



*Cameron's Europe:
Can the
Conservatives
achieve their
EU objectives?*



Charles Grant

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Charles Grant

**With contributions by
Katinka Barysch and Hugo Brady**

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AUTHOR’S ACKNOWLEDGEMENTS

I would like to thank those who have commented on drafts or helped in other ways, including Katinka Barysch, Hugo Brady, John Kerr, John Monks, Clara Marina O’Donnell, Denis MacShane, Simon Tilford, Stephen Tindale, Tomas Valasek and Philip Whyte. I have also been helped by many Conservatives, who would probably prefer to remain anonymous. Thanks to Kate Mullineux for design and layout.



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Cameron's Europe: Can the Conservatives achieve their EU objectives?

If the opinion polls are right, Britain's Conservative Party stands a good chance of returning to power in the spring of 2010, after 13 years in opposition. All over Europe, politicians and officials want to know what kind of EU policies the Conservatives will pursue if they win the next general election. David Cameron, the Conservative leader, gave some indications in a speech on November 4th 2009. Nevertheless continental Europeans still have very little knowledge of the current Conservative Party and its attitudes.

Similarly, many Conservatives are out of touch with how the EU has changed during their long years in opposition. Deprived of ministerial office, senior Conservatives tend to lack the personal contacts with top European politicians that earlier generations of Conservative leaders enjoyed. And their party's growing euroscepticism has cut them off from mainstream centre-right networks on the continent.

Continental Europeans who recall John Major's government remember that it contained not only eurosceptics but also heavyweight pro-EU figures like Ken Clarke, Michael Heseltine and Douglas Hurd. Since the time of the Major government, however, not only the Conservative Party but also the country at large have become much more eurosceptic.

Of all the 27 EU member-states, Britain is the most eurosceptic. According to the latest Eurobarometer survey, only 32 per cent of

Britons think their country has benefited from the EU. The next lowest scores are in Hungary (34 per cent) and Latvia (38 per cent), while the average across the EU is 56 per cent. Asked if the EU is a good thing, only 28 per cent of Britons say it is, compared with 53 per cent in the EU as a whole.¹ In the June 2009 European elections, the United Kingdom Independence Party, which is committed to leaving the EU, came second, with 17 per cent of the

¹ *Eurobarometer 71*, September 2009.

² *Charles Grant, 'Why is Britain eurosceptic?', CER essay*, December 2008.

vote, ahead of Labour on 15 per cent (with the far-right British National Party on 6 per cent). This is not the place for an analysis of why Britain is so eurosceptic, but British euroscepticism seems to be a growing force.²

Continental Europeans who fear that a Conservative government will disrupt the EU have been partially reassured by the relatively emollient tone of Cameron's November 4th speech. But they need to be aware of the strong pressures that could push a Prime Minister Cameron to take a hard line on Europe. Large sections of the press and his own party want Britain to loosen its ties to Europe – or even leave the EU altogether.

Indeed, the old division in the Conservative Party between pro- and anti-EU factions has largely disappeared. Most Conservatives are eurosceptic to a greater or lesser degree (Ken Clarke's position in the shadow cabinet is an anomaly). According to a survey of 144 Conservative prospective parliamentary candidates carried out in July 2009 by Conservative Home, a website, 10 per cent would like to keep Britain's relationship with the EU the way it is, 47 per cent would repatriate powers to Britain in some areas, 38 per cent want a 'fundamental renegotiation' of Britain's membership, and 5 per cent would withdraw from the EU.

Other EU governments, and pro-Europeans of all parties in Britain, need to understand that Cameron is, within his own party, a force for moderation. Though a eurosceptic of sorts, he is a pragmatist

rather than an ideologue and he sees that the British national interest requires constructive engagement with EU partners. Cameron needs to be supported against those who wish to provoke a crisis in Britain's relations with the EU.

Many Conservatives do not know how much the EU has changed since the governments of Margaret Thatcher and John Major. In those days, France and Germany could to a large extent set the EU's agenda. Britain had to fight hard to thwart anti-Americanism within the EU. The EU story was largely about the creation of the euro and whether Britain should join it, rows over social policy, and federalist pressure for stronger institutions.

But the enlargement of the EU – to Austria, Finland and Sweden in 1995, and then to 12 Central, Eastern and Southern European states in 2004-07 – has dramatically changed its character. English is the dominant language. And though France and Germany remain influential, no two countries can on their own set the agenda in a wider EU of 27 members. Under the leadership of Nicolas Sarkozy and Angela Merkel, France and Germany are much more Atlanticist than they were, as is the Union as a whole.

The question of Britain's membership of the euro has been resolved for the foreseeable future: it is not going to join. There is no significant EU legislation on social policy in the pipeline, and with the centre-right in power in most member-states, that is not going to change. The ratification of the Lisbon treaty means that the EU will stop talking about new treaties and focus less on institutional questions. Federalism is a spent force, confined to the political elites of Belgium and Luxembourg, a few German and Italian politicians, and some senior figures in the EU institutions. Most governments take a no-nonsense, pragmatic attitude to the EU, seeing it as a vehicle through which they can pursue national interests. In that they are not so different from Britain's Conservatives.

Changes in the world economy have also affected the EU's priorities. It is more focused on global challenges like regulating international finance, gaining access to Chinese markets, dealing with Russian power, stabilising its neighbourhood, tackling climate change, improving energy security, and combating organised crime and illegal immigration. The departure of treaty change from the agenda will help the EU to remain outward-looking. On all these questions there are big arguments among the member-states but on most of them a Conservative Britain would find that it has many allies.

This essay analyses the objectives that Cameron set out on November 4th 2009 and assesses his chances of achieving them. It argues that a Conservative government would find it very hard to obtain significant new opt-outs from the EU treaties. It suggests that Cameron should instead prioritise defending Britain's interests in key areas that have nothing to do with treaty change, such as the EU budget and the regulation of the City of London. And it points to issues on which the Conservatives could make a positive contribution to European policy-making, thereby winning allies and influence: the new Lisbon agenda of economic reform; energy and climate change; and the future of EU defence policy.

Cameron accepts the Lisbon treaty

For much of 2009, the Conservative position on the Lisbon treaty was that they would hold a referendum on it if, on taking office, some member-states had still not ratified it. And they said that they would "not let matters rest" if the Lisbon treaty was already law when they got into government. But the last obstacles of the treaty's entering into force were removed by the Irish people approving it (at the second

³ http://www.conservatives.com/News/Speeches/2009/11/David_Cameron_A_Europe_policy_that_people_can_believe_in.aspx attempt) in a referendum on October 2nd, and by Czech President Vaclav Klaus signing the document on November 3rd. On November 4th David Cameron explained what not letting matters rest would mean.³

Cameron unveiled a clever package of policies on the EU. On the one hand, he offered just enough red meat to satisfy significant numbers of British eurosceptics that a Conservative government would be serious about stopping the flow of sovereignty from Britain to the EU. On the other hand, both the style and the substance of Cameron's demands to other EU governments were sufficiently moderate to leave them with some hope that a Conservative Britain would not mess up the way the EU works. Several of the opt-outs from the treaties that Cameron is demanding already exist in the Lisbon treaty. It is true that France's Europe minister, Pierre Lellouche, reacted by saying that Conservative policies on Europe were "autistic" and that they would "castrate" British influence. But most other governments – and indeed the Elysée palace – reacted in more measured tones.

Given the range of options being considered by senior figures in the Conservative Party, Cameron could easily have chosen a more confrontational line. He disregarded the demands of many activists – and London Mayor Boris Johnson – for a referendum on the Lisbon treaty. If Cameron had given in to that demand, and the British people had then voted against a treaty that was already in force, the consequence could have been British withdrawal from the EU.

