

## GUEST EDITOR'S INTRODUCTION

### THE BREXIT NEGOTIATIONS AND THE MAY GOVERNMENT

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#### I. INTRODUCTION

In an apocryphal statement – later explained as a translation misunderstanding – Chinese leader Zhou Enlai famously answered a question about the effects of the French Revolution of 1789 by saying that it was too soon to tell. By the same token, it is definitely too early to form a final judgment about Brexit – the process whereby the United Kingdom (UK) is seeking to leave the European Union (EU). When this special issue was going to press at the end of summer 2019, the UK had not yet exited the EU – 38 months after the UK citizens had voted in a referendum to leave, and 29 months after the UK had notified its intention to do so under Article 50 of the Treaty on EU (TEU). Yet, Brexit has already had profound consequences for the UK – not least on the premiership of Theresa May, who was appointed Prime Minister on 13 July 2016, and resigned on 7 June 2019. What turned out to be one of the shortest premierships in UK modern history was heavily shaped by the avalanche of events put in motion by the referendum held on 23 June 2016. After all, the unprecedented decision by an EU Member State to secede from what is admittedly the most successful example of regional integration worldwide, opened a Pandora's box of legal and political problems, which became all the more evident during two years of complicated and contentious withdrawal negotiations. As a result, a growing body of literature in law, economics and political science has started to analyze the causes and consequences of Brexit.<sup>1</sup>

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<sup>1</sup> See Federico Fabbrini (ed) *The Law & Politics of Brexit* (OUP 2017).

This special issue – which includes contributions originally presented at a conference hosted by the Brexit Institute of Dublin City University in March 2019 – expands the analysis of Brexit by focusing specifically on the last two years of negotiations between the EU and the UK. Its aim is to assess the legal and political dynamics that played out in this crucial phase, and thus to offer an historical record of Theresa May's Government in the UK. As such, the special issue covers the period from the UK general elections in June 2017 (right after the notification of the UK intention to leave the EU pursuant to Article 50 TEU in March 2019) to the European Parliament (EP) elections in May 2019, in which the UK participated against all odds. The volume therefore analyzes the key issues in the withdrawal negotiations – as reflected in the November 2018 draft withdrawal agreement and the accompanying political declaration outlining the framework for future EU-UK relations – and considers the reasons that ultimately lead the UK, in March and April 2019, to seek an extension of its EU membership, hence postponing Brexit.

As things currently stand, the UK is set to leave the EU on 31 October 2019. However, much uncertainty remains; indeed, both a 'hard Brexit' – that is a disorderly exit with no deal – or a further extension of UK membership in the EU – perhaps to hold a people's vote on 'no Brexit' – are potentially on the table. This special issue however does not engage in speculation. The interest here is not to predict what will happen, but rather to understand what happened – identifying the key themes and challenges that emerged in a period of unprecedented Brexit negotiations. From a research point of view, this has the heuristic value of shedding light on the difficulties which a country faces when going down the road of seeking to exit the EU. And from a policy point of view, this may offer some useful lessons as navigation continues forward in the rough Brexit waters. As such, this Editorial is structured as follows: Sections II to VI provide an overview in chronological order of the succession of events that unfolded in the last two years, while Section VII summarizes the ten contributions I have guest edited for this Special Issue. Section VIII concludes.

## II. THE UK GENERAL ELECTIONS AND THE NEGOTIATIONS

The notification by the UK to the European Council of its decision to leave the EU on 29 March 2017 started the two-year time-frame set by Article 50

TEU to negotiate an orderly withdrawal.<sup>2</sup> However, UK Prime Minister Theresa May's decision to call snap elections in June 2017 resulted in a political boomerang. In the general elections of 8 June 2017, the Tory Party lost its tiny majority, being forced into a confidence and supply agreement with the Democratic Unionist Party, and thus started negotiations with the EU from a weaker position. The EU imposed successfully its strategy to divide the negotiations in two phases – with a first phase focused on settling the outstanding withdrawal issues, with discussions on the framework for future EU-UK relations postponed to a subsequent future phase.<sup>3</sup> In particular, following the priorities set by the European Council<sup>4</sup> and the European Parliament,<sup>5</sup> the European Commission Brexit Task Force – lead by Michel Barnier – identified three main items for the first phase of the negotiations: 1) the protection of the rights of EU citizens in the UK, and conversely of UK citizens in the EU; 2) the resolution of the problem of the border between Ireland and Northern Ireland, with the aim to avoid the return of a 'hard border'; and 3) the settlement of the financial claims the UK owed the EU before leaving.<sup>6</sup>

Talks between the two parties proceeded extremely slowly for much of the fall of 2017. With the exception of citizens' rights – which was the subject of an early agreement between the UK and the EU<sup>7</sup> – most issues in the withdrawal talks remained outstanding.<sup>8</sup> While Prime Minister Theresa May sought to chart a negotiating strategy, conceding that the UK had to pay a contribution to the EU as part of the withdrawal deal,<sup>9</sup> the UK Government

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<sup>2</sup> Prime Minister Theresa May, Letter to European Council President Donald Tusk (29 March 2017).

<sup>3</sup> See Kenneth Armstrong, *Brexit Time* (CUP 2017).

<sup>4</sup> European Council Guidelines, 29 April 2017, EUCO XT 20004/17.

<sup>5</sup> European Parliament resolution of 5 April 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union, P8\_TA(2017)0102.

<sup>6</sup> See Council Decision (EU/Euratom) of 22 May 2017 authorizing the opening of negotiations with the United Kingdom setting out the arrangements for its withdrawal from the European Union, Doc. XT21016/17.

<sup>7</sup> See also European Parliament resolution of 3 October 2017 on the state of play of negotiations with the United Kingdom, P8\_TA(2017)0361, para 7.

<sup>8</sup> European Council Conclusions, 20 October 2017, EUCO XT 20014/17.

