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The role of the European Council in the Brexit negotiations and in shaping the "new" foreign policy of the European Union[1]

Abstract: The aim of the article is to analyze the role of the European Council in negotiations related to the planned withdrawal of the United Kingdom from the European Union. European Union law defines the key role of the European Council in these negotiations. It is this institution that is responsible for shaping the principles and guidelines on the basis of which the negotiations are being conducted. It is no less important to regulate the future relations of the UK with the EU after the British leave the European Union. The role of the European Council will be crucial there as well.

Key words: Brexit, European Council, foreign policy, United Kingdom, European Union

Introduction

The process of European integration was dialectical from its very beginning, because opposing processes clashed with each other. On the one hand, the idea of deepening the European integration process, and thus in practice bringing its federalization, on the other hand the tendencies and processes which were perceived as the member states' liberation from the authority of supranational institutions (Faber, 2006, pp. 1–4). Of course, individual countries have differed and still differ in terms of assessment and support for these processes. On the one hand, the Benelux states almost always support pro-federal solutions. On the other hand, the northern states are skeptical about engagement beyond the framework of purely intergovernmental cooperation.

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Within this second category of processes, the establishment by member states at the turn of the 1960s and 1970s of the European Council as an institution which was to enable member states take control over the European integration’s process should be analyzed (Schoutheete, 2006, pp. 39–47). Thanks to the decisions made by the European Council in recent decades, there has been significant progress in European integration, but with greater scrutiny by the members over the development of the European Communities and the EU.

The foundation of the European Council occurred at the same time as the accession of the United Kingdom to the EC, which after many perturbations finally took place in 1973. From the very beginning of relations with the Communities, and even before their creation in the 1950s, the United Kingdom looked with great suspicion at the legal structures used to manage these international organizations, based on the considerable decision-making autonomy of those institutions independent from member states. Throughout the entire membership period, the United Kingdom practically contested all activities aimed at increasing the supranational institutions’ powers, as well as steps taken to expand integration outside the area of economic cooperation within the internal market borders.

The victory of the British Conservative Party in the parliamentary elections in 2010 heralded the intensification of anti-EU rhetoric introduced by the new government formed by David Cameron (The Guardian, 2015). The earlier, much more pro-European, though still cautious, policy of the Labour Party was criticized by the most Euroskeptic Tory representatives for many years. The new Prime Minister had to make an effort to ensure political stability within his own party and ensure another victory in the forthcoming election. One of the key instruments used for reaching those aims turned out to be anti-EU rhetoric, which won over voters and limited criticism from the PM’s own party. However, the main idea around which Cameron built his position in the internal politics was to hold a referendum on the further membership of the United Kingdom of the European Union.

Eventually, the British voted on the issue of their further membership of the EU during the second term of Conservative government. In June 2016, the majority of voters supported withdrawal from the EU (The Guardian 2016b). David Cameron, with reference to the previously negotiated “special relations,” encouraged his citizens to vote on staying in the EU. However, a much earlier campaign aimed at strengthening the already strong British Euroskepticism, won. This led to the resignation of

Cameron as the Prime Minister and the appointment of a new leader who took on the challenge of leading the UK’s withdrawal from the EU (The Guardian 2016a).

However, from the very beginning, Prime Minister Theresa May has had a difficult situation in her own party, because her leadership has been strongly contested (Maurice, 2017b). Partly as a consequence of this struggle, she made a very serious mistake of calling an early election in order to increase her legitimacy. However, this decision led to the loss of an independent majority in the House of Commons and the necessity of dealing with Unionists from Northern Ireland (Politico 2017).

The purpose of this article is to analyze what role the European Council currently plays in the negotiations on the issue of British exit from the European Union, and also to analyze how the new foreign policy of the European Union is being shaped in relation to the United Kingdom. The research hypothesis examined in this article assumes that the European Council, by imposing a negotiating model, affects the reaction and weakens the UK’s negotiating position during negotiations on the withdrawal of that country from the European Union, at the same time affecting the difficult, future mutual relations.