Cameron also rejected an idea that some senior Conservatives had been floating as recently as the Conservative Party conference in October 2009. This was for a referendum on the repatriation of powers in the fields of employment and judicial affairs, in order to strengthen the government's hand in demanding opt-outs in those areas. He opposed this idea, he said on November 4th, because "we would have just asked for that mandate in an election and received it. Would we really want to turn round straight after an election, with the public finances in the state they are in and the economy as fragile as it is and ask the same question all over again? A made-up referendum might make people feel better for five minutes but my job is to put together a plan that lasts five years, and I don't

⁴ Cameron seemed to echo the spirit of Margaret Thatcher's critique of the Labour government's plan for a referendum on EEC membership, in the House of Commons, on March 11th 1975: "The third point I want to make is the effect of a Referendum on representative Government.....our system, which has been copied all over the world, is one of representative Government under which those who do not have the time to look into every detail of this or that Bill choose people who are honourable and with whose opinions they are in harmony to discuss these matters. ...Perhaps the late Lord Attlee was right when he said that the referendum was a device of dictators and demagogues."

think a phoney referendum should play any part in that.... If we wasted everyone's time and taxpayers' money on a referendum that has no practical effect, I don't think the British people would thank us for it."⁴

Cameron said nothing about European defence co-operation, though many observers had expected him to say that a Conservative government would withdraw from parts of it. Some Conservative front-benchers have been particularly critical of the

European Defence Agency – which tries to organise multinational defence industrial projects on an efficient basis, and to co-ordinate R&D spending on defence. More generally, many Conservatives have been disparaging about the European Security and Defence Policy (ESDP), invented by Tony Blair and Jacques Chirac in 1998, which has led to the EU deploying two dozen missions of peacekeepers, policemen and civilian administrators to various troubled parts of the world. Conservatives have tended to view EU defence co-operation as a French scheme to undermine NATO, though that argument has been hard to sustain since France decided to return to full membership of NATO in 2008. Cameron may have listened to the Obama administration: it would like the EU to be more ambitious in defence, and it wants Britain to be actively involved in ESDP to ensure that it does not become anti-NATO.

Changes to UK law

Though Cameron shunned the idea of a referendum on the EU, he did promise three new laws in the UK, and he also said that he would seek to opt out of three areas of the EU treaties. The first

change within the UK is that "if we win the next election, we will amend the European Communities Act 1972 to prohibit, by law, the transfer of power to the EU without a referendum. And that will cover not just any future treaties like Lisbon, but any future attempt to take Britain into the euro."

This would put the UK in a similar position to Ireland, whose supreme court ruled in 1987 that a major transfer of powers to the EU must be approved by referendum. Therefore the Irish people have voted on every new EU treaty. This Cameron proposal would not damage the EU in the short or medium term, since there is unlikely to be another attempt to change the treaties for a generation.

Second, Cameron promised a United Kingdom Sovereignty Act "to make clear that ultimate authority stays in this country, in our Parliament. This is not about Westminster striking down individual items of EU legislation...It would simply put Britain on a par with Germany, where the German constitutional court has consistently upheld – including most recently on the Lisbon treaty – that ultimate authority lies with the bodies established by the German constitution."

The essence of the June 2009 ruling by the German court is that government at EU level requires democratic legitimacy, either from nation-states, or a federal system (see box on page 9). Since the EU is not a federation, and the European Parliament is not a truly democratic body, the powers exercised at EU level must not exceed limits set by the German constitution. The court said that the Lisbon treaty does not breach those limits and is therefore compatible with the German constitution. Its judgement specified several areas where the EU should be wary of encroaching on national competences. Some observers see the ruling, which is full of ambiguity, as a challenge to the principle of the supremacy of EU law, established by the European Court of Justice (ECJ) in 1964 and essential for a flourishing single market. And some see it

as a brake on any further attempt to promote treaty-based EU integration. But others view the ruling as another in a series of attempts by the court to grab more power for itself, and one that will have few practical consequences.

During the passage of the Sovereignty Bill through Parliament, Conservative eurosceptics could seek to amend it in ways that challenge the supremacy of European law or allow Parliament to block EU directives. If they succeeded, Britain would be on a collision course with the rest of the EU. However, Cameron's advisers emphasise that the UK Sovereignty Act should do nothing more than establish the equivalent of the German court ruling in UK law, thereby setting a limit on the transfer of further powers to the EU. That would not cause problems for the EU, since there is no appetite among other European governments to extend the Union's legal competences.

But there is a risk that the Sovereignty Act could create problems for Britain's relations with the EU: when asked how the act would work in practice, senior Conservatives do not always give clear answers. According to one of them: "The Act should prevent the ECJ encroaching into areas where it should not". Some pro-EU Conservatives worry that the act may be used to strike down ECJ rulings.

Cameron's third UK law would prevent the use of what he called the Lisbon treaty's "ratchet clause" without parliamentary approval. The ratchet clause is generally known as the *passerelle* article of the Lisbon treaty. This allows the European Council to decide, by unanimity, to switch decision-making in internal policies (but not foreign or defence policy) from unanimity to majority voting. In fact the Lisbon treaty states that any national parliament may, if it wishes, vote to block such a decision by the European Council. And when Gordon Brown's government passed the act that ratified the Lisbon treaty, it inserted a provision that the *passerelle* cannot be used without the agreement of both houses of Parliament. So it is hard to see what additional legal protections Cameron would want to put into another act of Parliament.

Sovereignty and Germany's constitutional court

David Cameron says that the purpose of his proposed UK Sovereignty Act is simply to put Britain on a par with Germany, where the German constitutional court has consistently upheld "that ultimate authority lies with the bodies established by the German constitution". But the German situation cannot be easily compared with that of the UK. Germany's written constitution – as interpreted by its guardian, the constitutional court (Bundesverfassungsgericht) – sets clear limits to parliamentary sovereignty, whereas in Britain there is no higher power than parliament and no written constitution. Although the German parliament has ratified every EU treaty with the required majority, individuals (usually politicians) have questioned the treaties' compatibility with aspects of the German constitution. That is how the constitutional court became involved: first in the *Solange I* and *II* judgments of 1974 and 1986, then in a ruling on the Maastricht treaty in 1993, and most recently in June 2009, when it ruled on the Lisbon treaty (or more accurately: on the German laws implementing the treaty).

These judgements are not straightforward catalogues of which EU actions are compatible with the German constitution and which are not. Far from it. The Lisbon verdict has 420 convoluted paragraphs on the nature of sovereignty, democracy and the state, some of which are wide open to interpretation. While the overall tenor of both the Lisbon and the Maastricht rulings is sceptical about further European integration, the court has declared both treaties to be compatible with the German constitution.

In a nutshell: the court regards the EU as a confederation of sovereign states, even after the Lisbon treaty. Since the Union is not a federal state, the legitimacy of its decisions can flow only from the democratic credentials of the member-states. The court does not see the European Parliament as a body that can bestow sufficient democratic legitimacy on the EU, partly because there is no 'European people' and partly because it is not elected

on the basis of the one-man-one-vote principle (the larger member-states, such as Germany, have many fewer MEPs – relative to the size of their populations – than the smaller ones).

Two consequences flow from this view: first, EU law is supreme over German national law only so long as (*solange* in German) it does not violate the basic rights guaranteed in the German constitution. These include the right to be ruled by a democratically legitimate government. Since the Bundesverfassungsgericht thinks that the EU lacks democratic legitimacy, it sets boundaries on the sovereignty that the German government and parliament can transfer to the supranational level. In the Lisbon treaty ruling, the court for the first time lists the 'core' areas in which the transfer of sovereignty needs to be limited, lest it 'hollow out' the German state. Economics is not an area that is central to German statehood, according to the court. But law and order, defence, education, culture, the media and social policy are. The court did not think that the Lisbon treaty leads to a transfer of significant new powers in these core areas. Nor did it specify the limits for future transfers of powers.

What it did do – and this is the second consequence of the court's view on sovereignty in the EU – is to ask the German parliament to get more actively involved in EU law-making. Since the court does not think that the European Parliament can turn the EU into a democracy, it has called on the two chambers of the German parliament (Bundestag and Bundesrat) to exercise more direct scrutiny over EU laws and decision-making – a principle that Cameron is likely to try and emulate in Britain.

