne by the general body of UK taxpayers in order to ease the path of that sector of the economy which is involved in the export of goods and services into the EU27 market. While there is clearly benefit in easing the path of these exporters, if the EU's negotiating position is that this can only be achieved at a high cost, the question then arises whether such sums would be better spent by the taxpayer in other ways, such as cutting taxes to improve competitiveness and boosting exports to the rest of the world rather than the EU27.

The Prime Minister has made it clear that “the days of Britain making vast contributions to the European Union every year will end”.⁸⁹ This commitment was repeated in the Conservative General Election Manifesto in May 2017.⁹⁰ In the absence of a negotiated withdrawal agreement, the withdrawal of the UK from the EU will become unconditionally effective 2 years after it notified the European Council of its intention to withdraw, i.e. at the end of 29 March 2019. Article 50 TEU makes clear that EU law will no longer apply to the UK at this point. The hierarchy of norms within EU law gives priority to the total withdrawal from the treaties at the end of the 2-year period under Article 50(3) TEU over and above any financial obligations imposed on the UK through EU secondary legislation. Public international law also supports the argument that no such obligations as are apparently being asserted exist, and further it is clear that an effective withdrawal from the EU does not depend on the fulfilment of any outstanding financial obligations prior to withdrawal. In the event of a dispute between the UK and the EU, the jurisdiction of the ECJ will no longer apply once the UK has withdrawn from the Union.

For the reasons set out in this paper, there is a powerful legal case that the UK will not owe the EU any monies on withdrawal, with the possible exception of residual payments towards the programme of the European Development Fund, and will be entitled to a net payment representing the value of its capital in the European Investment Bank.

Because of the strength of the UK's legal position, one possible way forward could be for the UK to propose that these financial claims (and its own counter-claims) be submitted to binding international arbitration before a neutral forum. Such a course would have the advantage of seizing the moral high ground by demonstrating that the UK is intent on meeting its proper legal obligations, while providing a possible route for unlocking a deadlock over these financial claims in the exit negotiations.

⁸⁹ Theresa May, Lancaster House speech (17 January 2017) available at: <https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech> (last accessed 8 February 2017).

⁹⁰ Conservative Party, 'The Conservative and Unionist Party Manifesto 2017: Forward, Together – Our Plan for a Stronger Britain and a Prosperous Future' (June 2017) at page 36, available at: <https://www.conservatives.com/manifesto> (accessed 17 July 2017)