

FAQ: Financial Disputes and their Settlement

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A number of financial claims may arise in the context of BREXIT from the EU and/ or the UK. According to public international law, obligations that arise when a treaty is in force will survive the withdrawal from that treaty and States remain responsible.

This FAQ discusses:

- What legal claims may arise from the EU and the UK?
- What is the legal basis for these claims?
- What role the CJEU will play in determining these claims?
- What role other courts or tribunals might have, if any, in determining these claims?

It is intended to provide a brief overview of some key issues, and is therefore not comprehensive.

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As the process moves forward for the UK to leave the European Union, a key factor under negotiation relates to any financial contributions that the UK might be required to make to the EU after its withdrawal on the basis of agreements reached whilst the UK is still a Member State. At the time of writing, there is no agreement on the extent of the sums owed by and to the UK or indeed the basis on which such amounts are to be determined. This FAQ assumes that there is no agreement on these issues in which case Public International Law provides clear rules on what those claims might be and which bodies are competent to adjudicate them. This FAQ is based on a lengthier analysis of these issues in 'Brexit Financial Disputes and Public International Law' published in the October 2017 issue of the *European Law Review*¹.

Q: Which legal claims may be made by the EU or the UK?

A: The European Commission (the Commission) may bring a claim against the UK for its share of contributions toward the EU budget, joint EU investment projects and the pensions of EU citizens. In relation to the latter, the EU has maintained the position that the UK remains liable for all financial commitments made under the Multilateral Financial Framework which runs from 2014 to 2020. The EU has further indicated that there are 'yet undetermined' sums which the UK may be liable to pay.

¹ JP Gauci, A Griffith and R McCorquodale, 'Brexit Financial Disputes and Public International Law' *European Law Review* Volume 52 (5) p 619

Q: Can the UK also bring financial claims against the EU for money owed to it?

A: Yes, the UK may claim against the EU its share of assets and income as well as the value of any rebates due to the UK under the Council Decision of 7 May 1985 on the Communities' system of own resources.

Q: Under international law, does the UK's obligation to pay survive its withdrawal from the EU?

A: Article 70 (1) of the Vienna Convention on the Law of Treaties (VCLT) which forms part of customary international law and is therefore binding on all States, provides that unless otherwise provided for under the treaty or agreed to by the parties,

“the termination of a treaty ...

- (a) releases the parties from any obligation further to perform the treaty;
- (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.”

Unlike explicit termination and withdrawal clauses under other treaties, Article 50 of the TEU which provides for the withdrawal of a EU member state, does not 'otherwise provide' for what happens to the obligations of Member States under the treaty upon its termination.

The effect of Article 70(1)(b) is that all financial obligations made under the EU treaties will survive the UK's withdrawal from the EU. These include those related to the UK's contributions to the EU budget, pensions, infrastructure investments and other programmes.

This scenario will be relevant only to the extent that the EU and the UK do not agree to a financial settlement as part of the withdrawal agreement. Such an agreement would supersede existing obligations and would need to be implemented in good faith by all parties.

Q: Can legal action follow a failure to fulfil these obligations?

A: According to Articles 258 and 259 of the TFEU, if a Member State fails to fulfil its obligations under the EU Treaties, both the Commission and other Member States can bring the matter before the CJEU.

Where a Member State alleges an infringement of the obligations under the EU Treaties, it must bring the matter before the Commission prior to approaching the CJEU. These provisions of the Treaty will continue to bind the parties given that the obligation being determined originated when the treaty was still in force between the parties.

Q: Does the CJEU have exclusive jurisdiction over such disputes?

A: Under Article 344 of the TFEU, EU Member States undertake not to submit disputes “concerning the interpretation or application of [EU] Treaties to any settlement method other than those provided for [in the TFEU]”. This provision confirms that under the current arrangements (which continue to apply in line with Article 70 of the Vienna Convention on the Law of Treaties), the CJEU would have exclusive jurisdiction over disputes concerning the UK's financial obligations under EU treaties.

This applies even if the parties sought an alternative for the resolution of disputes by approaching another tribunal which might otherwise have jurisdiction over the case. Though the exclusivity of the CJEU's jurisdiction has been challenged in some circumstances (as in the [Iron Rhine Arbitration](#)), other tribunals are likely to acknowledge the CJEU's exclusive jurisdiction over matters such as these which necessarily involve the interpretation and application of EU treaties (and therefore renounce to take such claims forward).

Q: Would the ICJ have jurisdiction?

A: The European Union does not have standing before the International Court of Justice and as such any claim would have to be brought by one or all of the Member States (and not by the Union itself). The UK has accepted the compulsory jurisdiction of the ICJ. However, in so doing, it entered a reservation explicitly excluding from the ICJ's jurisdiction, disputes where the UK and the other party or parties have agreed to another method of dispute settlement (of which the EU Treaties are a clear example).

Since EU Member States have agreed under the TFEU to settle disputes requiring interpretation and application of the treaties using the CJEU, the ICJ would not have jurisdiction over such disputes.

Q: Is arbitration an option in these circumstances?

A: Given the voluntary nature of arbitral proceedings, the parties could agree to arbitrate the dispute and use either an existing or an ad hoc tribunal. This would have to form an exception to Article 344. However, assuming that this is agreed, arbitration affords an attractive option in as much as it would allow the parties greater flexibility and control than an existing more traditional tribunal. Arbitration assumes the agreement of both parties (the EU and the UK) to submit the claims to arbitration meaning that a challenge to the arbitrator's competence on the basis of the exclusive jurisdiction of the CJEU is unlikely.

Q: How can these issues be avoided?

A: As noted above the points raised here will arise only if there is no agreement by the EU and the UK on a financial settlement or on a dispute settlement mechanism to address the failure to agree to such settlement. Article 70 of the VCLT makes it clear that there is continued application of commitments agreed to when the treaty was in force only if there is no agreement between the parties to the contrary. Both the EU and the UK therefore have an interest in reaching an agreement on the financial aspects of BREXIT. At the time of writing the [Financial Times](#) reported that the UK Government 'would assume EU liabilities worth up to €100bn although net payments, discharged over many decades, could fall to less than half that amount' and other media reports had confirmed this development. This would appear to indicate a move towards a possible agreement between the parties.