In its Lisbon ruling, the court asked that parliament should give its explicit approval to certain EU laws, but only in a few areas such as the transfer of new powers to the EU on the basis of the *passerelle* clause, and some aspects of criminal law. Germany's politicians had a lively debate over whether they should use this opportunity to extend the Bundestag's right to approve or kill EU laws to all areas, whether German ministers should seek a parliamentary mandate before travelling to Brussels to draw up new laws, and whether Germany should introduce referendums on EU matters. They decided against all these ideas. But even the more limited new powers that the Bundestag – and in some areas, the Bundesrat – have gained could become a brake on EU integration. In fact the Lisbon treaty gives all EU parliaments the right to stop the transfer of competences under the *passerelle* clauses. But since law-making tends to be slow in Germany's

consensus-oriented, multi-level political system, the Germans could hold the EU back if the European Council tried to extend majority voting.

Although the Bundesverfassungsgericht is Germany's most trusted political institution, the court's rulings on EU integration have been controversial. Lawyers, politicians and commentators have criticised the judges' rather old-fashioned view of sovereignty. The court is convinced that sovereignty can only exist at the level of the state. Ultimately, this leaves only two options for a legitimate EU: inter-governmental co-operation among nation-states or a full-blown European super-state. Critics say that the Bundesverfassungsgericht does not take account of the hybrid character of the EU, though it does accept that supranational powers in some areas are compatible with German sovereignty. Also, the court's negative view of the European Parliament clashes with the broad support this institution enjoys among most German politicians: whenever the EU treaties are revised, Germany invariably advocates more powers for Strasbourg.

Some commentators have warned that the ruling on the Lisbon treaty indicates that the court will set stricter limits to EU integration in the future. That remains to be seen. The Bundesverfassungsgericht has repeatedly warned German chancellors and law-makers that there are limits to how much power they can legally transfer to Brussels. Yet it has thus far judged all EU treaties to be in line with Germany's constitution. And it has not struck down any EU laws (it was asked to rule on those setting rules on banana imports, and on the replacement of the Deutschmark with the euro). The exception was its 2005 request to parliament to amend the law implementing the European arrest warrant.

The court, it seems, would like to define the final boundaries of what German sovereignty means in the European context, but cannot quite muster the courage to take that decision away from elected governments. The court's rather critical view of EU integration is not, however, totally out of touch with the German people and the political class, which have been turning more eurosceptic. Since it is not politically correct in Germany to criticise the EU, many Germans may even be glad to rely on their highest court to limit the country's further integration into the Union.

Katinka Barysch

Cameron could do other things to assuage eurosceptic passions within the UK. He could seek to overhaul the system of scrutiny of EU legislation at Westminster, which is widely recognised as inadequate. The House of Commons committee that scrutinises EU laws is under-resourced, and party whips struggle to find good MPs to serve on it. The committee seldom generates debate on draft directives before they are decided upon in the Council of Ministers and the European Parliament. But after directives have been agreed the committee does supervise their transposition into national law.

The Conservatives could try to create a new and more powerful committee for overseeing EU laws, modelled on that in Denmark, which mandates ministers on the line they should take in the Council of Ministers. After Council meetings in Brussels, Danish ministers have to report back to the committee. The entire Danish system would not transplant easily to Westminster: Denmark always has a minority government, and a Conservative government in Britain would probably not want a parliamentary committee to mandate its representatives in the Council of Ministers. But there is no reason why ministers should not face a scrutiny committee (or specialist sub-committees) before and after their discussions in the Council. The committee would be more up-to-speed on what is happening in Brussels and Strasbourg if British MEPs were allowed to attend its meetings, in a non-voting capacity.

⁵ Hugo Brady, *The disuniting kingdom: Britain needs to decide whether it's in or out of the EU*, *Wall Street Journal*, June 30th 2009.

Another idea, floated by Hugo Brady, would be for Prime Minister Cameron to establish a royal commission on the costs and benefits of Britain's EU membership.⁵ Such a body would have to be chaired by a senior figure

whose objectivity was beyond question, and who had no form in taking pro- or anti-EU positions. The commission would have the power to call witnesses and take evidence, and to engage with civil society as well as politicians. Some eurosceptics would be happy to have a chance to explain the damage done by the Common Agricultural Policy, EU red tape and Britain's net contribution to the EU budget. Many pro-

Europeans would welcome the opportunity to argue the benefits of being in a single market with a common trade policy, such as increased foreign investment. Whatever such a royal commission concluded, its hearings might take some of the poison out of Britain's European debate, and they would probably add some sobriety to it.

Opting out of justice and the charter of fundamental rights

Cameron has demanded three treaty changes from Britain's EU partners. These are more likely to cause problems than the changes to UK law, since the treaties cannot be altered without the consent of the other 26 governments. He knows that they will not agree to amend the text of the Lisbon treaty, because a) they have spent almost a decade negotiating the treaty and want to put it behind them; and b) if one part of the treaty is unpicked, the whole of the carefully balanced package may start to unravel.

Rather than seeking to amend the Lisbon treaty, Cameron wants legally-binding opt-outs enshrined in the form of protocols that would be attached to a future accession treaty.⁶ The EU used this device to provide the Irish and the Czechs with the reassurances they needed in order to ratify the Lisbon treaty. The Croatian accession treaty will be accompanied by protocols clarifying that Lisbon does not affect Ireland's abortion rules, tax system or neutrality; and that the Charter of Fundamental Rights creates no new social rights in the Czech Republic (Britain and Poland already have protocols saying the same).

The first opt-out that Cameron has asked for covers criminal justice. He wants to "limit the European Court of Justice's jurisdiction over criminal law to its pre-Lisbon level...ensuring that only British authorities can instigate criminal investigations in Britain".

Such an opt-out need not prove very difficult to negotiate, if Cameron asks for little more than what the Lisbon treaty already gives Britain.

⁶ *Every time a country joins the EU, its government and those of the existing member-states sign an accession treaty that must be ratified by all of them.*

Under that treaty, Britain has a de facto opt out (technically, the right to opt in) from all new EU laws to do with policing, justice or immigration (known as justice and home affairs or JHA).

However, this extremely complex area of law-making does pose difficulties for Britain. Lisbon gives the UK the right to opt in to policing and justice measures, which it had not enjoyed under the Nice treaty, but at the same time takes away its veto in those areas. The 'community method' now applies to JHA, meaning that the Commission proposes most laws⁷, decisions are taken by majority vote and the ECJ will have the right to make rulings. However, no member-state will be subject to ECJ rulings on existing EU laws on

⁷ Under the Lisbon treaty, procedures in policing and justice are still slightly different from those in mainstream policy areas: the Commission does not have sole right of initiative, since a quarter of the member-states may combine together to propose a law.

criminal justice, like the common arrest warrant, until 2014. Any new criminal justice laws that are agreed after December 1st 2009 (when the Lisbon treaty entered into force) will be immediately subject to ECJ rulings, in Britain and everywhere else. That also applies to amendments of existing laws, such as that for the arrest warrant.

In 2014 the UK – alone – will have the choice of accepting ECJ jurisdiction or opting out entirely from the 100 or so policing and justice measures that were agreed before December 2009 (and by 2014 those measures will still comprise the great majority of the legislation agreed in this area). The treaty also gives all member-states an additional safeguard: an 'emergency brake' procedure that allows any government to avoid taking part in EU measures in certain areas of criminal law (see box on page 16).

The arrest warrant, which allows for the automatic extradition of suspects accused of any one of 32 serious crimes, including terrorism, is a controversial issue among Conservatives. Some of them complain that it trades too much sovereignty for only a marginal increase in security and that it could become a Trojan horse for EU meddling in

UK criminal law. In Brussels there has been talk of 'balancing measures' that may be needed to protect the innocent from wrongful extradition and sub-standard trials in foreign courts. The nightmare scenario painted by some Tories is that in the long run these balancing measures could develop into some kind of EU criminal code.

The Lisbon treaty would not allow a Conservative government to opt out of only the arrest warrant; Britain would have to pull out of all the policing and justice measures agreed before the Lisbon treaty entered into force. And if Cameron did seek a special deal allowing Britain to opt out of merely the arrest warrant, the police and the security services would complain: the arrest warrant secured the rapid extradition of Hussein Osman from Italy to the UK after the attempted London Underground bombings on July 21st 2005.

A Conservative government should be able to negotiate protocols that repackage the existing opt-outs and emergency brakes available to the UK, while adding extra copper-plating and safeguards in certain areas.

