The election of a Conservative government in 2010 would see a mainstream Eurosceptic party take office in one of the European Union’s largest states for the first time. This briefing paper examines the Conservative Party’s European policy after the ‘Yes’ vote in the second Irish referendum on the Lisbon Treaty and the Conservatives’ annual conference in Manchester in October 2009. It explores the policy options that the Conservative leadership might pursue should the Lisbon Treaty have entered into force and briefly assesses the divisions on Europe within the Conservative Party.¹

**Lisbon referendum**

Conservative policy on the Lisbon Treaty remains unchanged after the Irish ‘Yes’. If Lisbon has not been ratified by all 27 EU Member States when a Conservative government takes office, then it would suspend ratification, hold a referendum on the treaty and lead the campaign for a ‘No’ vote. The referendum would be held in “the opening months” of a Cameron government because of the time needed for parliament to pass the requisite legislation (a draft Bill was produced during the European election campaign) and requirements on the length of the campaign.²

The likelihood of this scenario has waned significantly since the Irish voted ‘Yes’ and President Kaczynski completed the Polish ratification process. Czech President Vaclav Klaus is the last great hope for Eurosceptics. The Czech Parliament has approved the treaty, but Klaus has refused to sign it. He is waiting on the outcome of a case before the Czech Constitutional Court – a verdict is likely in weeks not months – and the EU’s response to his demand for an opt-out in relation to the Charter of Fundamental Rights. The chances of Klaus holding out until the general election are slim indeed.

‘Not let matters rest’

The Conservative position on what would happen if they enter government with Lisbon already in force was not changed, or even been elaborated on significantly, after the Irish ‘Yes’. The formula remains that the Lisbon Treaty would lack legitimacy and that a Conservative government would “not let matters rest there”. Cameron has reiterated, not always convincingly, that his party will have only one policy on Lisbon at a time. So what options are the Conservative leadership likely to consider?

A commitment to a referendum on some aspect of Britain’s relations with the EU has its attractions. It has had centre place in the contemporary Conservative narrative on Europe which emphasises democracy
and trust rather than sovereignty and nationhood. A referendum would help to bridge the democracy and legitimacy deficits within the EU, and also restore some trust in the British political process. Having criticised Labour for failing to deliver the referendum it pledged on the EU Constitution, the Conservatives would be vulnerable to a backlash from members and voters should they drop the promise of a referendum altogether. A July 2009 ConservativeHome survey of party members found that 84% wanted a referendum on Europe if Lisbon is ratified.

Post-ratification referendum

A commitment to hold a post-ratification referendum on Lisbon would be fraught with difficulties. Although the leadership have not ruled it out, Cameron recognises that “a new set of circumstances” applies if the treaty is in force. Eurosceptics such as Daniel Hannan have also highlighted the problems with this option. Once Lisbon enters into force, it replaces earlier treaties and its provisions become firmly embedded into the *acquis communautaire* (the body of EU law). Disentangling the Lisbon provisions would be a tortuous process for which other Member States would have no appetite. To unravel them via treaty reform, Britain would have to persuade a majority of states to convene an Intergovernmental Conference (IGC) in which changes would have to be agreed by unanimity – and the agenda could include the extension as well as the winding back of EU competences – and then ratified by all. A Cameron government will challenge the EU but must pick its fights carefully. Waging a battle with other Member States across multiple fronts with few allies and almost no prospect of success would be the antithesis of this. The major domestic economic and political challenges in store for the next government also count against a post-ratification referendum.

Governments tend only to call referendums when they are confident of winning, but still often lose control of the agenda during the campaign. Voters use referendums to punish unpopular governments – and the Conservatives will have introduced spending cuts and perhaps tax increases. A post-ratification referendum could also mutate into a broader ‘in/out’ vote on membership of the EU, exposing divisions within the Conservative Party and straining relations with business. But a retrospective Lisbon vote would also be too restrictive as it would not cover measures introduced by the Amsterdam and Nice treaties, both of which were opposed by the Conservatives.

Policy repatriation

In their 2009 European election manifesto, the Conservatives made a commitment to negotiate the repatriation of EU competences on social and employment policy. There are echoes of the opt-out from the ‘social chapter’ that John Major negotiated at Maastricht, but matters are more complicated now because EU social and employment laws do not originate from a single treaty chapter from which the Conservatives could seek a derogation. A Cameron government would have to persuade other Member States to unravel the *acquis* and hand British companies a competitive advantage. It may have to settle, in the first instance, for a European Council declaration which is less watertight than treaty change.