<sup>9</sup> Prime Minister Theresa May, Speech, Florence (22 September 2017).

lagged behind the European Commission in outlining its positions.<sup>10</sup> However, thanks to the efforts of EU Chief Negotiator Michel Barnier, on 8 December 2017 a break-through occurred when the negotiators published a joint report, which outlined in diplomatic terms the consensus reached by the two negotiating teams on the terms of the withdrawal.<sup>11</sup> In particular, the joint report included a compromise solution to deal with the thorny issue of the Irish border, which foresaw a form of regulatory alignment between Northern Ireland and the Republic of Ireland, to remove the need for physical checks on the free movement of goods in the island of Ireland, while reaffirming the constitutional integrity of the UK.<sup>12</sup>

On the basis of the joint report, the European Council in December 2017 concluded that sufficient progress had occurred in the first phase of the Brexit negotiations, thus opening the way to preliminary talks on the framework for the future EU-UK relationship.<sup>13</sup> As a result, in early 2018, the

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<sup>10</sup> This asymmetry in the preparation of the two parties was made evident by the fact that the European Commission quickly started releasing in May 2017 a series of working papers outlining its positions on the negotiating issues. See e.g. European Commission Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU, Working paper 'Essential Principles of Citizens' Rights' (24 May 2017); Working paper 'Essential Principles on Financial Settlement' (24 May 2017); Position paper transmitted to EU 27 on Governance (28 June 2017); Position paper transmitted to EU 27 on Issues Related to the Functioning of the Union Institutions, Agencies and Bodies (28 June 2017); Guiding principles transmitted to the EU27 for the Dialogue on Ireland/Northern Ireland (6 September 2017) TF50(2017) 15. The UK Government, on the other hand, only began releasing its position papers in August 2017. See e.g. HM Government, 'Future customs arrangements: A future partnership paper' (15 August 2018); 'Northern Ireland and Ireland: Position paper' (16 August 2017); 'Enforcement and dispute resolution: A Future partnership paper' (23 August 2017); 'Foreign policy, defense and development: A future partnership paper' (12 September 2017); 'Security, law enforcement and criminal justice: A future partnership paper' (18 September 2017).

<sup>11</sup> 'Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom orderly withdrawal from the European Union' (8 December 2017) TF50(2017)19.

<sup>12</sup> Ibid para 49.

<sup>13</sup> European Council Guidelines, 15 December 2017, EUCO XT 20011/17.

EU and the UK negotiators engaged in a concerted effort to, on the one hand, turn the diplomatic joint report into a legally binding withdrawal treaty, and, on the other, identify the priorities for future EU-UK cooperation. In quick response to the former, on 28 February 2018 the European Commission Brexit Task Force came up with a fully-fledged draft withdrawal agreement,<sup>14</sup> 75 per cent of which was swiftly agreed by the UK Government on 19 March 2018.<sup>15</sup> In particular, the UK Government accepted those sections of the EU draft withdrawal agreement concerning citizens' rights, the financial settlement and a newly devised transition period, which allowed the UK to remain part of the EU internal market and customs union for an extra 22 months after withdrawal, until 31 December 2020.<sup>16</sup> Crucially, however, the UK did not approve the provisions on the governance of the agreement – which gave a role to the European Court of Justice (ECJ) in the resolution of disputes – and the draft Protocol on Northern Ireland – which was designed to put in legally binding terms the solution to avoid a hard border on the island of Ireland.<sup>17</sup>

This produced a major stall in the negotiations, which carried on for all the spring and summer of 2018,<sup>18</sup> even though on 19 June 2018 the UK and the EU communicated that they had reached consensus on the text of another handful of minor and mostly technical provisions of the draft withdrawal treaty.<sup>19</sup> In the absence of progress in settling the terms of withdrawal,

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<sup>14</sup> European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 28 February 2018, TF50(2018) 33.

<sup>15</sup> Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community highlighting the progress made (coloured version) in the negotiation round with the UK of 16-19 March 2018, 19 March 2018, TF50 (2018) 35.

<sup>16</sup> See also HM Government, 'Draft text for discussion: Implementation period' (20 February 2018).

<sup>17</sup> See also HM Government, 'Technical note: Temporary customs arrangements' (7 June 2018).

<sup>18</sup> See European Council Conclusions, 29 June 2018, EUCO XT 20006/18.

<sup>19</sup> Joint statement from the negotiators of the European Union and the United Kingdom Government on progress of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union (19 June 2018) TF50(2018) 52.

however, also the discussions on the framework of future relations were halted, with talks on an ambitious EU-UK partnership covering trade, internal security, foreign affairs and sectoral cooperation being put on hold.<sup>20</sup> Moreover, since both parties had made clear that they regarded the negotiations as being driven by the principle that 'nothing is agreed until everything is agreed',<sup>21</sup> the paralysis in the talks led to growing concerns that a 'hard Brexit' would materialize – with the UK leaving the EU with no withdrawal agreement, and thus no framework for future relations.<sup>22</sup> In fact, in July 2018 the European Commission published a communication on preparedness and contingency planning in case of a no deal scenario,<sup>23</sup> and in August 2018 the UK Government started releasing batches of technical notes to inform citizens and business on how to prepare in the case of no deal.<sup>24</sup>

### III. THE UK INSTITUTIONAL TENSIONS AND POLITICAL INFIGHTING

The challenges in negotiating a mutually satisfactory deal between the EU and the UK were certainly due to a number of asymmetries between the parties. While on the EU side negotiations were delegated from an early stage to a special Task Force within the European Commission – a trusted body with experience in handling international trade talks – on the UK side, the Government had to scramble in setting up from scratch a new administration – the Department for Exiting the EU, and the Department for International Trade, which took significant time to acquire capacity and skills to engage meaningfully with its counterparties in the EU and the rest of the world.<sup>25</sup> Nevertheless, a deeper cause of the difficulties in the negotiation laid in the

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<sup>20</sup> See also European Parliament resolution of 14 March 2018 on the framework of the future EU-UK relationship, P8\_TA(2018)0069.

<sup>21</sup> European Council Guidelines, 23 March 2018, EUCO XT 20001/18, para 1.

<sup>22</sup> See also Federico Fabbrini, 'The Institutional Consequences of a 'Hard Brexit'', in-depth analysis requested by the European Parliament Constitutional Affairs Committee (May 2018).

<sup>23</sup> European Commission Communication, 'Preparing for the withdrawal of the United Kingdom from the European Union on 30 March 2019' (19 July 2018) COM(2018)556 final.