But Cameron might choose a tougher stance, saying that he will exercise the right to opt out of all EU criminal justice measures after 2014. He would not need to renegotiate any treaties to do that. The price to be paid would be a diminution of British influence in an area where – despite its less than full participation – Britain has been a leader.

Some Conservatives might push Cameron to take a different line, and ask that Britain be permanently exempt from ECJ jurisdiction, without having to opt out of all JHA co-operation. But if he did follow that advice he would probably be rebuffed. For the whole basis of EU law is that every member-state is subject to the same rules and sanctions. For example, when other governments grumble about EU rules limiting state aid, the UK points out that the Union's credibility would be damaged if some member-states failed to accept the rule of law or demanded special treatment. As far as the other member-states are concerned, the safeguards that the UK has already obtained on JHA are extremely generous.

Britain's special deal on justice and home affairs

Countries can rarely fight international terrorism and organised crime single-handed. Nor can they cope effectively with inward migration or secure their borders without working with other governments. Few have embraced this reality as fully as the UK, in response to the challenges it has faced from immigration, terrorism and crime over the last decade. Britain sends money and experts to bolster police and border forces throughout the EU, on the understanding that it is better to stop the trafficking of drugs, guns or people in the Greek islands or at Poland's eastern border than at home.

By working through the EU's institutions, the UK has helped to spread modern counter-terrorism techniques across Europe. And it has promoted the use of shared police intelligence to break up and prosecute organised criminal gangs. Britain has provided the first leader of Eurojust – the EU's busy office of senior national prosecutors – and the current head of Europol, its police agency. And Britain gets direct benefits from its involvement in justice and home affairs (JHA): it currently deports around 150 failed asylum seekers a month under EU rules which oblige the member-state where the asylum seeker first landed to take him or her back.

Britain can opt out of individual EU laws on asylum and immigration, if it chooses. But this special exemption has not diminished its influence on EU migration policy.

⁸ *The integrated approach proposed by Britain and others has had an impact on the EU's relations with several African countries, including Ethiopia, Senegal, Côte d'Ivoire and Libya. India has recently indicated that it wants to sign up to a comprehensive deal with the EU on migration issues.*

The UK can still participate in and shape negotiations concerning immigration, even when it does not intend to adopt the resulting legislation. Britain was particularly influential in 2005, when it held the rotating presidency and proposed a new 'joined up' approach to dealing with the countries that are sources of migration. The EU had tended to treat issues such as border controls, visa liberalisation, economic aid and trade policy separately, when it dealt with a particular country.⁸

However, Britain worries about EU discussions on the harmonisation of criminal law and court procedures. Most EU member-states have civil law systems, which work in a fundamentally different way from Britain's common law. Any move towards harmonisation – though the political and technical difficulties would be immense – could adversely affect Britain's legal traditions. The Conservatives say they are alarmed by the Lisbon treaty's introduction of majority voting on criminal law and by the fact that it will give the European Court of Justice (ECJ) powers to rule on cross-border criminal measures like the European arrest warrant. The Tories fear that an integrationist judgement from the court could start to create an EU body of criminal law, resulting in an unacceptable loss of British sovereignty.

In his speech on November 4th, Cameron made clear that he would not accept the court having a say over UK criminal law. But he failed to acknowledge that Britain has already successfully negotiated a plethora of safeguards to prevent any future undermining of the common law. In any case, the treaty prevents the ECJ having full jurisdiction over EU criminal law agreements until 2014. When that deadline expires, the UK has the option of pulling out of all EU criminal law measures agreed before December 2009. Furthermore, the Lisbon treaty:

- ★ Extends the UK's current opt-out on immigration and asylum policy to cover any EU law affecting the police or criminal justice. Britain cannot stop other EU countries from harmonising their criminal laws if they wish to do so, but it does not have to take part. As before, the British can still intervene and shape negotiations on any JHA matter, even though the resulting deal will not apply to the UK.

- ★ Creates an 'emergency brake' procedure for EU negotiations on criminal law. Any country that thinks a draft EU law poses a threat to its criminal justice system may press the brake. The disputed law will then be discussed by the European Council. The country that pressed the brake cannot block the law, if nine or more member-states are in favour, but it is not obliged to take part. So even if the UK chooses to opt in to future negotiations on a criminal law measure, it can still use the emergency brake to avoid being forced to take part in the outcome.

- ★ Bans the ECJ from having any say over matters affecting national security, the use of force by a country's police or the activities of intelligence services. Officers at Europol will never have the power to arrest people.

★ Allows the possibility of the EU establishing a European Public Prosecutor (EPP), which could initiate prosecutions in national courts, principally in cases of fraud against the EU budget. Such an EPP would be a stronger version of the current Eurojust. But the treaty enables Britain (or any other country) to pull the emergency brake to resist the creation of an EPP. If the brake is applied, other countries would be free to set up an EPP among themselves, but the prosecutor would have no powers in the courts of the countries that chose not to be involved.

Britain would struggle to secure a more generous deal on criminal justice issues than the one outlined above. The country has already secured wide-ranging exemptions. No member-state wants to lose control over its criminal law system, yet none has been catered for so extensively as the UK. It is more likely that renewed demands to reopen the Lisbon treaty's chapters on justice and home affairs would exasperate other EU members and snuff out Britain's long-standing, and positive, influence in this policy area. The UK's police forces would grumble if the Conservatives found a way of opting out of the European arrest warrant, which has been used to fast-track the extraditions of over 350 fugitives from British justice since it took effect in 2004 (and the average time taken to extradite a suspect has fallen from 18 months to about 50 days). A row over criminal justice would also undermine the Conservatives' other ambitions, such as working more closely with the EU's border agency, Frontex, on illegal immigration.

However, a Conservative government might be able to garner broad support for a protocol to protect the special position of any EU legal system that uses common law (the others are in Cyprus, Ireland and Malta). The protocol could repackage the existing safeguards and emergency brakes available to Britain and state that no future measure or court ruling can undermine the fundamental characteristics of common law, such as the right to trial by jury, the powers of judges to set legal precedents and the presumption of innocence. It could also redefine co-operation between the Schengen area of border-free travel and non-Schengen countries like Britain and Ireland. The protocol could state that countries outside Schengen would have the right to join the Frontex border agency as long as they contributed to it financially (Britain has twice been rebuffed in its efforts to join). The price for such a protocol would be a promise from Britain not to opt out of EU criminal law co-operation in 2014.

Hugo Brady

A second area where Cameron seeks an opt-out is the Charter of Fundamental Rights, first negotiated in 2000 and now part of the Lisbon treaty. The charter consists mainly of rights and freedoms that EU countries have signed up to in various other documents, such as the European Convention of Human Rights. It adds some aspirational 'principles', like the right to job training and health care, but specifies that these will only have meaning insofar as they are already applied and practiced in individual member-states. Thus the 'right to strike' will not create new worker entitlements beyond existing national labour laws.

Nevertheless, British business leaders worried that such principles could one day start to undermine the UK's liberal jobs market. And some eurosceptics fear that a person could go to a court and ask for one of the principles in the charter – such as the right to housing – to be made applicable. So during the drafting of the Lisbon treaty, Tony Blair's government insisted on a protocol specifying that the charter does not create new labour or social rights and that it does not extend the ability of any court (British or European) to strike down UK laws. Poland also signed up to this protocol, which though legally-binding is strictly a clarification rather than an opt-out.

The Cameron government should be able to negotiate a new protocol that clarifies – in even stronger language than the existing charter and protocol – that nothing in the charter can affect what happens in the UK. But the UK would find it extremely hard to opt out of the charter, for two reasons.

One is that its partners would not agree: the charter is an integral part of the Lisbon treaty. The other is that opting out does not make sense legally. Because the charter gathers together existing rights already referred to in the European Convention on Human Rights and in national laws, and because it does not create new ones, an opt-out would imply that Britain was renouncing rights it had signed up to elsewhere. Furthermore, suppose that Britain opted out and the ECJ then ruled that an EU directive breached the charter: the

directive would apply in Britain but not in other member-states and EU law would then not apply evenly throughout the EU. For these reasons, UK government lawyers advised during the negotiation of the Lisbon treaty that a British opt-out would be meaningless. If a Conservative government did somehow manage to negotiate an opt-out, the underlying rights referred to in the charter would still apply, which means that the opt-out would have no effect.