Brexit negotiations and the political role of the European Council

Analyzing the role of the European Council in Brexit, it is necessary to go back to the beginning of 2016, when the former British Prime Minister, David Cameron tried to negotiate some deviations for the United Kingdom from the basic principles of the functioning of the European Union, which, with a positive outcome of these negotiations, were to form the basis for recommending its citizens to vote to stay in the European Union (The European Council, 2016, pp. 8–24). Those negotiations were a problem from the perspective of the member states, because on the one hand they wanted to keep the United Kingdom in the European Union, which is particularly important during a period of political, economic or migratory crises within the EU. On the other hand, the members of the Union had to ensure the coherence of European Union law, in the sense of compliance of the adopted regulations with the treaties and the principle of equality of all member states. It was necessary to maintain a delicate balance between concessions for the United Kingdom, and its obligations, because there was a fear that other member states may want

to follow the UK’s path and negotiate special relations for themselves while still being members of the European Union. This situation would endanger the stability of the legal and political order of the entire European Union.

It is worth analyzing the nature of specific solutions prepared for keeping the United Kingdom in the EU, and their importance for creating further elements of diversified integration in the EU. First of all, the UK was exempt from having to take part in any further activities in the field of political integration. The exclusion also included not applying to the United Kingdom the idea enshrined in the preamble of the treaties, namely the necessity to build “an ever closer Union among the nations of Europe.” Secondly, an introduction of solutions at the level of secondary legislation enabling temporary application of restrictions under the free movement of workers, “in situations of extremely high inflow of workers from other Member States in the longer term” was announced, which would establish general clauses with very imprecise application conditions. Thirdly, there were previews of the introduction of transitional measures in the new accession treaties in the field of free movement of people which would restrict the possibility of newly admitted EU citizens to use the existing rules (The European Council, 2016, pp. 8–24).

The negotiated solutions allowed the British Prime Minister to recommend to his citizens a vote for staying in the European Union. Despite the support from David Cameron’s government for remaining in the European Union on the basis of the package of negotiated reforms, which in his opinion significantly strengthened the position of the United Kingdom in the European Union (H. Stewart, R. Syal, R. Mason, 2016), and the additional targeted action of the European Union on the implementation of British interests, these issues did not exist in practice during the pre-referendum campaign in June 2016. Nevertheless, reality showed that the citizens still voted by a small majority for leaving the European Union, which resulted in David Cameron’s resignation.

So, as already noted, even before the formal notification of the UK’s desire to leave the EU, the European Council was involved in potentially preventing the danger of Brexit. However, the final result of these activities turned out to be negative. Therefore, the question should be asked of whether the member states, and thus the European Council as an institution, could actually have done more for a positive result of the Brexit referendum in the United Kingdom, which should be understood as consenting to greater concessions to that country. It seems that, in fact, the

outcome of these negotiations and the position taken by the British Prime Minister after their completion had practically no influence on the British decision taken in the referendum. Only a handful of voters would have likely been guided by the opinion of the Prime Minister, but it was of little importance to the overall result.

It should be noted that the British Prime Minister’s much earlier policy of conducting internal policy through anti-EU rhetoric led to the effect that the majority of Britons felt that it would be better for their country to leave the European Union. Thus, it turned out that the negotiations were pointless because, by his earlier risky game David Cameron convinced the British that the European Union was a project which was not worth participating in (Rettman 2013).

Article 50 of the European Union Treaty indicates only the basic principles relating to the course of negotiations on the withdrawal of a state from the European Union. Because in practice, apart from the case of Greenland, this is the first time that a member state has attempted to leave the European Union, so a model of negotiations will be created during their conduct. A certain model for Brexit could be sought in the model of negotiations for membership of the European Union. However, this breakthrough event forced the necessity of building, on the one hand, a model in which negotiations will take place in a formal sense, and on the other hand also shaping the negotiating position of the European Union as a whole, which is a basic difficulty because of the competitive interests of EU member states.