<sup>24</sup> HM Government, 'Preparation for a "no deal" scenario' (23 August 2018).

<sup>25</sup> See Lewis Lloyd, 'The Brexit Effect: How Government has Changed since the EU Referendum', Institute for Government (March 2019).

institutional tensions and political infighting that Brexit created within the UK itself. If in the EU the states and institutions were happy to leave the Commission to run the negotiations and back its work – focusing their discussions on other controversial issues – in the UK Brexit sparked an all-out tag war.

At the institutional level, in the absence of a written constitution, Brexit unsettled the relationship between Government and Parliament – as well as between London and Edinburgh, Cardiff and Belfast.<sup>26</sup> In particular, effort by the UK Government to legislate for Brexit with the adoption of a flagship bill repealing the European Communities Act 1972 with effects from 29 March 2019 run into tremendous obstacles both in Westminster and in the devolved governments.<sup>27</sup> The EU (Withdrawal) Act became law by the tiniest of margins on 26 June 2018,<sup>28</sup> with the House of Commons overruling the House of Lords, which had sought inter alia to bind the UK in a customs union with the EU and to retain the EU Charter of Fundamental Rights as part of UK law post-Brexit.<sup>29</sup> Moreover, in order to win support for her bill, Prime Minister May had to accept the principle that the UK Parliament would have a meaningful vote on the final withdrawal treaty<sup>30</sup> – even though this solution went beyond the provisions of the Constitutional Reform and Governance Act 2010.<sup>31</sup> And, since the UK Government did not seek the consent of

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<sup>26</sup> See Vernon Bogdanor, *Beyond Brexit: Britain's Unprotected Constitution* (Bloomsbury 2019).

<sup>27</sup> See also Department for Exiting the European Union, 'Legislating for the Withdrawal Agreement between the United Kingdom and the European Union' (30 July 2018) Cm 9674.

<sup>28</sup> European Union (Withdrawal) Act 2018.

<sup>29</sup> See House of Lords, Select Committee on the Constitution, 'European Union (Withdrawal) Bill' (29 January 2018) HL 69.

<sup>30</sup> European Union (Withdrawal) Act 2018, sec 13(1). See also House of Commons, Procedure Committee, 'Motions under Section 13(1) of the European Union (Withdrawal) Act 2018' (16 November 2018) HC1664.

<sup>31</sup> Constitutional Reform and Governance Act 2010, sec 20 (stating that an international treaty must be laid for 21 sitting days before both Houses of Parliament before it can be ratified).

devolved legislatures, the Scottish Parliament<sup>32</sup> and the Welsh Assembly<sup>33</sup> adopted Continuity Bills challenging the gist of the EU (Withdrawal) Act 2018. While eventually Wales retracted its position,<sup>34</sup> and the UK Supreme Court – in its first ever judgment reviewing the federal division of competences between Scotland and the UK – ruled that Holyrood had exceeded its powers,<sup>35</sup> relations between the central administration and the devolved governments on the direction of the Brexit negotiations remained sour despite efforts by the UK Cabinet Office to devise common frameworks.<sup>36</sup>

At the political level, in fact, Brexit fostered an ideological polarization and party fragmentation.<sup>37</sup> Political clashes were particularly virulent within the Conservative Party, with a 'hard Brexit' and a 'soft Brexit' faction opposing each other. Prime Minister Theresa May sought to balance the factions within her cabinet and develop a position which could command a consensus within her party, but she ultimately failed to do so.<sup>38</sup> In fact, her own position significantly changed over time – expect, perhaps, on the issue of curbing

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<sup>32</sup> See UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill 2018.

<sup>33</sup> See Law Derived from the European Union (Wales) Bill 2018.

<sup>34</sup> See Welsh Government, 'Welsh Government agrees deal on Brexit Bill that respects devolution' (24 April 2018).

<sup>35</sup> UK Supreme Court, Judgment of 13 December 2018, *The UK Withdrawal from the European Union (Legal Continuity) Bill – A reference by the Attorney General and the Advocate General for Scotland* [2018] UKSC 64.

<sup>36</sup> See Cabinet Office, 'The European Union (Withdrawal) Act and Common Frameworks: 26 June 2018 to 25 September 2018' (13 November 2018). But see also Concordat concerning the implementation of the Gibraltar Protocol to the Withdrawal Agreement and related memoranda of understanding between HM's Government of Great Britain and Northern Ireland and HM's Government of Gibraltar (15 November 2018), codifying the consent of the Government of Gibraltar to the conclusion of the withdrawal agreement by the UK Government.

<sup>37</sup> See Goeffrey Evans & Anand Menon, *Brexit & British Politics* (Polity 2017).

<sup>38</sup> See also House of Commons, European Scrutiny Committee, 'The draft EU/UK Withdrawal Agreement' (8 March 2019) HC 1798, paras 10-11 (stating that the handling of the process of negotiations internally 'left the Government vulnerable to internal divisions and therefore capable of undermining its own negotiating position with the EU').



migration<sup>39</sup> – under the realization that the negotiating space with the EU was very limited. Hence, while in February 2017 she had boldly claimed that 'a no deal [wa]s better than a bad deal'<sup>40</sup> a year later she conceded that Brexit required trade-offs,<sup>41</sup> and that the UK was willing to compromise in order to maintain close security ties with the EU and continuing access to its market.<sup>42</sup> On 6 July 2018 the Prime Minister advanced at a cabinet meeting in Chequers a plan for future EU-UK trade relations that sought to bind the UK in a free trade zone with the EU, with regulatory alignment for goods and agri-food products and a facilitated customs arrangement.<sup>43</sup> While Prime Minister Theresa May's proposal was rejected by the EU as unworkable,<sup>44</sup> it promptly led to the resignation from the UK Government of pro-Brexit ministers, including the Secretary for Foreign Affairs Boris Johnson and the Secretary of State for Exiting the EU David Davis, who saw this as too compromising toward the EU.

Similar political divisions also characterized the Labour Party, which under the leadership of Jeremy Corbyn, a well-known Eurosceptic, failed to propose an alternative Brexit plan.<sup>45</sup> In fact, notwithstanding a growing popular movement calling for a second referendum, which culminated in a political rally in London in October 2018 where 700.000 people protested to ask for a new people's vote on Brexit,<sup>46</sup> the priority of the Opposition remained to seek new general elections to topple the May Government.