Opting out of social and employment law

The third, and most difficult area in which Cameron wants to repatriate powers to the UK is social and employment policy. This has long been a neuralgic issue for the Conservative Party. During the negotiation of the Maastricht treaty, in 1991, Prime Minister John Major's employment secretary, Michael Howard, threatened to resign unless Britain won an opt-out from the treaty's social chapter. Major succeeded in opting out of the treaty articles allowing for EU legislation on equal rights for men and women, working conditions and the consultation of workers.

However, shortly after Labour took office in 1997, Tony Blair opted back in to the social chapter during the negotiation of the Amsterdam treaty. In fact the most controversial EU social and employment measures, such as the working time directive, have stemmed not from the social chapter, but from the EU's treaty articles on health and safety. In any case the social chapter no longer exists, its articles having been distributed through other parts of the treaties. The Lisbon treaty made no changes to the articles on employment and social policy.

On November 4th Cameron said that “we will want to negotiate the return of Britain's opt-out from social and employment legislation in those areas which have proved most damaging to our economy and public services, for example aspects of the working time directive that are causing real problems in the National Health Service and the fire service.”

Wisely, Cameron is not seeking simply to restore the opt-out from the articles that once constituted the Maastricht social chapter. His advisers acknowledge that some laws derived from those articles, such as those on rights to parental leave, are desirable. But they say that a Conservative government would probably ask not only for changes to legislation but also for opt-outs from treaty articles. They also say that they have not yet decided which articles to focus on.

If a Conservative government does ask for Britain-specific opt-outs from treaty articles governing employment, it will find other governments unwilling to oblige. They believe that Britain's relatively liberal employment laws help it to win foreign investment that would otherwise go to continental Europe. They do not want to give the UK an even bigger – and as they would see it, unfair – advantage in this area. And they know that if Britain won an opt-out from EU rules on employment, many Central European states would insist on having the same opt-out. If around a third of the member-states did not have to respect EU rules on employment, the single market would be irretrievably fissured, in the eyes of many governments.

But if Cameron is prepared to go for symbolism rather than substance, he may be able to obtain a special deal on social policy. The Brussels institutions are skilled at cooking pieces of euro-fudge, allowing all parties to claim satisfaction. A compromise could build on the fact that the argument over EU social policy is to quite a large extent a hangover from the past, when Jacques Delors and Margaret Thatcher used to provoke each other by advocating and opposing the ‘social dimension’. It is many years since the Commission proposed a significant new piece of social or employment law, and there are none in the pipeline (see box on page 22).

Britain could seek a political agreement that the opt-out provisions of the working time directive would be maintained, and that the EU would not pass new laws on employment conditions for a defined period of time. It could also ask for a protocol stating that social policy should conform to the principle of subsidiarity – the idea that decisions should be taken at the lowest level of government possible.

'Social Europe' loses momentum

The EU's involvement in social policy is much less controversial than it was in the 1990s, when the Commission churned out a series of directives on employment issues. Nonetheless the directive on working time – first agreed in 1993, but not implemented in Britain till 1998 – is still causing headaches for the governments of Britain and other countries. David Cameron highlighted the problems caused by this directive in his statement on November 4th.

The working time directive established the principle of a 48-hour working week, and at least four weeks paid holiday a year. It allows member-states to give any worker the right to opt out of the 48-hour rule, so long as he or she does so voluntarily. Britain and a few other member-states such as Malta have chosen to exercise this blanket opt-out; others have applied the opt-out only to certain sectors of the workforce. But in Britain's National Health Service (NHS), the doctors – encouraged by their trade union, the British Medical Association – decided not to opt out. The 48-hour working week for British doctors was finally introduced in August 2009. Now a number of doctors – including the president of the Royal College of Surgeons – have complained that restrictions on their working hours are damaging the training of doctors, and even putting patients' lives at risk. The government responds that patients do not want to be treated by over-tired doctors.

The real problem in Britain is that the NHS's resources are limited: there are not enough doctors, or big enough budgets to pay for importing extra doctors, to satisfy a strict interpretation of the EU rules. Two ECJ rulings, in 2000 and 2003, which are together known as *Simap-Jaeger*, are a particular problem. The Luxembourg court ruled that the time doctors spend 'on call' should count as working time. Britain and many other member-states do not fully implement this ruling, with the result that doctors on call are not paid. In 2004 the Commission proposed a new working time directive, partly so that it could reduce the impact of *Simap-Jaeger* on health services. During the

following five years of negotiations, the European Parliament and several governments, including France, sought to remove the provision allowing employees to opt out of the 48-hour rule. Britain, with great difficulty, assembled a blocking minority – including Germany and Poland – that prevented the removal of the opt-out. The Council of Ministers finally agreed on a text during the Czech presidency in early 2009. But the European Parliament voted against the Council's text, saying that it would only accept a directive without the opt-out.

Britain's Labour government and Conservative opposition agree on the fundamentals of this directive: they both want the opt-out provision to remain, and they both want the ECJ rulings overturned. The status quo suits Britain, though there is a risk of the Commission starting infraction proceedings against it and other countries that do not count on-call time as working time. If the Commission comes up with a new draft directive that seeks to overturn *Simap-Jaeger*, but leaves other working time matters alone, that would also suit Britain – though the European Parliament would probably reject it. If the Commission seeks to revise the whole of the current directive, there is a risk that Britain's blocking minority could crumble (Germany's support for maintaining the opt-outs may be wobbly).

Another employment measure that has raised emotions is the posted workers directive, according to which the pay and conditions of a worker posted from country A to country B should not undermine the minimum norms established in B. Two ECJ rulings have annoyed trade unions by stating that firms posting workers to another member-state do not have to respect all the collective bargaining arrangements established in the host country. If posted workers had to comply with those arrangements, said the court, the principle of free movement of labour would be threatened. This became an issue in Britain in 2009, when workers went on strike at several oil refineries, claiming that posted Italian and Portuguese workers were undermining a national agreement on pay and conditions (the dispute was resolved before it was established whether that national agreement had been breached). The trade unions and many Socialist parties want the Commission to propose new legislation that would overturn the ECJ rulings. José Manuel Barroso, the Commission president, has said that the matter is under review, but most governments do not want the rules on posted workers changed.

There is one major piece of social legislation currently in the pipeline: a directive against discrimination on grounds of race, sexual orientation,

disability or religious belief. The UK supports this measure, since it will bring other EU countries up to the standards on non-discrimination that already apply in the UK.

The Commission plans no further significant legislative measures on employment. The arrival of a new team of commissioners at the start of 2010 will do little to alter the Commission's economically liberal orientation. The accession of the Central and East Europeans has killed off the idea that the EU should legislate on subjects like minimum wages. Nevertheless the entry of those countries has reignited fears in France and elsewhere of 'social dumping' – the diversion of investment towards countries with liberal employment laws. Furthermore, the financial crisis and the perception of the failure of 'Anglo-Saxon' capitalism have made some politicians step up their rhetoric on the need for 'social Europe'.

The EU is due to replace the ten-year-old 'Lisbon agenda' of economic reform with a new economic programme, to be known as 'Europe 2020', during the Spanish presidency in 2010. This will certainly stress social Europe more than the Lisbon agenda did. But the word social will mean an emphasis on skills, training and job creation, rather EU legislation on employment conditions, which few governments want.

Britain could request a special protocol that would sort out one of the most contentious issues of the working time directive. As the box explains, the *Simap-Jaeger* judgements of the ECJ say that time spent 'on call', for example by junior hospital doctors, should count as working time. Many governments oppose this ruling and could support a protocol that overturned *Simap-Jaeger*. There is a precedent for using a protocol to overturn a court ruling: in the 1990 Barber judgement, the ECJ said that pension schemes should not allow men and women to retire at different ages. EU governments feared that implementing the Barber judgement would bankrupt their pension systems, so they overturned it in a protocol attached to the Maastricht treaty.