Returning the right to make social and employment law to Westminster would not mean necessarily that a Conservative government would roll back existing policy. Were it to decide on repeal, the Working Time Directive, which limits working time to an average of 48 hours per week, and Agency Workers Directive, which gives temporary workers equivalent rights to full-time workers, would be prime candidates. The UK has a derogation on the former but this has come under pressure periodically, for example in 2008-09 when the European Parliament (EP) voted for the opt-out to be phased out. The Agency Workers Directive, which the Conservatives have opposed, is scheduled to be implemented in the UK by December 2011.
The Conservatives have also been particularly concerned about the development of EU powers in justice and home affairs. Lisbon gives the EU competence in judicial cooperation in criminal matters and police cooperation, and extends the use of qualified majority voting. The UK retains the right to opt-in to police and judicial matters but a Conservative government may seek further assurances. It could try to extricate Britain from those EU measures which Labour opted-in to, and seek assurances that Britain has not relinquished its veto over future developments in the areas that it has signed up to.

Under Michael Howard’s leadership, the Conservatives sought the repatriation of fisheries and international development policy. Both pledges were dropped by Cameron. On the former, the European Commission’s latest proposals for reform of the Common Fisheries Policy give Member States greater leeway to manage fish stocks and a Conservative government would press for further reform. On the latter, the Conservatives now identify international development as an area in which the EU should play a greater role, albeit without an extension of its competences.

What are the chances of successful policy repatriation? Persuading the other 26 Member States to accept extensive British demands would be difficult indeed, but not impossible. Cameron cannot rely on support from other centre right governments, especially in France and Germany. Pulling Conservative MEPs out of the European People’s Party (EPP) group in the EP damaged relations with the German Christian Democrat Union in particular. But a Cameron government would not be without influence or potential allies. There is, for example, no great appetite for extensive EU social policy in many countries – 14 other states have an opt-out on the Working Time Directive.

In addition, after years of uncertainty over the EU Constitution and Lisbon Treaty, even the most federalist governments would be wary of provoking full-scale conflict with Britain. Cameron has been talking tough on repatriation and showed that he would not bow to pressure from other EU leaders by leaving the EPP. John Major pursued a policy of non-cooperation when the European Commission banned the export of British beef during the BSE crisis (although it had little impact) and Margaret Thatcher blocked progress on the European Community budget until she secured an acceptable British rebate. Cameron might consider similar options, as a last resort, in regard to the EU’s next financial framework or enlargement. However, it is worth remembering that the Conservatives also have a pro-active agenda on the EU – positive messages formed a greater proportion of the Conservative European election manifesto in 2009 than in 2004 – and will want to win support for their positions on deregulation, climate change, international development and energy security.

**Repatriation referendum**

Policy repatriation may be coupled with a referendum as part of a twin-track Conservative European policy, pursued at both EU and national level. Lorraine Mullally of Open Europe has proposed a “referendum on reform” in which voters would be asked to endorse the government’s demands for policy repatriation and a threat to withhold agreement on the EU budget unless its demands are met. A ‘Yes’ vote might strengthen the government’s hand in negotiations, but would not guarantee success. Other Member States would be under no obligation to take heed of such a referendum – and they ‘have previous’ for by-passing referendum results. Furthermore, a manifesto commitment to repatriate social and employment policy would in itself give the government a clear mandate.

The risks of losing control of the agenda and airing internal party grievances would remain in a “referendum on reform”. They may be greater still in a referendum on the outcome of negotiations because some compromise will have been necessary. Harold Wilson called a referendum on continued EC membership in 1975 having concluded negotiations on a revision of British membership terms. But
the circumstances were different. Then a referendum was a means to unite a divided governing party and a pro-European public delivered the result that Wilson wanted. A post-renegotiation referendum under a Cameron government might expose rather than salve Conservative divisions, and a well-organised ‘No’ campaign (would some Tory Eurosceptics join it?) might persuade voters that a ‘No’ vote would force the government to seek more radical change. A promise of a referendum on policy repatriation will, though, appeal to the Conservative leadership given its European policy emphasis on democratic consent, and for tactical reasons. It would postpone the moment of reckoning and apply, temporarily at least, a sticking plaster to the sore of intra-party conflict.