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<sup>39</sup> See HM Government, 'The UK's future skilled-based migration system' (19 December 2018) Cm. 9722.

<sup>40</sup> Prime Minister Theresa May, speech, Lancaster House (17 January 2017).

<sup>41</sup> Prime Minister Theresa May, speech, Mansion House (2 March 2018).

<sup>42</sup> Prime Minister Theresa May, speech, Munich Security Conference (17 February 2018).

<sup>43</sup> See Statement from HM Government, Chequers (6 July 2018). See further HM Government, 'The Future Relationship between the United Kingdom and the European Union', 12 July 2018, Cm 9593.

<sup>44</sup> See EU Chief Negotiator Michel Barnier, statement (20 July 2018) and European Council President Donald Tusk, remarks after the Salzburg informal summit (20 September 2018).

<sup>45</sup> See Leader of the Opposition Jeremy Corbyn, speech (26 February 2018).

<sup>46</sup> BBC, 'People's Vote March: Hundreds of thousands attend London protest', *BBC News* (20 October 2018) <<https://www.bbc.com/news/uk-45925542>> accessed 27 September 2019.

When Labour signaled its openness toward a new referendum at its 2018 Party Conference,<sup>47</sup> it had been clear to experts that there would be not enough time to approve the legislation needed for a second popular vote before March 2019. Yet the reality remained that the UK was not ready to leave the EU in March 2019 with no deal. As pointed out by the UK National Audit Office,<sup>48</sup> the UK was entirely unprepared to manage its borders from day one in a case of a 'no-deal' Brexit, reflecting a material impossibility to pull out of the EU in such a short period of time. On the EU side, instead, preparations for a no deal had steadily advanced, and even intensified during autumn 2018.<sup>49</sup>

#### IV. THE DRAFT WITHDRAWAL AGREEMENT AND ITS REJECTION

It is against this background that eventually the UK and the EU managed to walk the last mile and agree on a draft Brexit deal for an orderly UK withdrawal from the EU. On 14 November 2018 the European Commission and the UK Government published a draft withdrawal agreement<sup>50</sup> – a 585-page international treaty – which was accompanied by an outline political declaration on the framework of future relations between the UK and the EU<sup>51</sup> – a much lighter document which was formally endorsed by the 27 heads

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<sup>47</sup> Leader of the Opposition Jeremy Corbyn, speech at Labor Party Annual Conference, Brighton (26 September 2018).

<sup>48</sup> National Audit Office, 'The UK Border: Preparedness for EU Exit' (24 October 2018) HC 1619. But see also House of Commons, Committee of Public Accounts, 'Defra Progress toward Brexit' (14 November 2014) HC 1514 (reporting unpreparedness of the UK Department of Environment Food and Rural Affairs).

<sup>49</sup> European Commission Communication, 'Preparing for the withdrawal of the United Kingdom from the European Union on 30 March 2019: A Contingency Action Plan' (13 November 2019) COM(2018)880 final; and European Commission Communication, 'Preparing for the withdrawal of the United Kingdom from the European Union on 30 March 2019: Implementing the Commission's Contingency Action Plan' (19 December 2018) COM(2018)890 final.

<sup>50</sup> Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as agreed at negotiators' level on 14 November 2018 (14 November 2018) TF50(2018) 55.

<sup>51</sup> Outline of the political declaration setting out the framework for the future relationship between the European Union and the United Kingdom of Great

of state and government in the European Council on 25 November 2018.<sup>52</sup> The draft withdrawal agreement included detailed provisions to guarantee the continuing protection of EU citizens in the UK; it codified a methodology to calculate the UK's outstanding contributions to the EU budget; and established governance and dispute resolution mechanisms.

Moreover, the draft withdrawal agreement also codified a transition period – going from March 2019 until December 2020, but potentially extendable once until December 2022 – allowing the UK to remain within the EU internal market for an implementation phase. Finally and crucially, the draft withdrawal agreement also included a lengthy Protocol on Ireland/Northern Ireland – known in jargon as the 'backstop' – that would enter into force after the end of the transition period, in case the EU and the UK had not agreed a future trade deal that removed the need for customs control, to avoid the return of a hard border on the island of Ireland.<sup>53</sup>

The Brexit deal, however, immediately received strong opposition in the UK Parliament, with the second Secretary of State for Exiting the EU, Dominic Raab, resigning in protest. In particular, the Irish backstop quickly emerged as the main point of contention: by maintaining the UK in a single customs territory with the EU post-Brexit and requiring Northern Ireland to keep regulatory alignment with Ireland and the EU, the backstop rallied opposition within the Tory Party and its junior partner, the Democratic Unionist Party of Northern Ireland, as it deprived the UK of the autonomy to run an independent trade policy,<sup>54</sup> and put Northern Ireland in a different regulatory regime than Great Britain.<sup>55</sup> The EU sought to allay these concerns

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Britain and Northern Ireland, as agreed at negotiators' level on 14 November 2018 (14 November 2018) TF50(2018) 56.

<sup>52</sup> European Council Conclusions, 25 November 2018, EUCO XT 20015/18.

<sup>53</sup> See also European Commission Fact Sheet, 'Brexit Negotiations: What is in the Withdrawal Agreement' (14 November 2018); and House of Lords, European Union Committee, 'Brexit: the Withdrawal Agreement and Political Declaration' (5 December 2018) HL 245.

<sup>54</sup> Department for International Trade, 'Preparing for our future UK trade policy' (9 October 2017) Cm 9470.

<sup>55</sup> See UK Attorney General Geoffrey Cox, Letter to Prime Minister Theresa May, Legal Effect of the Protocol on Ireland/Northern Ireland (13 November 2018). But see HM Government, 'UK Government commitments to Northern Ireland and its

by clarifying that it regarded the backstop as a simple insurance policy, never intended to enter into operation.<sup>56</sup> Yet this did not change the legal reality that the UK would not have a unilateral right to exit the backstop.<sup>57</sup> At the same time, an Opinion of the Advocate General of the ECJ delivered on 4 December 2018<sup>58</sup> – and affirmed by the full court on 10 December 2018<sup>59</sup> – confirmed that the UK always had the option to unilaterally revoke in good faith its intention to withdraw from the EU under Article 50 TEU, effectively reducing the incentive to support the withdrawal agreement among those Members of Parliament (MPs) who were against Brexit and favorable to organize a new people's vote.