However, the negotiations on social policy are bound to be difficult. Europe's trade unions and the European Parliament are strongly

opposed to the provision of the working time directive that allows workers to opt out of the 48-hour rule. Social policy is more politically sensitive in a country like France than it is in Britain. Indeed, many French politicians believe that if the EU is going to reconnect with ordinary voters it needs to play a much bigger role in social policy. Luckily for the Conservatives, those views are shared by only a minority of the member-states.

Will Cameron get what he wants?

A Conservative government is more likely to obtain the protocols it desires if it deals with other governments in a tactful and measured manner, and if it comes up with constructive new ideas in some policy areas. To judge from Cameron's statement on November 4th, he seems to have understood this point. "We will not rush into some massive Euro-bust-up", he said. "We will take our time, negotiate firmly, patiently and respectfully, and aim to achieve the return of the powers I have set out over the lifetime of a parliament."

He said that William Hague, the shadow foreign secretary, was leading the detailed work on exactly what needed to change, and that if the Conservatives won the election, Hague would "draw on the specialised legal advice which the government has available to it, as well as the expertise of officials from the Foreign Office and other relevant departments".

In the same statement Cameron talked of the EU's achievements in spreading democracy and the rule of law across the European continent. He said he looked forward to working with other EU governments on challenges like energy security, climate change, restoring economic growth and global poverty. And if he does, as his advisers promise, take a positive attitude to many issues on the EU agenda, he will earn the good will of his fellow heads of government.

The other leaders in the European Council will want to do business with the prime minister of one of the most important member-

states. Newcomers to the club are generally treated with respect and benevolence.

But if Cameron's negotiating tactics become heavier, or if senior figures in his party resort to intemperate eurosceptic rhetoric (of the sort practiced by some of John Major's ministers), that goodwill will soon dissipate. Most European leaders are well and truly fed up with the long years of negotiation that led to the constitutional and Lisbon treaties. They know that the EU faces many pressing challenges, including those mentioned by Cameron on November 4th. And they also know that if talks with a Conservative government drag on for years, and become acrimonious – which is very possible – they will distract everyone from dealing with those challenges.

The Conservatives may face a number of difficulties in trying to negotiate opt-outs in the form of protocols. First, Cameron's decision to disengage the Conservatives from the centre-right European Peoples' Party (EPP) in the European Parliament has greatly annoyed a number of other leaders, notably Chancellor Angela Merkel and President Nicolas Sarkozy. The EPP remains the leading force in the European Parliament, despite the Conservatives forming the European Conservatives and Reformists group with other parties, including the Polish Law and Justice Party and the Czech Civic Democratic Party. Some senior Conservatives admit that quitting the EPP has caused their party more grief than they had expected. The importance and power of Europe's political groupings was evident during the discussions over who should get which job created by the Lisbon treaty: the EPP heads of government decided that their group would take the presidency of the European Council, and they did a deal with Socialist leaders that the High Representative should come from one of their parties.

Conservative strategists emphasise that a Cameron government would proceed cautiously rather than demand a lot of concessions from its partners all at once. They believe they can achieve their objectives by building relationships with other leaders – and doing

them favours from time to time – over a period of several years. They are right to think of moving slowly over renegotiating the treaties; over time, the annoyance of Merkel, Sarkozy and others over the EPP withdrawal will diminish.

But the second potential problem is that a Conservative government will need to find an accession treaty onto which its special protocols can be attached. The Conservatives know that the other governments would be unwilling to go through the onerous procedure of ratifying changes to the existing treaties merely for some Britain-specific protocols.

Only one country is certain to join the EU during the life of the next British parliament: Croatia. Its accession treaty will probably be completed within a year of the British general election. Iceland may also join the EU, and if it does, it will do so either at the same time as Croatia or soon afterwards. So if a Cameron government wants opt-outs that can be made legally binding in the form of protocols attached to an accession treaty it will need to move swiftly. After Croatia and Iceland, there is likely to be a wait of five years or longer before any other country (such as Serbia or Macedonia) enters the EU.

A third potential difficulty is that the procedure for negotiating special protocols may be more complicated than Conservative leaders imagine. They assume that they can strike the necessary deals on opt-outs with the heads of government in the European Council, without having to involve other EU institutions. However, the Lisbon treaty changed the procedure for modifying the EU treaties. Under the old procedure, the European Council had to call an inter-governmental conference (IGC) – a meeting of representatives of the 27 governments – to do the drafting. But the Lisbon treaty was preceded by a convention that brought together national and European parliamentarians, as well as the Commission and the national governments, to debate and draft what became the constitutional treaty. That text was then modified by an IGC, and

modified again by another IGC when the constitutional treaty evolved into the Lisbon treaty.

Although some governments considered the last convention a jamboree that produced more windy rhetoric than substantive discussion, they all agreed to a new rule in the Lisbon treaty: the normal procedure for changing the treaties is to hold a convention, followed by an IGC. However, there are two exceptions to this rule.

First, the European Parliament may give the governments permission to change the treaties without a convention, if it considers the changes under consideration to be relatively minor, though every member-state would still have to ratify the change. The Conservatives should not assume that the European Parliament would agree to dispense with a convention, particularly if the treaty change involved a British opt-out from social policy.

Second, the Lisbon treaty provides a fast-track mechanism for changing the treaties, without a convention or IGC, provided there is unanimity in the European Council. This is the provision under which the *passerelle* clause, discussed earlier, operates. Treaty changes made in this way must be ratified by each member-state. However, this fast-track mechanism can only be used for internal policies. Thus it could not be used in areas such as trade or foreign policy – or for a justice and home affairs protocol.

A fourth potential problem for the Tories is that their leverage over other governments will be relatively limited. Some senior Conservatives say that it should not be difficult to negotiate an opt-out from social policy, since John Major managed to do so at Maastricht. But Major was always likely to win his opt-out: if he had not got what he wanted, he would have vetoed the Maastricht treaty. Cameron has no equivalent leverage to use against other governments. Conservatives point out that Ireland and the Czech Republic were able to negotiate the protocols that are due to be added to the Croatian accession treaty. But those two countries had

leverage: they would not have ratified the Lisbon treaty without those protocols.

So what could a Cameron government do in order to strengthen its hand? It could threaten to leave an empty chair, as President Charles de Gaulle did in 1965, in protest against the introduction of qualified majority voting. John Major did almost the same thing in May 1996, in protest against the ban on British beef at the time of mad cow disease. British ministers turned up to meetings but consistently blocked all measures that required unanimous support, including those that Britain had itself proposed. After three months Major climbed down without having achieved his objective.

Britain could leave an empty chair in 2010, thereby thwarting Croatian and Icelandic accession, although EU enlargement has been a longstanding objective of the Conservative Party. And Britain could veto international treaties between the EU and other countries, some of which require unanimity. Agreements on the EU's seven-year budget cycle also need the unanimous approval of every member-state, but the damage that Britain could inflict in this area is relatively limited: if it blocked agreement on the new series of budgets that is due to start in 2014, the old budget would continue. One consequence of Cameron leaving an empty chair would be to incur his partners' ill will, making them unwilling to do the Conservatives favours in areas that matter for Britain.

In his November 4th statement, Cameron wisely did not threaten an empty chair. But he did threaten something else, for the parliament after the next one. "If [Britain] cannot get these guarantees, and if Europe continues to head in the wrong, centralising direction....we would not rule out a referendum on a wider package of guarantees to protect our democratic decision-making, while remaining, of course, members of the European Union." Presumably the point would be to seek a direct a mandate to repatriate powers in certain areas, as a means of forcing Britain's partners to bend.

This is a pistol aimed at the heads of other European leaders. Cameron must hope that its existence will achieve the desired effect, and that he does not have to pull the trigger. In any referendum campaign on pulling out of EU rules on social policy, Conservative leaders might lose control of the party's eurosceptics, and it is not certain the government would win; some people like the fact that the EU prevents them from working more than 48 hours a week. But if the Conservatives won a referendum, and then the other governments refused to change the relevant treaty articles – which is very plausible – then what? Within the UK, pressure for quitting the EU would grow.