The very similar negotiation mechanism, familiar from accession negotiations, is something that means the British government is in a more difficult situation with regard to the European Union. It is worth noting that, on the one hand negotiations are conducted on a working level by Michel Barnier, and on the other hand we have talks at the highest political level with the European Council. It is the European Council that assesses the progress of negotiations, and thus in fact, the acting and willingness of the British government to cooperation with the EU, so the European Council will decide whether to initiate or not negotiations referring to future relations. So the British side is subjected to pressure from two actors acting in the interests of the EU: EU negotiators in daily negotiations; and the European Council, which only from time to time speaks about the progress of negotiations. That is why the British sometimes could have an illusory conviction about the progress of negotiations in analyzing issues resolved during particular negotiation sessions and, on the other hand,

there would be a message from the European Council about insufficient progress of these negotiations, which, as indicated earlier, blocks the possibility of talks on those issues most significant to the British.

The basis for the negotiations are the guidelines adopted by the European Council in April 2017. On an operational level, however, the Council of the European Union prepared “Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union” which established precise technical details for the conducted negotiations, but more importantly, expanded and refined the EU’s negotiating goals (The Council, 2017a, pp. 1–16; The Council 2017b, pp. 1–4). There is a two-phase approach indicated by the European Council. The first phase will concentrate on securing the rights of EU citizens and businesses in the United Kingdom after this state leaving the EU. The second crucial problem during this phase will be to “[s]ettle the disentanglement of the United Kingdom from the Union and from all the rights and obligations the United Kingdom derives from commitments undertaken as a Member State” (The European Council, 2017, p. 4). The second part of the negotiations will concern future EU-UK relations. The very formation of the negotiating process puts the UK in a difficult position, and undoubtedly the European Council intentionally divided the two phases of the negotiations. The conflicting interests of the United Kingdom and the EU are obvious, and concern the gradation of the goals of both negotiating partners. Focusing on the technical aspects of negotiations, the Union negotiator is supposed to conduct negotiations with the United Kingdom in “continuous coordination and permanent” cooperation with the Council and its preparatory bodies, especially Coreper (The Council, 2017a, pp. 1–16). This engagement of member states allows them to control every step and decision made by Michel Barnier. Of course, by appointing Barnier the European Commission wanted to take the fore on the EU side to implement and preserve its own interests. Possible disputes between European Commission member states will not necessarily lead to the strengthening of British negotiators’ position. Rather, negotiations will be slowed down, because in the event of disagreement between the institutions of the EU, the European Council will ultimately decide whether or not to approve the results of negotiations. Therefore, any attempts to make the European Commission autonomous during the negotiations will meet with a strong reaction from member states.

However, first of all, it is worth focusing on a certain key mechanism that the European Council in practice imposed on the United Kingdom.

Namely, the current Theresa May government was placed in the role of a petitioner in ongoing talks, expecting to present positions on individual sensitive issues relating to future bilateral relations. It turned out in practice that the European Union is unilaterally shaping the course of the negotiation process, because it imposes on the British government the obligation to present proposals solving the most sensitive issues, and then in most cases the EU negates the British propositions, expecting new, more favorable ones from the EU’s perspective. But even more importantly, the progress in these issues identified as key for the EU is related to the potential consent of the European Council to start negotiations on a future trade agreement which will be the basis for the new relations with the United Kingdom. However, from a British perspective, this is a crucial issue in the ongoing negotiations, perhaps even more important than the issues of the “divorce” with the EU. Now this process is completely blocked by the European Council.

There are several key issues from the perspective of the European Council which determine the course of the negotiation process with the United Kingdom. First of all, there is the problem related to the future statuses of current nationals of member states living in the United Kingdom. The crucial issues are the solutions related to acquired rights which the British government will propose after Brexit for those EU nationals who want to remain in the United Kingdom. It is, however, obvious that the European Union would like these rights to be fully maintained. Last but not least, the EC would like to control the United Kingdom’s compliance with these obligations using the European Court of Justice, so this EU court will determine whether the rights of EU citizens are being fully respected in accordance with the provisions of the agreement concluded with the European Union (Rettman, 2017). From the British perspective, however, this is a fundamental problem, because in the election campaign the problem of immigrants, especially those from Central European countries, was one of the leading themes of the camp supporting withdrawal from the European Union, and this political statement received widespread support from a large part of the British population. Thus, the British government is in a very difficult situation, because on the one hand it has to meet the expectations of European Union member states regarding the status of their citizens after Brexit, and on the other hand it has to fulfill the obligation imposed on it by its citizens in a political sense.