Referendum on a future EU treaty

It is, though, already Conservative policy – and has been since William Hague’s leadership – to amend the European Communities Act 1972 so that any future treaty that transfers new competences to the EU must be put to a referendum. However, for the first time in more than two decades, a major EU treaty revision is not in the offing. An accession treaty will be required when Croatia joins the EU, which could be as early as 2011. These have not normally involved a transfer of competences, although the Croatia treaty may include declarations on the guarantees given to Ireland ahead of its second Lisbon referendum and on any new British opt-outs. The timing, and indeed likelihood, of a new treaty is also clouded by the ‘simplified revision procedure’ (the so-called ‘ratchet clause’) in the Lisbon Treaty. It allows Member States to agree that decisions currently taken by unanimity (except on defence) can in future be decided by a majority vote. The upshot is that EU treaties might be amended without recourse to an IGC. To be used, this procedure requires that all Member States agree by unanimity and that all national parliaments also give their approval. Under the European Union (Amendment) Act 2008, ministers may not support the use of the simplified revision procedure without the prior approval of Parliament. Will some Eurosceptics argue that the Conservatives’ promise of a referendum on the transfer of competences applies also to the use of the simplified revision procedure, or even to a decision to opt-in to new EU policies on justice and home affairs?

Parliamentary supremacy

Alongside a commitment to popular sovereignty, in the form of a referendum, a return to the traditional Tory notion of parliamentary sovereignty is likely. A Conservative government should make full use of the Lisbon Treaty’s provisions enhancing the role for national parliaments in EU governance. A more radical option would be to make explicit the supremacy of the Parliament allowing British courts to give effect to Westminster legislation that is expressly inconsistent with EU law. When Bill Cash tabled an amendment to the Legislative and Regulative Reform Bill 2006 reasserting the supremacy of the UK Parliament, 136 Tory MPs backed it. Support for a similar amendment to the European Communities (Amendment) Bill 2008 fell back to 40 as the whips put obstacles in its way. But the Conservative frontbench gave its backing to a supremacy clause proposed by Cash for the Parliamentary Standards Bill in 2009. Under Hague’s leadership, the Conservatives proposed legislation to ring fence ‘reserve powers’ on which EU law could not override the will of parliament, and limit the ‘treaty creep’ that had seen EU competences extended beyond their original intent. In the House of Commons in March 2008 Hague reiterated that he had “great sympathy with the constitutional safeguard of ultimate supremacy” but felt that further thought was needed.

Conservative concerns about the assurances negotiated by the Blair government on two further elements of the Lisbon Treaty add to the case for a statement on parliamentary supremacy. A protocol states that the Charter of Fundamental Rights does not extend the ability of the ECJ or any British court or tribunal
to rule that UK laws, regulations or administrative practices are inconsistent with the Charter. It further
states that nothing in the Charter creates justiciable rights that apply to the UK above those that already
exist in British law. Lisbon also extends legal personality to the EU, meaning that it will be able to be
sign treaties in its own right. A declaration states that legal personality does not authorise the EU to act
“beyond the competences conferred on it by Member States”.

Interest in parliamentary supremacy has also been revived by the verdict of the German Federal
Constitutional Court on Lisbon.16 Although the court found the treaty compatible with Germany’s Basic
Law, it suspended ratification until the German Parliament approved new measures to enhance its role in
decisions on the future transfer of competences to the EU. The Karlsruhe court also suggested that
Member States should retain sovereignty on issues such as criminal law, policing, and core fiscal
policies. It maintains the right to overrule EU legislation or decisions of the European Court of Justice
that violate the German constitution. One avenue for Eurosceptics in Britain may thus be to seek a ruling
from the new Supreme Court on the limits of EU competences. Also of interest in this context are
Conservative proposals to replace the Human Rights Act 1998 with a British Bill of Rights. The UK
would remain a signatory of the European Convention on Human Rights but a British Bill of Rights,
Conservatives claim, would constrain the influence of the European Court of Human Rights and restore
the leading role of Parliament in defining the rights of British citizens.17 Legislation on parliamentary
supremacy could be pursued in conjunction with this, at the same time as negotiations on policy
repatriation, or as a response to their failure.

Issue salience and the ECR

I ideology, the predominance of Euroscepticism in the party, and the proximity of the Conservative
position to public opinion all suggest that the Tories should prioritise Europe. But Conservative leaders
have not done so since Hague’s ill-fated “save the Pound” campaign at the 2001 general election.18
Cameron is the third successive Eurosceptic Conservative leader to downplay the issue. The low salience
of the European issue in Conservative politics is explained by concern that divisions within the party
might resurface and recognition that “banging on” about an issue that does not feature prominently
among voter concerns makes the Conservatives appear out of touch.