On 9 December 2018, therefore, UK Prime Minister Theresa May decided to postpone a vote in Westminster on the withdrawal agreement, which she was due to lose. This prompted a party leadership challenge within the Conservative Party, which she won.<sup>60</sup> But the inevitable happened on 15 January 2019, when the House of Commons resoundingly rejected the deal negotiated by the UK Government with the EU by a vote of 432 to 202 – a historic margin of 230 against.<sup>61</sup> The day after the single greatest loss in Parliament by the UK Government in a century, Theresa May was subject to a parliamentary vote of no-confidence tabled by the Opposition, which,

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integral place in the United Kingdom' (9 January 2019) 4 (outlining the UK Government commitment to secure 'no divergence in practice between the rules in Great Britain and [Northern Ireland]').

<sup>56</sup> See European Council Conclusions (13 December 2018) EUCO XT 20022/18; and European Council President Donald Tusk and European Commission President Jean-Claude Juncker, Joint Letter to Prime Minister Theresa May (14 January 2019).

<sup>57</sup> See HM Government, 'EU Exit: Legal Position on the Withdrawal Agreement' (4 December 2018) Cm 9747.

<sup>58</sup> Case C-621/18 *Wightman* [2018], Opinion of AG Campos Sanchez-Bordona, ECLI:EU:C:2018:978.

<sup>59</sup> Case C-621/18 *Wightman* [2018], ECLI:EU:C:2018:999.

<sup>60</sup> BBC, 'Brexit: Prime Minister Theresa May wins vote after leadership challenge', *BBC News* (13 December 2018) <<https://www.bbc.co.uk/newsround/46536473>> accessed 27 September 2019.

<sup>61</sup> See House of Commons, Exiting the European Union Committee, 'Response to the Vote on the Withdrawal Agreement and Political Declaration: Options for Parliament' (16 January 2019) HC 1902.

however, she survived. This opened a phase of uncertainty, with the UK Government seeking to devise a plan B going forward.<sup>62</sup> On 29 January 2019, the UK Parliament approved a motion requesting that the UK Government renegotiate the withdrawal agreement – specifically seeking alternative arrangements to replace the Irish backstop<sup>63</sup> – but simultaneously rejected a proposal to rule out a hard Brexit by postponing withdrawal absent a deal.

In the subsequent weeks, Prime Minister Theresa May and her new Secretary of State for Exiting the EU Stephen Barclays, the third to take up the job, engaged in new negotiations with the EU which in the meanwhile had proceeded in authorizing the ratification of the withdrawal deal.<sup>64</sup> On 11 March 2019, the two parties agreed on complementing the agreement with an Instrument relating to the withdrawal of the UK from the EU.<sup>65</sup> This was a legally binding interpretative declaration which clarified the meaning of the withdrawal treaty, in particular confirming the commitment of the EU and the UK to enter in good faith into future trade negotiations at the earliest, so as to prevent the need to ever apply the backstop foreseen in the Northern Ireland Protocol. In addition, they published a Joint Statement supplementing the Political Declaration,<sup>66</sup> a non-legally binding add-on to the outline of the future EU-UK relations. Moreover, the UK Government also advanced a unilateral declaration, where it clarified its interpretation of the withdrawal agreement, stressing its readiness to pull out of the backstop if the EU failed in bad faith to negotiate on alternative solutions after the end

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<sup>62</sup> See House of Commons, Exiting the European Union Committee, 'Response to the Vote on the Withdrawal Agreement and Political Declaration: Assessing the Options' (28 January 2019) HC 1908.

<sup>63</sup> See further, House of Commons, Northern Ireland Affairs Committee, 'The Northern Ireland Backstop and the Border' (9 March 2019) HC 1850.

<sup>64</sup> See Council Decision (EU) 2019/274 of 11 January 2019 on the signing, on behalf of the European Union and of the European Atomic Energy Community, of the Agreement on the Withdrawal of the United Kingdom from the European Union, OJ 2019 L 471/1.

<sup>65</sup> Instrument relating to the agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (11 March 2019) TF50(2019) 61.

<sup>66</sup> Joint Statement supplementing the Political Declaration setting out the framework for future relationship between the European Union and the United Kingdom of Great Britain and Northern Ireland (11 March 2019) TF50(2019) 62.

of the transition period.<sup>67</sup> The following day, on 12 March 2019, Theresa May brought the deal as renegotiated back to the House of Commons. Nevertheless – partially worried by the legal opinion of UK Attorney General Geoffrey Cox, who confirmed that as a legal matter the UK continued to face the risk of remaining bound to the backstop indefinitely, given the impossibility of a unilateral exit<sup>68</sup> – the UK Parliament again roundly rejected the deal: 391 to 241, a loss of 149 votes.<sup>69</sup>

## V. THE EXTENSION

This precipitated a theatrical showdown in the UK Parliament. In fact, as promised by the Prime Minister, following the new rejection of the deal, Westminster was immediately called to vote on new resolutions: on 13 March 2019 on whether to endorse a no-deal withdrawal, which it rejected, and on 14 March 2019 on whether to seek an extension of Article 50 TEU, which it approved. With the exit date of 29 March 2019 looming, and facing a situation of significant lack of preparation for a hard Brexit,<sup>70</sup> on 20 March 2019 therefore the UK Prime Minister, in a letter to the President of the European Council, formally requested an extension of UK membership in the EU under Article 50(3) TEU until 30 June 2019.<sup>71</sup> However, considering the legal and political difficulties that an extension going beyond the date of

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<sup>67</sup> Declaration by Her Majesty's Government of the United Kingdom of Great Britain and Northern Ireland concerning the Northern Ireland Protocol (11 March 2019).

<sup>68</sup> UK Attorney General Geoffrey Cox, Letter to Prime Minister Theresa May, Legal Opinion on Joint Instrument and Unilateral Declaration concerning the Withdrawal Agreement (12 March 2019).

