

LEAVE ALLIANCE

Brexit Monograph 10

Liechtenstein reprised

2 September 2016

Introduction

For some considerable time, we have known that the Principality of Liechtenstein – despite being a party to the EEA Agreement – had been exempt from the requirement to permit unrestricted free movement of people within the EEA area, despite this apparently being a non-negotiable requirement of the Agreement.¹

Not until some time later, and then only after extensive research, were we able to understand more fully the processes involved, on which we published a blogpost in mid-June of this year.² On 28 June we published a more detailed version, which was further updated on 18 July, based on a formal written submission made to the Treasury Select Committee.³ This was after the idea of using the so-called "Liechtenstein option" had been dismissed on 5 July by Monnet professor Michael Dougan, as an "armchair lawyers' argument".⁴

We would expect a self-professed advocate for the "remain" proposition to oppose what would appear to be almost a "silver bullet", reconciling the inherent tension between participating in the Single Market and seeking to restrict free movement of persons. And nor can this source be relied upon for accurate analysis. Dougan mistakenly describes the solution as "an emergency safeguard provision for highly specific situations".^{5,6}

¹ This was noted in Flexcit on 29 April 2014.

² <http://www.eureferendum.com/blogview.aspx?blogno=86102>

³ <http://www.eureferendum.com/blogview.aspx?blogno=86122> and <http://www.eureferendum.com/blogview.aspx?blogno=86148>

⁴ <http://www.eureferendum.com/blogview.aspx?blogno=86137>

⁵ *Ibid.*

⁶ <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/treasury-committee/the-uks-future-economic-relationship-with-the-european-union/oral/34854.pdf>

Less explicable has been the hostile response of "Eurosceptic" Conservative backbenchers occasioned on 24 July when *The Observer* reported that an "emergency brake" on EU migration was among the options under consideration for keeping Britain inside the Single Market.⁷ Expanded upon in the *Irish Times* and the *Daily Telegraph* website, the report noted that Liechtenstein "had a transitional arrangement on free movement of people which effectively gives it control over immigration from the EU".^{8,9}

This provoked an immediate rejection from John Redwood, who said there should be no negotiation over taking back full control over immigration and other areas of sovereignty. Steve Baker - a Treasury Select Committee member who had received our written submission – was equally hostile.¹⁰ His view was: "If we end up with the Government doing things that don't end the supremacy of EU law, don't leave us able to control our own migration policy and leave us in the EEA, then there will be a great deal of dissatisfaction". He added: "British migration policy needs to be operated on the basis of British citizenship, not EU citizenship. We want to have taken back control and be seen to have taken back control".¹¹

Subsequently, the evidence submitted to the Treasury Committee was expanded and redrafted, to be published as the first Monograph in this series.¹² Based on intensive, well founded research, one might have thought that it would have been well received. But that has not proved to be the case. When it was distributed to about 70 "influential" members of a private e-mail circulation list, it elicited a dismissive response from MP Peter Lilley in the form of a written critique covering this and some of the other Monographs published.¹³ Separately, the document was used to brief programme-makers for BBC *Newsnight* engaged in producing a short film about the Liechtenstein solution. This film was also dismissive of the solution.

Given the continued need for a high quality debate on Brexit, it is important to understand how to present and project information in a way that it can have maximum effect. In this Monograph, therefore, we examine aspects of the treatment of information on the Liechtenstein solution in the hope of improving

⁷ <https://www.theguardian.com/world/2016/jul/24/brexit-deal-free-movement-exemption-seven-years>

⁸ <http://www.irishtimes.com/news/world/uk/tory-anger-over-reported-possible-compromise-on-migration-1.2733117>

⁹ <http://www.telegraph.co.uk/news/2016/07/24/tory-mps-react-with-fury-as-eu-leaders-consider-uk-emergency-bra/>

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<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/treasury-committee/the-uks-future-economic-relationship-with-the-european-union/oral/35137.pdf>

¹¹ *Ibid.*

¹² <http://www.eureferendum.com/documents/BrexitMonograph001.pdf>

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<http://www.eureferendum.com/documents/NORTH%E2%80%99S%20PAPERS%20ON%20BREXIT.pdf>

understanding of the dynamics of the Brexit debate. In particular, we examine in detail the Peter Lilley critique, and then review the *Newsnight* programme, identifying lessons which might be of value.