Cameron knows that if he fails to deliver on the pledges he made on November 4th, his party's eurosceptics will give him a hard time. If he forms a government with an overwhelming majority in the House of Commons, he will be able to ignore the demands of the most vociferous eurosceptics. But what if he has a majority of only 21, as John Major did after the 1992 general election? Cameron could then become a hostage of the eurosceptic fringe, as did Major. Cameron could be driven to seek more concessions on social policy than Britain's partners were willing to grant. He might then need to pick up that pistol to strengthen his domestic position.

Scoring goals in other areas

Cameron will face heavy pressure to deliver on treaty change. But he would be well advised not to focus all his energies on the treaties, particularly in the area of social policy, where he is likely to be stymied by other governments. Cameron and Hague should take whatever they can get in a protocol on employment law, together with a political agreement that the working time directive opt-outs should be kept, plus protocols on judicial co-operation and the Charter of Fundamental Rights. But they should save some ammunition for forthcoming battles in some key areas where British interests may be threatened. They will need to concentrate their fire on a small number of targets, rather than try to achieve victories on every single subject.

One area they should focus on is the EU budget negotiations. The current, seven-year budget cycle ends in 2013. In 2010 the EU will discuss the broad objectives of the EU budget, and in 2012 the Commission will table budget proposals for the seven years starting in 2014. The Commission will also unveil plans for reform of the Common Agricultural Policy – which, together with rural development, consumes about 40 per cent of the EU budget – and the regional funds, which account for much of the rest.

Cameron could, for example, seek an agreement that the proportion of the EU budget spent on agriculture would decline by a certain amount over the seven-year cycle, and that Britain would keep the major part of the rebate that Margaret Thatcher won in 1984.⁹ He could also argue for the budget to be linked directly to the 'EU2020' programme of economic reform that is due to be agreed in the first half of 2010: more of the budget should be spent on objectives that boost the European economy, such as pan-European energy grids, and carbon capture and storage.

⁹ On October 29th 2009, Geoff Randall wrote in his *Daily Telegraph* column of the 2005 budget negotiations: "Our hard-won EU rebate, worth billions, was handed back – for nothing in return." That is wrong. The rebate still exists though it was shaved, mainly to take account of the costs of enlargement. The more the CAP is reformed, the less unfair the overall budget will be to the UK, and harder it becomes to justify the British rebate.

Another priority for Cameron should be safeguarding the interests of the City of London. Rules on financial regulation are subject to qualified majority voting, so Britain does face the potential risk of being out-voted, despite having a much bigger financial services industry than any other member-state. Some other governments may be keen to use heavier EU regulation to disadvantage the City.

Take the example of the alternative investment fund managers directive, which at the end of 2009 was still being argued over. France and Germany pressed the Commission to come up with this directive, which covers the hitherto largely unregulated private equity and hedge fund sectors – despite the fact that neither of these industries played

a significant role in causing the financial crisis. The initial draft, drawn up in a hurry without much consultation, was “poorly constructed, ill-focused and premature”, to quote a report commissioned by the European Parliament. It would have prevented American funds from marketing in the EU and could have led to many firms relocating from London to Zurich. When the Council of Ministers and the European Parliament agree on a final version of this directive it will hopefully not cause much damage to the City of London.

George Osborne, the shadow chancellor, has said that the next Conservative government will have a Treasury minister based in

¹⁰ *Financial Times*, Brussels.¹⁰ The Conservatives say this is necessary because in recent years the Labour

government has taken its eye off the ball while the EU has hatched a series of financial regulations that may hurt the City. Until now no member-state (other than Belgium) has ever based a minister in Brussels. Placing a Treasury minister in Brussels would be a bad idea if he or she undermined the role of the permanent representative, who leads a highly-effective and professional team of officials in the UK representation. But if the minister spent time building friendships and alliances in the Commission, the European Parliament and the national governments (which are of course not in Brussels), in order to influence future legislation, the City could benefit.

A piece in *E!Sharp* by David Rennie offered some good advice for a Cameron government: “Sane countries like Sweden say they cannot imagine imposing regulations on the UK against our will, because the impact on us is too big. Get that in writing: a political pledge from

¹¹ <http://www.esharp.eu/issue/2009-6/Global-Eyes> the other leaders that Britain has a veto on financial regulation affecting the City.”¹¹

And what if Britain's partners refused to go along with that? Cameron could then threaten to wield the ‘Luxembourg compromise’ to block any attempt to regulate financial markets that ignored the interests of the City. The Luxembourg compromise is an informal agreement concocted in 1966 in order to persuade de Gaulle to abandon his

policy of leaving an empty chair. It allows a government to veto a law that is subject to qualified majority voting, if it believes its ‘vital interests’ are under threat. In the 1960s, 1970s and 1980s a number of governments threatened to use this weapon, thereby dissuading the other countries from outvoting them. In 1992 France said it would use the Luxembourg compromise to prevent an agreement in the Uruguay trade round that would have cut subsidies to French farmers – and as a result it won them a better deal. No government has used the weapon since then (to this author's knowledge).

A positive agenda for the EU

In all these forthcoming arguments between Britain and its partners, Conservative leaders are more likely to get what they want if they show that they are making a positive contribution to some parts of the European agenda. In at least three areas, Conservatives could come up with policies that are true to their own traditions and principles yet also constructive at an EU level.

The new Lisbon agenda

For the past ten years the EU has been pursuing an agenda of economic reform, known as the ‘Lisbon agenda’, with mixed success. Many countries have failed to meet key targets such as raising the level of employment in their workforces to 70 per cent, while the long saga of the governments' inability to agree on a single European patent continues. Liberalisation of general services and of energy markets has been insufficient. But there has been progress on liberalising telecoms, financial services and postal services, while some governments have reformed labour markets and pension systems. To their credit, shadow ministers such as William Hague and George Osborne have supported the EU's Lisbon agenda. During the Spanish EU presidency, in the first half of 2010, EU leaders will adopt a new economic reform strategy, to be known as ‘EU2020’. The Conservative Party could exert real influence on the terms of the debate if, before the British general election, it came up with its own ideas for the strategy.

Constructive engagement from the British will be crucial, because many Europeans believe that the financial crisis has discredited 'Anglo-Saxon' capitalism – and hence, by implication, the broadly liberalising assumptions of the Lisbon agenda. Against this backdrop, the new Commission will need encouragement to hold the line against governments whose protectionist instincts may threaten the single market or block further efforts to free up product and labour markets. With most politicians focused on the need to boost demand in their economies, it will be more important than ever to make the case for open markets and supply-side reform.

The Conservatives should argue that far from discrediting the Lisbon agenda, the economic crisis has underlined the continued urgency of most of its key goals: raising employment and productivity, consolidating stretched public finances, and preparing for the rapid ageing of populations. Meeting these goals will inevitably require micro-economic reforms – and a special emphasis on improving skills. The Conservatives should oppose attempts to turn the strategy into a wish-list of vague social targets. In most EU countries, poverty, inequality and long-term unemployment do not reflect excessive market liberalisation or low levels of social transfers (as many believe). They are largely the result of poor skills and under-performing education systems.

The Conservatives should also make the case for reforms that encourage innovation. They should try and steer the European debate away from its current emphasis on R&D spending – a poor proxy for the innovative capacity of an economy – and towards removing obstacles to the diffusion of new technologies, as well as helping high-tech companies to grow. The focus should be on improving the availability of venture capital; fostering links

¹² Simon Tilford and Philip Whyte, *The Lisbon scorecard IX: How to emerge from the wreckage*, CER report, March 2009.

between universities and business; using public procurement intelligently to create lead markets for new technologies; and fostering investment in the green economy.¹²

Climate change and energy

Most Conservatives accept that when it comes to combating climate change and ensuring energy security, action at EU level is an important part of the answer. Everybody agrees that greater energy efficiency is essential to tackling carbon emissions and improving energy security. In December 2008 EU leaders committed to improving energy efficiency by 20 per cent by 2020. The problem is that most energy experts believe that the EU stands little chance of meeting this target.