<sup>69</sup> See House of Commons Exiting the European Union Committee, 'Response to the 12 March Vote on the Withdrawal Agreement and Political Declaration' (13 March 2019) HC 2073.

<sup>70</sup> See National Audit Office, 'Contingency Preparations for Exiting the EU with No Deal' (12 March 2019) HC 2058; House of Commons Committee of Public Accounts, 'Brexit and the UK Border' (12 March 2019) HC 1942, p. 3 (stating that government 'departments have continued to struggle to prepare should the UK leave the EU without a deal' and reporting embarrassing cases of mismanagement of contingency preparations).

<sup>71</sup> See Prime Minister Theresa May, Letter to European Council President Donald Tusk (20 March 2019).

the approaching EP elections of 23-26 May 2019 would pose for the EU,<sup>72</sup> on 21 March 2019 the European Council responded to the UK request by agreeing

to an extension until 22 May 2019, provided the Withdrawal Agreement is approved by the House of Commons next week. If the Withdrawal Agreement is not approved by the House of Commons next week, the European Council agrees to an extension until 12 April 2019 [the latest date by which the UK had to start domestic procedures to run EP elections in May] and expects the United Kingdom to indicate a way forward before this date for consideration by the European Council.<sup>73</sup>

While the European Council decision<sup>74</sup> kicked back the ball into the UK court, on 25 March MPs decided to grab control of parliamentary procedures – a prerogative traditionally belonging to the government in the British system<sup>75</sup> – and organized a round of indicative voting to see whether any options commanded a majority in the House of Commons. On 28 March, however, sequential votes by MPs on eight alternative solutions to the Brexit impasse, showed no majority for any option.<sup>76</sup> Despite resistance by the Speaker of the House John Bercow, who had invoked a 1604 precedent to prevent a new vote on a motion which was substantially the same to one already considered by Parliament,<sup>77</sup> the UK Government brought back the deal for a third time in the House of Commons – this time asking MPs to vote only on the withdrawal agreement, without the political declaration. Yet,

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<sup>72</sup> See European Commission President Jean-Claude Juncker, Letter to European Council President Donald Tusk (11 March 2019) (stating that the UK exit 'should be complete before the [EP] elections that will take place between 23-26 May [2019]. If the United Kingdom has not left the European Union by then, it will be legally required to hold these elections, in line with the rights and obligations of all Member States as set out in the Treaties').

<sup>73</sup> European Council Conclusions (21 March 2019) EUCO XT 20004/19, para 3.

<sup>74</sup> European Council Decision (EU) 2019/476 taken in agreement with the United Kingdom of 22 March 2019 extending the period under Article 50(3)TEU, OJ L 80 I/1.

<sup>75</sup> See Adam Tomkins, 'The Struggle to Delimit Executive Power in Britain' in Paul Craig & Adam Tomkin (eds) *The Executive and Public Law* (OUP 2006) 16.

<sup>76</sup> BBC, 'No Majority for Any Option after MPs' Votes', *BBC News* (28 March 2019) <<https://www.bbc.com/news/uk-politics-47728333>> accessed 27 September 2019.

<sup>77</sup> House of Commons Hansard, Speaker's Statement (18 March 2019).

despite promises by the Prime Minister to her fellow Conservative MPs that she would step down if her deal was approved, on 29 March 2019 – the day when the UK was originally expected to leave the EU – Westminster once more rejected the agreement: by 58 votes. With the default exit day now postponed to 12 April,<sup>78</sup> and with Parliament unable to compromise on any other exit alternative,<sup>79</sup> on 2 April 2019 Prime Minister May belatedly decided to cross the aisle and work with the Opposition, seeking 'national unity to deliver the national interest.'<sup>80</sup>

While constructive talks between the Majority and the Opposition took off, ten days before the new exit date approaching Parliament passed in record time legislation to avert a hard Brexit.<sup>81</sup> As a result, Prime Minister Theresa May on 5 April 2019 submitted to the European Council a further request to extend UK membership of the EU, once more seeking a postponement of exit day to 30 June 2019.<sup>82</sup> In a special European Council meeting of 10 April 2019, the European Council accepted the UK request, but set a different, flexible extension.<sup>83</sup> The European Council agreed to an extension to be 'as long as necessary and, in any event, no longer than 31 October 2019'<sup>84</sup> – the date when the new Commission would take office. However, it decided that

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<sup>78</sup> See European Union (Withdrawal) Act 2018 (Exit Day) (Amendment) Regulations 2019.

<sup>79</sup> BBC, 'Brexit votes: MPs fail to back proposals again', *BBC News* (1 April 2019) <<https://www.bbc.com/news/uk-politics-47781009>> accessed 27 September 2019.

<sup>80</sup> Prime Minister Theresa May, Statement (2 April 2019).

<sup>81</sup> See European Union (Withdrawal) Act 2019.

<sup>82</sup> See Prime Minister Theresa May, Letter to European Council President Donald Tusk (5 April 2019).

<sup>83</sup> In the meanwhile, a number of EU member states had adopted domestic legislation to prepare for a 'hard Brexit'. See e.g. Loi n° 2019-30 du 19 janvier 2019 habilitant le Gouvernement à prendre par ordonnances les mesures de préparation au Retrait du Royaume Unie de l'Union européenne (Fr.); Real decreto-ley 5/2019, de 1 marzo, por el que se adoptan medidas de contingencia ante la retirada del Reino Unido de Gran Bretaña e Irlanda del Norte de la Unión Europea sin que se haya alcanzado el acuerdo previsto en el artículo 50 del Tratado de la Unión Europea (Sp.); Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2019 (Ir.).

<sup>84</sup> European Council Conclusions 10 April 2019, EUCO XT 20015/19 para 2.