The Peter Lilley critique

In his critique on the Liechtenstein solution, Mr Lilley represents his own version of the message delivered by Monograph 1.¹⁴ In his view, it says: "if we joined Efta and thereby the EEA we would, under EEA Article 112 which allows for safeguard provisions, be able to negotiate limitations on free movement of people, as has Liechtenstein". Thus, in Lilley's words, "we could have tariff free access to the Single Market yet not be obliged to accept free movement of labour".

His immediate observation of this self-cast scenario is that it strikes him as "a bit of a pipe dream". Notwithstanding that we are already parties to the EEA Agreement, and would intend remain such, Lilley's goes on to assert that, since the EU was extremely reluctant to negotiate all but the most minimal changes in UK benefits law, and nothing at all on free movement as such – even to keep the UK in the EU - this suggests that "they will not concede much to lure us into the EEA".

The phrasing here contrasts with the argument in the Monograph, where it is specifically argued that the UK should maintain its status as a contracting party to the EEA Agreement. It is not clear why Lilley suggests that the UK would be "lured" into something in which it already full participates.

Then, in asserting that: "the EU" will "not concede much", he positions Article 112 as a concession. He neglects to point out that Efta states have the right to invoke the Article unilaterally. They do not require any concessions (or permission) from other parties to the Agreement. Nevertheless, he asserts that Liechtenstein is "allowed" to retain quotas, neglecting to state that it is empowered to impose quotas. This is an important mistake. Lilley is wrongly implying that Liechtenstein can only act with the permission of other parties.

Essentially, his own argument rests on the experience of Prime Minister David Cameron in seeking to limit freedom of movement, in negotiations conducted prior to the referendum. Then, the UK – as a full EU member - sought and failed to obtain concessions by way of amendments to the EU treaties. Mr Lilley extrapolates this scenario, averring that the UK, having left the EU and acquired the status of an Efta state member of the EEA Agreement (an entirely different treaty), would fail in its attempts to invoke a treaty provision already in place, available to it as of right.

Mr Lilley then compounds his errors by arguing that Liechtenstein has only been able to invoke this provision because of its "specific geographical

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<http://www.eureferendum.com/documents/NORTH%E2%80%99S%20PAPERS%20ON%20BREXIT.pdf>

situation". Therefore – and necessarily in his view - because the UK is so much larger than Liechtenstein, "this scarcely qualifies as a precedent on which we could rely". He ignores the fact that Article 112 allows for several grounds to be invoked, namely: "serious economic, societal or environmental difficulties of a sectorial (sic) or regional nature", which are "liable to persist". He seems unaware that the UK would not need to rely on any "geographical situation". It could just as easily invoke economic or societal difficulties, or any combination of the grounds.

In an attempt further to reinforce his argument, however, Lilley goes on to note that current measures "are subject to review by the EEA Council every five years". He then relies on a citation in the Monograph of a 1992 Commission proposal on implementing the EEA Agreement (which does not appear to have been adopted), which suggests that EU members (but not Efta states) in requesting the Commission to apply safeguard measures (which they must), "provide the Commission with the information needed to justify it".

In using this citation, Lilley again misses the distinction between EU members and Efta states, the one having to rely on the Commission to take action, the other not. He also fails to note that the five-yearly "review" of the treaty change is of an informal nature (the whole EEA Agreement is also periodically reviewed), and that the treaty amendment which Liechtenstein has secured is not reliant on it.

Concluding his critique, Lilley then asserts that most Leave voters were voting for UK to make its own laws; the next most important issue was effective control of immigration. This (the Liechtenstein solution), he says, offers neither.

The BBC Newsnight programme

On 10 August, this author was contacted by Matthew Thompson on behalf of the BBC *Newsnight* proposing an interview for a film on Liechtenstein, "analysing their relationship with the EEA, which ... appears to allow for both membership of the single market, and restrictions on free movement".

This author's response was to doubt the ability of the BBC "to explain anything as complex as the Liechtenstein/EEA solution", noting that, even to call it a Liechtenstein solution is wrong. Originally, the exclusion was sought by Switzerland and Liechtenstein and both countries were named in the first version of Protocol 15 (something which even the current Swiss politicians seem unaware - even though they are currently seeking "safeguard measures" from the EU which would be very similar to Protocol 15).

The main issue, Thompson was advised, was that Liechtenstein had managed to negotiate what amounted to a permanent opt-out to unrestricted free movement of persons, with an amendment to the treaty. Yet still, this author wrote, we are getting people who should know better calling it an "emergency brake" and talking about invoking Articles 112-113 of the EEA Agreement. "If, we're

going to see talking heads prattling on about emergency brakes, then I'd rather not have anything to do with it", this author averred.