The announcement of the surprise early election made by Theresa May indicated that, even among those who rule the United Kingdom,

there is a significant lack of conviction as to the rules and guidelines for conducting the Brexit negotiations with the EU (Zalan, 2017). The argument used by Theresa May that her decision was aimed at obtaining a stable majority supporting the withdrawal from the EU (Maurice, 2017a) is difficult to consider credible, because the decision of the British Prime Minister ended up with the opposite situation, and thus strengthened the Bremainers’ camp.

Another issue that could potentially appear on the agenda in connection with the negotiations is the problem of the lack of agreement on the notification by the UK government of its desire to leave the European Union within two years. In this case, there are two potential solutions in accordance with Art. 50 of the European Union Treaty. Namely, in the first case, the European Council may decide to extend negotiations in accordance with the United Kingdom. The second solution is simply the recognition that after two years from the notification of the desire to leave the EU, the United Kingdom ceases to be a member of the European Union (*Consolidated*).

At this stage, it is difficult to say whether the negotiations will be finalized on time, however, the relatively small progress on key issues, and additionally the need to ratify the negotiated agreement, indicate that the deadline may not be met. At this point, on the margins of the main argument, it is worth solving one of the issues related to the conclusion of an agreement on the withdrawal of a member state from the European Union. Namely, such an agreement on the part of the European Union does not require ratification by member states (*Consolidated*). The situation is different in the case of EU enlargement, when such consent is required, which automatically affects the extension and potential uncertainty of the ratification process. However, the question whether this agreement will actually require ratification will be resolved only after it has been negotiated, as it may turn out that due to its content it will regulate issues that lie within the competences of the member states and their national parliaments, and thus ratification will be required by all 27 member states.

A situation can be imagined in which the content concerning withdrawal and issues concerning future EU-UK relations will be placed in two separate agreements. Nevertheless, from the British perspective, the latter agreement is much more important, and it is difficult to imagine that this document would only deal with trade issues, which would then make its ratification by European Union institutions alone possible. Due to the

planned transition periods, the issue of EU citizens’ rights, or the UK’s financial commitment after Brexit, it seems that there will be very strong pressure from national parliaments to ratify the agreement regulating the new relationship in a parliamentary manner.

So, if the situation arose where after two years there was a need to extend negotiations, the question that has to be asked concerns the conditions under which the European Council would make such a decision. Of course, it seems that it would be in the interest of both parties to extend these negotiations until full agreement is reached. At the same time, however, the lack of such a solution would be a much bigger problem for the United Kingdom than the European Union. One can refer primarily to the uncertainty of British business as to future relations with the EU, which results in, for example, the announcements of the possible relocation of enterprises from the UK to the area of the internal market. Therefore, once again, the role of the European Council could turn out to be crucial in creating relations with the UK, as it would be an opportunity to force the negotiating partner to agree to solutions that it previously opposed as a condition for conducting further negotiations. Due to the significant dynamics of negotiations, it is difficult at present to determine what specific issues could be the subject of such concessions.

A “new” foreign policy. How the EU will manage post-Brexit relations with the United Kingdom

The case of the United Kingdom, which was the first state to initiate the procedure of leaving the European Union, is a completely new situation. Thus, in relation to the United Kingdom, there is an unprecedented situation where, still being a member of the EU, it participates in making key decisions for the European Union. However, at the same time, the United Kingdom does not take part in discussions shaping the position of the European Union in Brexit negotiations. As a result, we are dealing with a situation when there is a need to shape a “new” foreign policy in the geographical sense, because the state that will most likely leave the European Union will appear as a “new foreign country.” This is why the European Union must build its relations with the United Kingdom at this stage as a non-EU member state, but as a country with which the European Union undoubtedly has to cooperate, due to various conditions, mainly geographic, historical and economic.

