Lex Specialis and the Interpretation of Article 50 TEU

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On 15 December 2017, EU leaders decided that there had been 'sufficient progress' in the first phase of Article 50 negotiations with the United Kingdom. This followed the Commission's recommendation finding that it was satisfied that progress had been made on the issues of citizens' rights, the issue of the Ireland/Northern Ireland border, and the financial settlement. As the negotiations move to the next stage, new legal questions will arise, often relating to the interpretation of Article 50 of the Treaty on European Union (TEU). Given the complexity of withdrawal from the European Union, Article 50 is a relatively short provision and cannot possibly govern every possible scenario that might arise from Brexit. This gives rise to questions about how Article 50 relates to (a) other provisions of the EU Treaties and to (b) general international law. In this regard, there has been debate about whether Article 50 should be regarded as *lex specialis*.

Lex specialis (*lex specialis derogat legi generali*) is a legal maxim according to which specific rules are given priority over general rules. It is both a principle of legal interpretation and a method of resolving norm conflict. The*lex specialis* principle not only exists in international law, but is also applied in national systems as well as within the EU legal order.[1] As there is no formal hierarchy of sources in international law, there will often be conflicts between different rules and norms emanating from different legal orders. The principle allows parties to 'contract out' of general international law in certain situations. The *lex specialis* principle has been subject to considerable debate, especially in the light of the discussion about the fragmentation of international law. The application of this seemingly straightforward principle also gives rise to further questions: when does a norm conflict exist, what are 'general' and 'specific' rules, and what does it mean to give priority to a specific rule?

There are a number of instances where it has been debated whether Article 50 should be considered *lex specialis* vis-à-vis a general rule of international law or the EU Treaties.

The first relates to whether the UK will be liable for outstanding financial obligations after the date of withdrawal. Article 50 is silent on the issue of the financial obligations, simply stating that upon the withdrawal date "[t]he Treaties shall cease to apply to the State in question…" However, under the 1969 Vienna Convention on the Law of Treaties (VCLT), 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" (Article 70(1) VCLT) unless the parties agree otherwise, or the treaty itself provides otherwise. According to 70(1) VCLT, the UK would continue to be liable for financial obligations arising during its EU membership after the date of withdrawal.

One could make the argument, however, that Article 50 is *lex specialis* and thus the EU Treaties 'contract out' from general international law. This was the stance taken by the House of Lords in its Report on 'Brexit and the EU Budget', which concludes that the UK can leave the EU without being liable for outstanding obligations under the EU budget and related financial instruments (para. 135). This conclusion is based on the argument that Article 50, as the more specific provision relating to withdrawal, should be given priority over the 'general' rules of public international law.

A second question where a *lex specialis* argument has been employed regards whether the UK can revoke its notification of its intention to withdraw under Article 50. The VCLT provides a procedure with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty. Article 68 VCLT sets out that "a notification or

instrument provided for in article 65 or 67 may be revoked at any time before it takes effect." This suggests that the UK could withdraw its notice at any point up until withdrawal takes effect. Whereas general international law envisages the possibility of revocation, Article 50 is silent on the issue. Again, the question arises whether Article 50 should be considered *lex specialis* that displaces the application of general rules.

In these two examples, there is a conflict between the general rules of international law and the provisions of Article 50. It is likely that future conflicts will arise between Article 50 and other provisions, either of the EU Treaties or of international law. There are two main approaches to these questions.

According to one approach, Article 50 was intended to provide the complete set of procedural rules to govern the withdrawal of a Member State. Thus, rules of general international law are displaced by Article 50 in their entirety. This fits with the conception of the EU legal order as a 'self-contained regime', which seeks to provide a complete systems of procedures, rights and remedies, without recourse to international law principles.

A second approach views Article 50 as providing only a limited set of procedural rules, which are intended to be applied in a complementary fashion alongside other provisions in the EU Treaties and general international law. According to this approach, the *lex specalis* rule only applies where there is a conflict between two rules governing a particular area. In the two instances discussed above, there is no conflict between two rules – rather, in these instances, Article 50 is silent on a particular issue (financial settlement, revocation of Article 50), whereas there is applicable general international law. In these instances, the general rules can apply to fill in the gaps where Article 50 is silent.

The second approach is more appropriate. Article 50 provides only a limited set of procedural rules governing withdrawal, and was never intended to be comprehensive. Other provisions of the EU Treaties and international law binding on the Union can thus play a residual role to complement Article 50.

[1] See Case T-123/99, JT's Corporation Ltd v. Commission of the European Communities, EU:T:2000:230, para. 50. Case T-60/06, RENV II – Italy v Commission EU:T:2016:233, paras 52-58 ; Case C 280/13 Barclays Bank, EU:C:2014:279, para. 44 ; T 307/12 and T 408/13 Mayaleh v Council, EU:T:2014:926, para. 198.

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