Thompson's response was that we (*Newsnight*), "will absolutely endeavour to do it [make the film] to your satisfaction". On that basis this author participated in the production, taking part in a 30-minute pre-recorded interview in the BBC Leeds studio, with business editor Helen Thomas.¹⁵

Broadcast on 17 August, even the studio introduction gave a highly partial and distorted viewpoint, with Evan Davis asking whether Liechtenstein's status was "something that could be granted to us". Thus, Davis repeated the same error that Lilley had perpetrated, assuming that the solution was one that the UK would have to be offered, rather than it being a matter of right. Nevertheless, the clip itself started moderately well with Helen Thomas stating:

Liechtenstein, like Norway, is part of the Single Market, through its membership of the European Economic Area. But the country also has a tightly controlled quota system on immigration. Now that's a combination that some in Europe claim is impossible – that the four freedoms, of people, goods, capital and services, can't be detached from each other. So is this reason to celebrate, an example to point to as the UK starts the long and complicated process of extricating itself from the EU?

This author's contribution came next, the 30-minute interview cut down to 27 seconds. The clip selected stressed that that the solution was "not specific to Liechtenstein". The country was adopting "safeguard measures" which then brought them a treaty change, but this "doesn't just apply to Liechtenstein ... this is not just specifically a Liechtenstein solution". When the EEA was first set up, viewers were told: "there were actually four countries which took advantage of these provisions".

Thomas then conceded that the solution was, in effect, "permanent", but immediately sought to contradict her own contributor, asserting that the solution applied uniquely to Liechtenstein. Using a graphic to illustrate "subtle differences" between it and the UK (the UK's population is about 65 million, 1,750 times larger; its GDP is much bigger, and Liechtenstein is about half the size of the Isle of Wight), it was "not clear", she said: "that the UK will get an invitation to Liechtenstein's party. It's starting from a very different position. And that's one reason to question whether the model would work for the UK".

There followed comment from academic Dr Josephine van Zeben, described as a "fellow in EU law, Oxford University". Her own website has her seeking "to add to well-established areas of research, primarily multilevel governance theories and the regulation of public goods with collective action dimensions, such as climate change".¹⁶

¹⁵ *Newsnight*, 17 August 2016, <https://www.youtube.com/watch?v=Z3TqhGM5Khs>.

¹⁶ <http://www.josephinevanzeben.com/>

Van Zeben proceeded to fortify previous errors, declaring that the Liechtenstein solution: "doesn't set a legal precedent give that that provisions under which Liechtenstein have been able to negotiate their situation is one under the EEA Agreement of which the UK is not yet a member". The UK is, of course, currently a party to the EEA Agreement.

Having made one error, van Zeben went on to make others, declaring: "When we're talking about political precedent, I am sure that Theresa May might mention [the] Liechtenstein situation when negotiating but there's absolutely no reason to believe that the EEA members would give a concession such as this one to the UK, given that its demographic, social and economic situation is so different". She fails to recognise that Article 112 allows for multiple trigger criteria, and that the Article is invoked unilaterally, as of right. It is not a "concession", but a core part of the EEA Agreement.

With these errors firmly part of the narrative, Thomas interviewed Adrian Hasler: Prime Minister of Liechtenstein, to lock them in place, first declaring that he: "doesn't think the same deal will be on offer". Hasler tells Thomas: "Twenty years ago it was different, but I think when we would today negotiate such a solution, it wouldn't be possible". Thomas then duplicated the van Zeben error, telling us that the UK would need to join both the European Free Trade Association *and* the EEA.

To conclude her piece, Thomas interviewed Ernst Walch, former Foreign Minister of Liechtenstein. He thought that the immigration issue had to be changed and it could only be solved with changes. That, he thought, "plays into the hands of Britain". But Thomas had the last word, again contradicting this author's statement that the solution "doesn't just apply to Liechtenstein". Embracing the "Liechtenstein's model" Thomas concluded, "may prove complicated". But its "unique situation" could prove an illuminating example.

Common factors?

In these two case studies, we see separate actors from different backgrounds – media and politics - both exploring the same issue with the benefit of the same briefing, and making the same errors.