After the referendum, and the confirmation by the British authorities of respecting its citizens’ decision to start negotiations on withdrawing from the European Union, statements of politicians from other member states have appeared which indicate that Britain cannot, in any case, count on retaining the solutions that are most beneficial for the UK, namely those relating to their participation in the internal market, at the same time resigning from less welcome obligations. Very clearly, German Chancellor Angela Merkel said that the negotiation process cannot be based on the British “choosing candies” (The Guardian, 2017). However, what has not been clearly said, but could undoubtedly appear, is the conviction of many European politicians about the necessity of punishing the British during the negotiation process so that no other member states would try to copy the British political path and leave the European Union, while on the other hand continuing to enjoy the benefits of European integration. Therefore, the negotiations, apart from the need to establish rules concerning Brexit, also have a second, symbolic dimension, aimed at increasing the cohesion and commitment of other member states in the process of European integration.

Undoubtedly, the situation in which EU member states shape a common interest in opposition to the British interest in the negotiations on British withdrawal from the European Union is a situation that reduces confidence in relations between the UK and individual member states. It has to be taken into account that the UK is still a member of the EU and, as stated above, both sides are condemned to cooperate in the future. So punishments made during this phase of negations may influence difficulties in the unfolding history of EU-UK relations.

The crucial statement concerning the “new” foreign policy is included in political guidelines set by the European Council on April 29, 2017. As the EC stated: “The European Council welcomes and shares the United Kingdom’s desire to establish a close partnership between the Union and the United Kingdom after its departure. While a relationship between the Union and a non-Member State cannot offer the same benefits as Union membership, strong and constructive ties will remain in both sides’ interest and should encompass more than just trade” (The European Council, 2017, p. 8). First of all, what is obvious is the distinction between the situation of a member state and non-member states. Secondly, the European Council recognizes the need for cooperation in areas beyond trade exchange. However, it further indicates that cooperation in the scope of the free trade area must be balanced. Cooperation will be necessary in the

area of, for example, internal security and global problems. On the other hand, it can undoubtedly be said that the European Union will strive to restrict UK access to the internal market, that is, to the remaining freedoms of movement. The British government, despite less than friendly actions on the part of the EU, will be focused on a pragmatic model of negotiating future relations, because Theresa May is aware that the future of the British economy will largely depend on the quality of the negotiated agreement. At the same time, however, there are also signs from EU institutions that the British will be able to “buy” wider access to the internal market (Fox, 2017). Therefore, ultimately, everything may break down over the “price” of such a transaction. When it comes to Brexit, eventually, one can assume that the relations between the EU and the UK will initially be strained due to the new situation for both partners, as well as the memory of the manner and effects of negotiations. On both sides there may be a kind of regret associated with the difficult negotiations. Ultimately, however, a conciliatory approach must be won, because only this will enable effective cooperation in the future.

Conclusions

The European Council is a key element of the negotiation system related to the UK’s withdrawal from the EU. The European Council prepared guidelines that determine the scope and pace of negotiations. These are guidelines that first take into account the interest of the European Union and its member states. The British government in practice had to agree on the model of negotiations shaped by the European Union.

The difficult internal situation in British policy further weakens the negotiating position of Prime Minister Theresa May. On the one hand, it is criticized by Brexit activists that negotiations are too slow and, above all, that the UK government is making too many concessions to the EU. On the other hand, a minority government along with ministers who undermine the authority of Theresa May and who dreams of taking her place (Maurice, 2017b), does not help Prime Minister to enhance her position towards Brussels. So at the end those very complex negotiations are an easy pretext to criticize Theresa May’s leadership.

The EU undoubtedly has an advantage at this stage of negotiations, primarily by blocking the transition to the second stage, where future relations with the UK would be the subject of talks. In fact, despite the con-

stant pressure from the British government on the EU to agree to start the second stage, in practice it may turn out that negotiations on new relations will not be simpler than talks on the withdrawal from the EU itself.

The European Council, which is formally responsible for creating the Common Foreign and Security Policy, will also have a leading role in shaping the political and economic relations with the United Kingdom. The European Council will have a rather difficult task, because, as indicated above, it must “punish” the United Kingdom for leaving the EU. At the same time, however, it must avoid humiliating its partner, so that it can build a future relationship in a positive atmosphere.

Bibliography

Consolidated version of the Treaty on European Union, OJ C 326, 26.10.2012, pp. 13–390.

Faber A. (2006), *Theoretical Approaches to EU Deepening and Widening: A Multidisciplinary Overview and Some Tentative (Hypo) theses*, http://www.eu-consent.net/library/brx061012/WP%20II%20III%20Paperredefiningconcepts.pdf.