If the Conservatives do not offer a referendum on Lisbon, some Eurosceptic voters may think twice
about voting for them. UKIP is poised to do better at the next election than it did in 2005, but the direct
threat it poses to the Conservatives is often exaggerated.19 UKIP continues to perform best in
Conservative-supporting areas but it is likely to be no more than an irritant in many Conservative seats
and target seats across southern England. The exception may be the South West where a strong UKIP
performance would make it more difficult for the Conservatives to snatch seats from the Liberal
Democrats. It is also worth noting that UKIP has achieved some of its most impressive gains in Labour
areas (e.g. Dudley, Stoke-on-Trent and Hartlepool) and is targeting Labour voters actively.20

Conservative strategists will not be planning to focus on Europe in the general election campaign. However, David Miliband’s criticism of the Conservatives’ allies in the European Conservatives and
Reformists group (ECR) has prompted speculation that Labour may try to raise the salience of the
issue.21 The allegations concerning the past (and present) views of ECR group leader Michal Kaminski,
his Law and Justice party (PiS) and the Latvian For Fatherland and Freedom party (TB/LNNK) are
serious and have not been dismissed comprehensively. A charitable interpretation would be that they are
politically motivated and do not pay sufficient heed to the socially-conservative political culture of these
states.22 But the danger of damage by association remains. If adverse publicity about ECR parties persists
in the election campaign, wavering voters (particularly former Liberal Democrats) may question the extent to which the Conservatives have changed.

The ECR came close to being stillborn when Conservative MEP Edward McMillan-Scott defied his party and stood again for the Vice Presidency of the EP. He was duly elected, whereas the official ECR candidate Michal Kaminski was not, as other groups seized the opportunity to embarrass the upstart group. With the PiS making ominous noises about the future of the group, Timothy Kirkhope – who should have become group leader under a deal on the distribution of posts – stood aside and Kaminski became leader unopposed. McMillan-Scott was expelled from the group and the party.

Things have stabilised somewhat since this inauspicious start. Malcolm Harbour has become chair of the influential Internal Market committee in the EP and Commission President Barroso courted ECR support ahead of his re-election. But testing times lie ahead. The ECR is vulnerable because of the EP’s rule that groups must have members from at least seven Member States. The ECR currently includes parties from eight, but five of them consist of only one MEP – defection could inflict serious damage, and this gives small delegations significant leverage. It is important that the ECR remains viable for a period of one year because after that time, EP rules state that a group need not collapse automatically should it falls below the threshold, provided that other groups agree. Differences between ECR member parties are apparent on issues such as agriculture, climate change, Turkish accession and even the Lisbon Treaty – which the Czech Civic Democrats (ODS) and the PiS backed in their national legislatures. But roll-call voting in the EP reveals congruence between the Conservatives and the ODS and PiS on crucial Single European Market issues.

Conflict postponed, not resolved

The Conservative Party’s long-running civil war on Europe did not explode back into life at its annual conference in Manchester. With a return to power tantalisingly close, potential dissenters kept their own counsel for the most part. Kenneth Clarke and Daniel Hannan hinted at arguments to come but given the gulf between their views – Clarke defied the whip to vote for ratification of the Lisbon Treaty, while Hannan campaigns for British withdrawal – their restraint was more notable than their comments. But the truce is an uneasy one and William Hague’s alleged description of the European issue as a “ticking time bomb” for his party is compelling. The question is not whether the bomb explodes, but when it will do so – and with how much ferocity.

If the party leadership does not provide an unconditional commitment to a referendum on Lisbon, it will have to manage Eurosceptic discontent. In 2007, 46 Conservative MPs signed Early Day Motion 2143 calling on the Prime Minister to hold a referendum “before or after ratification”. Cameron’s stock among Eurosceptics rose when he finally delivered the long-awaited exit from the EPP group and he will hope that this delivers their (tacit) consent should he ask them to trust his judgement again. His pragmatic Euroscepticism suggests that the short-term electoral or party management gains that might follow from an unconditional commitment to a referendum will be outweighed by strategic considerations on which course of action is most conducive to effective statecraft (i.e. to governing competence and the ‘national interest’).

The post-election Conservative parliamentary party will be almost uniformly Eurosceptic so we will not see a repeat of the 1990s divisions between pro-Europeans and Eurosceptics. Television news cameras recorded the Conservative Group for Europe’s meeting in Manchester, but a crew from the BBC’s ‘Last Chance to See’ would not have been out of place. With Ian Taylor and David Curry retiring, Ken Clarke and John Gummer will carry the pro-European Tory torch in the Commons. Clarke’s heavyweight
status ensures that the pro-European rump can punch above it weight: a Cabinet walk-out by Clarke over European policy would be damaging.