The Commission is coming up with several directives on energy efficiency, such as one requiring new buildings and major renovations to meet higher efficiency standards. But this is not enough. More action is needed to ensure that buildings, factories and power stations waste less energy. In particular, little is being done to retrofit older housing stock. National governments have resisted the concept of binding targets on energy efficiency at the EU level, but without such targets they are unlikely to take the necessary steps. A Conservative government should be in the forefront of pressing for tougher action from the EU on energy efficiency.

The EU's emissions trading scheme is a valiant attempt at using a market mechanism to discourage companies from emitting CO₂. But it is not working: with a carbon price currently at €14 a tonne, firms have little incentive to invest in carbon-efficient equipment. The Conservatives should propose that the EU set a floor under the price of carbon, of at least €30 a tonne. Adair Turner, the chairman of the UK climate change committee, has already called for such a floor. Without one, the private sector will not invest in nuclear power, renewables or carbon capture and storage (CCS). Since Britain and Germany are the biggest recipients of emissions trading permits, Cameron and Merkel could take a joint initiative on setting a floor price.

As already mentioned, the Tories should propose that a greater proportion of the EU budget be spent on economically useful objectives, such as energy grids and CCS. A new electricity grid is

needed to transfer wind energy from the North Sea to the countries around it. Another grid could take solar power from the Sahara to Southern Europe. The Nabucco pipeline needs both diplomatic and financial support if it is to bring Caspian gas into the EU. The EU has agreed to build 10 to 12 CCS demonstration plants by 2015, but not yet allocated most of the money. If CCS takes off, networks of pipelines will have to be built to take CO₂ to underground storage sites. All these projects require huge investments, some of which will have to come from the EU.

European defence co-operation

The EU's role in defence has long been unpopular among Conservatives. But with the French back in NATO and the Americans now keen that the EU should play a greater role in defence, Conservatives have a chance to recognise – as most others do – that NATO and the ESDP are complementary rather than competitive. For example, NATO does not go in for deploying policemen, judges, border monitors and customs officers to trouble-spots, yet the EU specialises in such missions. Meanwhile the EU does not seek to emulate NATO's preparations for 'high-intensity' warfare. And the EU, unlike NATO, can encourage much-needed defence industrial consolidation and thus the emergence of a more efficient European industry.

Conservatives are right to sneer at the military capabilities of many EU countries: more than half of them have armed forces that are not sufficiently well-trained or equipped to engage in serious military conflicts. But Britain, like the US, has an interest in its allies improving their military capabilities. If more partners can fight alongside the British in Afghanistan, so much the better.

The French are big believers in EU defence. Since Sarkozy became president they have focused on using the ESDP to generate better military capabilities – a goal they share with the UK. If a Conservative government took a constructive attitude to EU defence it would earn a lot of credit in Paris. The Poles – who take

defence seriously – hold the EU presidency in the second half of 2011 and have already launched an initiative with the French to develop the ESDP. A Conservative Britain should ask Paris and Warsaw to make this a trilateral initiative. Such a move would run against the instincts of some Conservatives. But they should remember that whenever the British take the lead in EU defence, others tend to follow, since they know that Britain has the best armed forces in Europe. Furthermore, EU defence is organised on a largely inter-governmental basis (the Commission is only involved in questions of trade and industry).

Britain, France and Poland share an interest not only in strengthening Europe's military muscle, but also in improving co-operation between the EU and NATO. Though complementary, the two institutions barely talk to one another. Turkey prevents NATO from working with the EU as a way of pressuring European governments to do more to assist its membership ambitions and to lift their blockade of Northern Cyprus. Cyprus blocks the EU from working with NATO because of Turkey's refusal to open its ports and airports to the Greek Cypriots. This ridiculous dispute means that NATO is not formally allowed to protect EU personnel in Kosovo or Afghanistan. The Conservatives should work with the French and the Poles to break the logjam. If such a move fails they should consider invoking the Lisbon treaty provisions that allow the most militarily capable member-states to form their own club – and then push such a group, which would not include Cyprus, to forge a closer relationship with NATO.

With defence budgets under pressure all across Europe, governments can get more capability for less money by working together. For example they can pool resources in less sensitive areas like the maintenance of equipment, catering, logistics and air transport. This makes most sense for the smaller countries that will be incapable of fielding serious forces for allied missions unless they team up with others. But even Britain can no longer afford to maintain a full spectrum of military capabilities. It should work with its more

¹³ Clara Marina O'Donnell, 'Britain must pool defence capabilities', *CER bulletin*, October/November 2009.

capable partners on pooling and on specialising in certain roles.¹³ France has only one aircraft carrier, while Britain may not be able to afford both the carriers it plans to build. When Britain or France is short of a particular capability or technology, why not ask the other one to help out?

Common European equipment programmes have an unhappy track record, largely because participating governments tend to use their share of the work to prop up inefficient national champions. A Conservative government should demand that the European Defence Agency (EDA) improve the efficiency of the programmes it manages by making greater use of open procurement. Until now the Conservatives have opposed the Commission's efforts to open up defence procurement in the single market, on the grounds that this is 'supranationalism'. They should think again: since Britain has the most open defence markets, and the most efficient defence industry, it has the most to gain from the removal of protectionist barriers. The Conservatives should also urge the US to relax export controls on sales of defence equipment to Europe – and they should push the EDA to engage with the Americans to ensure that transatlantic barriers to the defence trade are kept to a minimum.

Confronting the hard-liners

However a Cameron government handles Europe, hard-line Conservative eurosceptics will not be satisfied. Cameron's statement on November 4th led to the resignations of two MEPs, Daniel Hannan and Roger Helmer, as front-bench spokesmen; they had wanted a referendum. But Conservative leaders found the eurosceptics' reaction more muted than they had feared. Of the main newspapers, only the *Daily Mail* and the *Express* were strongly critical of Cameron for abandoning his referendum pledge. At the moment, most Conservatives understand that their party needs to stay disciplined in order to regain power.

But if and when the Conservatives win the election, some of that discipline will weaken. A lot of activists and MPs will let their true feelings about the EU spill out. At some point Cameron will have to take stances on Europe that many of his party's rank and file dislike. When that time comes, he will need to educate them on how much the EU has changed since the Tories were last in office.

As the introduction to this essay explained, the EU has in many ways moved in a direction that suits Conservatives, partly because of enlargement. Social policy has become less important, nobody is putting pressure on Britain to join the euro, federalism is a waning force and very few governments are instinctively anti-American. Despite the financial crisis and the recession, the single market is still more or less in one piece. The resurgence of protectionism, doctrinaire socialism or far-right nationalism that many expected has not come about.

Most Conservative Party members are unaware how much the Union has changed since they were last in power. One of Tony Blair's achievements was to persuade Labour Party activists that the world had changed and that their party needed to accept the market economy; thus the party had to drop clause four of its constitution, on socialist forms of ownership. Can David Cameron display similar leadership with regard to his party's views on Europe?

David Cameron and William Hague are sincere when they say they want Britain to remain in the EU. But if they ask Britain's partners for opt-outs that are substantially different to those obtained by the Labour government during the negotiation of the Lisbon treaty, they are likely to fail. In a major clash between Britain and its partners, the eurosceptic forces which wish to drive Britain out of the EU would flourish. The ability of Cameron and Hague to control those forces must be open to question. Their best strategy would therefore be to seek only modest changes to the treaties, but to try and persuade other governments to grant them 'victories' in areas like social policy, the EU budget and financial regulation.

After a few years in power, Conservative politicians will discover the realities of European and global power politics. A middle-sized country such as Britain needs to work with other European governments, and the EU institutions, in order to pursue its international objectives. But the first few years of a Conservative government may be a rough ride for Britain and for Europe.

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Cameron's Europe: Can the Conservatives achieve their EU objectives?

Charles Grant

David Cameron, the leader of Britain's Conservatives and perhaps its next prime minister, has unveiled a new strategy for the European Union. Charles Grant assesses its viability and argues that Cameron's scheme to opt out of the EU treaties will be hard to pull off, particularly in the area of social policy. Grant urges Cameron to focus instead on safeguarding key British interests such as the City of London. He concludes that a Conservative Britain would boost its influence in the EU if it came up with constructive proposals on economic reform, energy, climate change and European defence.

Charles Grant is director of the Centre for European Reform.

ISBN 978 1 901229 93 6 ★ £8