Fox B. (2017), *London: Little room for manoeuvre in Brexit talks*, “EUobserver”, 5 September, https://euobserver.com/uk-referendum/138877.

Maurice E. (2017a), *May surprises EU with snap election*, “EUobserver”, 18 April, https://euobserver.com/uk-referendum/137604.

Maurice E. (2017b), *EU puts May under pressure over Brexit and ‘Boris’*, “EUobserver”, 3 October, https://euobserver.com/uk-referendum/139259.

Schoutheete Ph. de (2006), *The European Council*, in: *The Institutions of the European Union*, eds. J. Peterson, M. Shackleton, Oxford.

Politico (2017), *Northern Ireland’s DUP derails Theresa May’s trip to Brussels*, 7 December, https://www.politico.eu/article/arlene-foster-theresa-may-brexit-northern-irelands-dup-derail-theresa-mays-trip-to-brussels/.

Stewart H., Syal R., Mason R., *David Cameron makes final plea for Britain to vote to remain in the EU*, https://www.theguardian.com/politics/2016/jun/22/david-cameron-makes-final-plea-for-britain-to-vote-to-remain-in-the-eu.

Rettman A. (2013), *Cameron publishes bits of unlucky EU speech*, “EUobserver”, 1 January, https://euobserver.com/institutional/118777.

Rettman A. (2017), *UK to recognise some rulings by EU states’ courts*, “EUobserver”, 22 August, https://euobserver.com/uk-referendum/138775.

The Council (2017a), *Council decision supplementing the Council Decision of 22 May 2017 authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the arrangements for its withdrawal from the European Union*, Brussels, 22.05.2017, COM(2017) 218 final.

The Council (2017b), *Council Decision of 22 May 2017 authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the arrangements for its withdrawal from the European Union*, Brussels, 20.12.2017, COM(2017) 830 final.

The European Council (2017), *European Council (Art. 50) guidelines following the United Kingdom’s notification under Article 50 TEU*, EUCO XT 20004/17.

The European Council (2016), *European Council meeting (18 and 19 February 2016) – Conclusions*, Brussels, 19 February 2016, EUCO 1/16, pp. 8–24).

The Guardian (2015), *Cameron prepares to form Conservative government after election victory*, https://www.theguardian.com/politics/2015/may/08/david-cameron-conservative-government-election-victory.

The Guardian (2016a), *David Cameron resigns after UK votes to leave European Union*, https://www.theguardian.com/politics/2016/jun/24/david-cameron-resigns-after-uk-votes-to-leave-european-union.

The Guardian (2016b), *UK votes to leave EU after dramatic night divides nation*, https://www.theguardian.com/politics/2016/jun/24/britain-votes-for-brexit-eu-referendum-david-cameron.

The Guardian (2017), *Angela Merkel rejects one of Theresa May’s key Brexit demands*, https://www.theguardian.com/politics/2017/mar/29/angela-merkel-rejects-one-of-theresa-mays-key-brexit-demands.

Zalan E. (2017), *‘Unhappy’ day as UK delivers Brexit letter*, “EUobserver”, 29 March, https://euobserver.com/uk-referendum/137430.

Rola Rady Europejskiej w negocjacjach dotyczących brexitu i kształtowaniu „nowej” polityki zagranicznej Unii Europejskiej

Streszczenie

Celem artykułu jest analiza roli Rady Europejskiej w negocjacjach związanych z planowanym wystąpieniem Wielkiej Brytanii z Unii Europejskiej. Prawo Unii określa kluczową rolę Rady Europejskiej w tych negocjacjach. To ta instytucja jest odpowiedzialna za kształtowanie zasad i wytycznych, na podstawie których prowadzone są negocjacje. Nie mniej ważne jest uregulowanie przyszłych stosunków Wielkiej Brytanii z UE po tym, jak Brytyjczycy opuszczą Unię Europejską, gdzie Rada Europejska będzie również odgrywać kluczową rolę.

Słowa kluczowe: brexit, Rada Europejska, polityka zagraniczna, Wielka Brytania, Unia Europejska