'if the Withdrawal Agreement is ratified [...] before this date, the withdrawal will take place' earlier.<sup>85</sup> Moreover, it clarified that:

This decision shall cease to apply on 31 May 2019 in the event that the United Kingdom has not held elections to the European Parliament in accordance with applicable Union law and has not ratified the Withdrawal Agreement by 22 May 2019.<sup>86</sup>

Finally, addressing concerns that the UK may become a disrupter within the EU, the European Council underlined that 'the extension cannot be allowed to undermine the regular functioning of the Union and its institutions.'<sup>87</sup> While calling on the UK to act in a constructive and responsible manner throughout the extension in accordance with the duty of sincere cooperation,"<sup>88</sup> the European Council also pointed out that where appropriate, the other 27 EU Member States 'will continue to meet separately at all levels to discuss matters related to the [EU] situation after the withdrawal of the United Kingdom.'<sup>89</sup>

#### IV. THE EUROPEAN PARLIAMENT ELECTIONS AND THE END OF THE MAY GOVERNMENT

Despite six weeks of good faith negotiations between the sherpas of the Labour and the Conservative parties, on 17 May 2019 the Leader of the Opposition Jeremy Corbyn informed the Prime Minister that talks had gone as far as they could.<sup>90</sup> Crucially, disagreement remained between the two parties among others on the policy goal to pursue a future permanent UK membership of the EU customs union, which was supported by Labour but rejected by the Conservatives.<sup>91</sup> On 21 May 2019 Prime Minister May made a

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<sup>85</sup> Ibid.

<sup>86</sup> See European Council Decision (EU) 2019/584 taken in agreement with the United Kingdom of 11 April 2019 extending the period under Article 50(3) TEU, OJ L 101/1, Art 2.

<sup>87</sup> European Council Conclusions, 10 April 2019, EUCO XT 20015/19 para 3.

<sup>88</sup> Ibid para 7.

<sup>89</sup> Ibid para 8.

<sup>90</sup> See Leader of the Opposition Jeremy Corbyn, Letter to Prime Minister Theresa May (17 May 2019).

<sup>91</sup> See also House of Lords, European Union Committee, 'Brexit: the customs challenge' (20 September 2018) HL 187.

last ditch effort to convince Westminster to approve the Brexit deal, putting forward a revised UK withdrawal bill,<sup>92</sup> but the effort received a strong pushback from within the Conservative Party itself. Therefore, on 23 May 2019 citizens in the UK were called to the polls to elect members of the EP.<sup>93</sup> The fact that the UK had to host elections for the EP – exactly 35 months after voting to leave the EU – was a demonstration of the failure of the Brexit process. But the EP elections results also turned into a political earthquake, as UK citizens skillfully used the polls to express their discontent for the way in which Brexit was being managed.

The EP elections' result confirmed a major restructuring of the British party system.<sup>94</sup> With both Labour and the Conservatives uncertain as to whether they would even run an electoral campaign, the triumph at the ballot box was for the newly-founded, single-issue Brexit Party of Nigel Farage: running on a simple Leave platform, the Brexit Party topped the national competition drawing almost 32 per cent of the national vote, and securing for itself 29 out of 73 UK seats in the EP. However, the EP elections also showed an excellent performance for parties which explicitly embraced a Remain position, in particular the Liberal Democrats (Lib-Dems), the Greens, as well as the Scottish National Party (SNP) and Plaid Cymru: with 16, 7, 4 and 1 EP seats each, all these forces improved their performance compared to the 2014 EP elections. Instead, the vote was a bloodbath for Labour – and particularly for the Tories. While Labour payed for its indecisive position on Europe, drawing just 14 per cent of the vote, slicing by half its contingent at the EP (from 20 to 10 EP seats) and ending up in third position in the ranking, the Conservative Party ended up in fifth place, with a meager 9 per cent of the national votes, and 4 EP seats (15 seat less than in 2014).

On 24 May 2019, therefore, in an emotional speech Prime Minister Theresa May tendered her resignation as premier and leader of the Conservative Party, acknowledging her failures to deliver Brexit.<sup>95</sup> Her resignation opened a succession process, which started on 7 June 2019 and concluded on 22 July

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<sup>92</sup> Prime Minister Theresa May, Speech (21 May 2019).

<sup>93</sup> See European Parliamentary Elections (Appointed Day of Poll) Order 2019.

<sup>94</sup> 2019 European elections results, available at <<https://election-results.eu/>> accessed 27 September 2019.

<sup>95</sup> See Prime Minister Theresa May, Statement (24 May 2019).

2019 with the appointment as Prime Minister of Boris Johnson, a strong supporter of Brexit, who was chosen also for his ability to ward off an electoral threat coming from the Brexit Party on the right.<sup>96</sup> Yet, this development – with the prospect of a no deal withdrawal from the EU by default on 31 October 2019 – also reignited secessionist calls within the UK, with Scottish First Minister Nicola Sturgeon advancing legislation on 27 May 2019 to organize a new independence referendum in Scotland.<sup>97</sup> Moreover, it shed dark clouds on the relations between the Government and Parliament, as the latter remained fundamentally hostile to the idea of a 'hard Brexit'.<sup>98</sup> Three years after the Brexit referendum, therefore, the UK remained highly divided on the matter. In fact, while the EU, which just started a new institutional cycle, indicated its openness to a further Brexit extension,<sup>99</sup> the ongoing UK constitutional crisis following the attempt by the Prime Minister to prorogue the UK Parliament<sup>100</sup> suggest that rough waters lie ahead in the process of UK withdrawal from the EU.

## VII. THE STRUCTURE OF THIS SPECIAL ISSUE

The summary of the chronological events that unfolded in the two-year withdrawal negotiations suggest that Brexit is a process, rather than a moment; perhaps a mirage or a nightmare, but so far not a game with a clear-cut end. In fact, alternative scenarios remain possible – and only the future will tell where the UK will be landing in its effort to leave the EU. For that, new analyses will be necessary. For now, however, it is important to assess

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<sup>96</sup> See <<https://www.conservatives.com/>> accessed 27 September 2019.

<sup>97</sup> Referendum (Scotland) Bill.

<sup>98</sup> See House of Commons Speaker John Bercow, speech at 'Festival dell'Economia', Trento (1 June 2019) (indicating that it would be unthinkable for Parliament to be evacuated from the center-stage in deciding about Brexit).

<sup>99</sup> See also European Commission President-elect Ursula von der Leyen, speech at the European Parliament, Strasbourg (16 July 2019) (indicating that the Commission is willing to further extend UK membership of the EU in October but that the withdrawal agreement cannot be renegotiated).