The European fault line on the Conservative benches will be that between ‘soft’ and ‘hard’ Eurosceptic. The former support membership of a reformed EU, but oppose parts of the EU’s current trajectory (e.g. the euro) and the further transfer of competences. This is the leadership position. Hard Euroscepticism involves principled opposition to European integration as embodied in the EU. The Better Off Out group is the key vehicle for the latter, but its numbers have been depressed by Cameron’s insistence that its members cannot serve on the frontbench and that prospective parliamentary candidates should not join it. Withdrawal remains a minority taste. In a July 2009 ConservativeHome survey of Conservative candidates in target seats, only 5% said that they wanted Britain to withdraw from the EU but 38% favoured ‘fundamental renegotiation’. The location of the fuzzy boundary between ‘soft’ and ‘hard’ Eurosceptic positions will be crucial to the prospects of party unity. The referendum and repatriation issues will expose some of the differences between these positions. Will enough of the ‘soft’ Eurosceptic majority of MPs be satisfied with limited repatriation, or will it persuade them that a more fundamental renegotiation of British membership is required? Many Eurosceptic MPs may be dissuaded from voicing criticism of Cameron’s European policy early in the next parliament, but ‘hard’ Eurosceptics who entered the Commons in 2005 (e.g. Philip Hollobone and Philip Davies) soon developed a habit of rebellion.

This paper has not considered an ‘in/out’ referendum (or one on a return to a relationship based primarily on free trade), a fundamental renegotiation of British membership of the EU, or withdrawal as options because these are not consistent with the current policy of the Conservative leadership. An ‘in/out’ referendum might provide closure on the European issue, but it would not provide a government that supports EU membership with leverage in negotiations in the EU. Were a vote in favour of withdrawal delivered, the Lisbon Treaty’s secession clause is significant. If a Member State notifies the European Council that it wishes to leave the EU, negotiations begin on the arrangements for its withdrawal and future relationship with the EU. The agreement would have to be approved by the EP and the Council, acting by a qualified majority. If negotiations have not concluded two years after the notification of intention to withdraw, the EU treaties may cease to apply in the Member State. Alternatively, the UK Parliament could also seek to withdraw by repealing the European Communities Act 1972 and awaiting the EU’s response.

Conclusion

In the 1990s life became very difficult for a Conservative government that was in a minority in the EU and suffered internal divisions at home. History is unlikely to repeat itself in quite such stark terms, but a period of difficult relations in the EU and Eurosceptic discontent at home looks likely for a Cameron government. Securing anything beyond limited concessions from EU negotiations will prove difficult. If he cannot deliver, then Cameron will have to manage dissent within his party. Cameron’s handling of the EPP issue revealed that his ‘soft’ Euroscepticism is tempered by political pragmatism: considerations of statecraft will determine the vigour with which his European policy objectives are pursued.

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5 Reported in P. Webster, ‘Cameron says Tories will reconsider Lisbon referendum if EU ratifies’, *The Times*, 30 September 2009, [www.timesonline.co.uk/tol/news/politics/article6855217.ece#](http://www.timesonline.co.uk/tol/news/politics/article6855217.ece#)


8 The 2009 Conservative European manifesto, for example, talks of “grave concern” about “the incorporation of the Prüm Treaty into EU law” (it covers the sharing of DNA and fingerprint data).


11 Using the Euro Manifestos project 2009 codebook, Dr Gemma Loomes coded the 2009 and 2004 Conservative manifests for this research project. In 2009, 10.2% of statements were pro-EU and 17.2% anti-EU, compared to 5.3% and 25.8% respectively in 2004.


13 But the House of Commons European Scrutiny Committee, *Subsidiarity, National Parliaments and the Lisbon Treaty*, 33rd Report, 2007-08, (para.37) doubted whether the provisions “would make much practical difference to the influence presently enjoyed by the UK Parliament”.


The Court has issued an English language summary of its decision: www.bundesverfassungsgericht.de/pressemitteilungen/bvg09-072en.html


See the claim that UKIP could cost the Conservatives 50 seats, G. Hinsliff and H. Macdonald, ‘UKIP threat to David Cameron’s election majority’, The Observer, 25 October 2009.

This will be examined further in the second Briefing Paper in this series.


McMillan-Scott sets out his case on his website, www.emcmillanscott.com/10.html


The four were the only Conservative MPs to disobey the whip on the Lisbon Treaty.