<sup>100</sup> BBC, 'Parliament suspension: Queen Approves PM's Plan', *BBC News* (28 August 2019) <<https://www.bbc.com/news/uk-politics-49493632>> accessed 27 September 2019. But see now also UK Supreme Court, *R (on the application of Miller) v. Prime Minister* [2019] UKSC 41 (holding that the suspension of Parliament for six weeks by the Prime Minister was unlawful and devoid of any effect).

what has happened from the 2017 UK general elections to the 2019 EP elections, with the aim to map the legal and political dynamics of the Brexit negotiations – and to set the historical record of Prime Minister Theresa May's Government. This is the purpose of this special issue, which brings together a distinguished set of lawyers and political scientists from leading British, Irish and European universities to offer an up-to-date evaluation of the key developments in the negotiations on the UK withdrawal from the EU. Thanks to its comprehensive outlook and interdisciplinary perspective, the special issue provides analytical insights and policy lessons on a two-year critical time-phase in the Brexit story spanning from June 2017 to June 2019, covering the negotiations led by Prime Minister Theresa May's Government.

Specifically, the ten contributions included in this special issue cover the following topics. The first three articles look at process, explaining some *key words* that popped up in the withdrawal talks. Emily Jones assesses the negotiating strategy of the EU and the UK, and offers a critical analysis of the mistakes that the May Government made, from triggering Article 50 TEU too early, before adequate preparations had been made, to failing to win domestic support for the negotiated deal. Kenneth Armstrong focuses on the notion of transition – or, in UK parlance: implementation – a time-devised that was crafted during the negotiations to secure a smooth UK landing outside the EU. In fact, as Armstrong explains, Article 50 TEU makes no reference to an idea of transition, but this quickly appeared as a necessary tool to negotiators, and was codified in the draft withdrawal agreement – which foresaw a transition period until December 2020, potentially extendable till December 2022, in which the UK would remain within the EU internal market and customs union, while being outside the EU as such. Federico Fabbrini and Rebecca Schmidt consider instead the notion of extension, which (contrary to transition) is foreseen in Article 50(3) TEU and was granted twice by the European Council in Spring 2019 at the request of, and in agreement with, the UK. As Fabbrini and Schmidt point out, extension differs from transition, as the UK maintains the rights and obligations of a Member State – but its application just ahead of the EP elections also created special challenges for the EU and the functioning of its institutions.

The next four articles look instead at substance, considering the *key issues* that arose in the negotiations. Catherine Barnard and Emilija Leinarte examine

the issue of citizens' rights, analyzing the reciprocal efforts by the UK and the EU to guarantee on an ongoing basis the rights of EU citizens resident in the UK, and UK citizens resident in the EU. However, Barnard and Leinarte also discuss the UK Government's proposal to fundamentally overhaul the UK immigration system after Brexit, emphasizing how curbing migration continued to remain a rallying cry for Prime Minister May. Eileen Connolly and John Doyle focus on the problem of the Irish border, explaining its technical difficulty as well as its geo-political implications: in fact, as Connolly and Doyle point out, a 'hard Brexit' with the return of a hard border in the island of Ireland would undermine the peace process started with the Good Friday Agreement of 1998, potentially leading to new waves of violence. Paola Mariani and Giorgio Sacerdoti map the negotiations on trade issues, examining the positions of the EU and the UK, the solutions found in the draft withdrawal agreement and the World Trade Organization rules which would govern EU-UK trade and customs relations in the absence of a deal. Ben Tonra considers another issue which – in fact – actually played a rather limited role during the negotiations: security cooperation. As Tonra argues, while the EU and the UK clearly share an interest in maintaining close ties in the field of defense and foreign affairs, security did not feature prominently in the withdrawal talks, as it was overshadowed by other priorities, but could garner greater attention by policy-makers in the future.

The last three contributions, finally, consider some *key challenges* that the two-year Brexit negotiations pose for the future. Sionaidh Douglas-Scott reflects on how the Brexit talks further unsettled the UK territorial constitution, dramatizing trends that the Brexit referendum had already exposed. In particular, Douglas-Scott considers growing impatience for the status quo in Scotland, which has now decided to seek a new independence referendum, as well as in Northern Ireland, where calls for a border poll to reunify with Ireland are growing. This is also the topic of the article by Etain Tannam, which focuses on Brexit and the future of the relations between the UK and Ireland: as Tannam points out, the decision of the UK to withdraw from the EU came at a time of unprecedented positive relations between the two countries, but the Brexit negotiations badly damaged bilateral rapports, unearthing traditional stereotypes which bode ill for the future. Finally, Federico Fabbrini considers the future of the EU 27 and argues that while the EU has been remarkably united in dealing with the UK during the Brexit

negotiations, important cleavages remain among the 27 other Member States, in important areas like economic & monetary union, the management of migrations and respect for the rule of law. As such, he considers a number of alternative scenarios, suggesting that the future of Europe remains wide open, and may require additional adjustments in constitutional structures and forms of institutional governance.

### VIII. CONCLUSION

The period of time going from the June 2017 UK general elections (following the March 2017 UK notification of its intention to leave the EU) to the May 2019 EP elections constitutes an extraordinarily interesting and rich phase in the relationship between the UK and the EU. Over two years, leaders and lawyers endeavored to negotiate an orderly UK withdrawal from the EU, facing daunting technical problems and novel political challenges. The purpose of this special issue is to shed light on this stage of Brexit negotiations, offering also an historical record of Theresa May's Government in the UK. In fact, what turned out to be one of the shortest premierships in modern UK history was shaped from start to end by the struggle over Brexit, proving how profound the impact of the June 2016 referendum has already been. As this special issue was going to press at the end of summer 2019 – at record speed, thanks to the efforts of the European Journal of Legal Studies staff – the UK had not yet left the EU, and it remains uncertain whether it will. The postponed exit date is now set for 31 October 2019, but the struggle between the new UK Prime Minister and Parliament suggests that the Brexit course remains yet to be decided. New analyses will no doubt be needed down the road to assess the future shifts and turns in the withdrawal process – and the Brexit Institute will be there for that. This special issue, however, takes stock of the important developments that have taken place so far in the two-year Brexit negotiations, offering rigorous analytical insights and helpful policy lessons of the key words, issues and challenges that emerged in one of the most looked-at stories in contemporary global affairs.