Both seek to position the solution as specific to Liechtenstein and both fail to note that the Efta states have the unilateral right to invoke Article 112. Instead, they suggest that it is dependent on the permission of the EU. Both, in particular, fail to note the safeguard measures have been invoked by other Efta states and the European Commission. Both neglect to say that safeguard features are a common feature of trade and related agreements throughout the world.

Crucially, both have relied on Monograph 1 as one of their sources, yet they either ignore or contradict it. They evidently prefer their own or different views, projecting the same errors and misrepresenting the situation in the same way.

However, it hardly seems possible that they share the same agenda in wanting to invalidate the thesis in Monograph 1 – which they both have sought to do. Lilley has been an active member of the "leave" campaign while *Newsnight*, insofar as it has a corporate view, is generally thought to favour the "remain" proposition. Yet such is the closeness of the views held by each party that coincidence seems unlikely.

One possible explanation lies in the "power of the narrative", where disparate commentators rely on a "particular reality".¹⁷ Contemporary media reports tend to position the Lichtenstein solution as an "emergency brake" of limited scope and duration, with even *The Times* at the beginning of September using this phrase.¹⁸ It has been shared by Dougan and many others.^{19,20,21,22} That "particular reality" having been lodged, it is very hard to shift.

Commentators thus influenced are falling prey to "prestige", identified so lucidly by Gustave le Bon. "Great power", he wrote, "is given to ideas propagated by affirmation, repetition, and contagion by the circumstance that they acquire in time that mysterious force known as prestige".²³ He added:

Prestige in reality is a sort of domination exercised on our mind by an individual, a work, or an idea. This domination entirely paralyses our critical faculty, and fills our soul with astonishment and respect. The sentiment provoked is inexplicable, like all sentiments, but it would appear to be of the same kind as the fascination to which a magnetised person is subjected. Prestige is the mainspring of all authority. Neither gods, kings, nor women have ever reigned without it.

This could certainly be a factor in the *Newsnight* clip, where Thomas defers to Adrian Hasler when he tells her that he "doesn't think the same deal will be on offer". But in turn, Thomas massages the prestige of Dr Josephine van Zeben, describing her as a "fellow in EU law, Oxford University", even though her speciality is climate change. In that instance, prestige seems to be the servant rather than the master, used to support the film's narrative.

Lilley, on the other hand, shows evidence of ambivalence. In the preamble to his critique, he writes: "I have great respect for Richard North. He does original research. It is thorough and well documented. On a range of issues he has been right and the conventional wisdom wrong. Moreover, he is not a closet Remainer trying to inveigle the UK back into the EU by the back door. So I am

¹⁷ For a detailed evaluation of narrative theory, see:
http://www.philol.msu.ru/~discours/images/stories/speckurs/Narrative_and_media.pdf In particular, p.140 *et seq*: television news as narrative.

¹⁸ <http://www.thetimes.co.uk/article/5569a752-6fbd-11e6-b4fa-dff7fb6cfc8a>

¹⁹ *Op cit*.

²⁰ <http://eulawanalysis.blogspot.co.uk/2014/10/camerons-emergency-brake-killing-free.html>

²¹ <http://www.cer.org.uk/insights/can-britain-join-norway-eea>

²² <http://www.conservativehome.com/thetorydiary/2016/06/britains-post-brexite-future-the-iceland-option-if-you-cant-beat-them-join-them.html>

²³ <https://socserv2.socsci.mcmaster.ca/~econ/ugcm/3ll3/lebon/Crowds.pdf>

reluctant to take issue with him".²⁴ Nevertheless, he does take issue, failing to break out of his "particular reality".

What also might be of relevance here is that Lilley is a "gatekeeper" to a group of likeminded MPs and others, including John Redwood and Steve Baker. All of these have expressed opposition to the UK's continued participation in the Single Market, a view which Lilley shares.²⁵ To keep faith with his peer group, he cannot be seen to approve something which facilitates continued participation.

The role of peer group approval has been well documented. It is akin to the phenomenon of "acceptable diagnosis bias", identified by this author and others, based on observations in Ceylon between 1943-46, when the most common diagnosis for pyrexias of unknown origin was "malaria". After the successful completion of a mosquito eradication programme, it no longer became acceptable to report such illness as malaria. Physicians, therefore, took to using the label "influenza", the overall rate of reporting of pyrexias of unknown origin remaining remarkably constant.²⁶

If professional people, applying their professional judgment, ostensibly exercising scientific method, are prone to such biases, politicians surely cannot be immune to such influences – especially if their self-esteem is reliant on peer group approval.

This may be sufficient to explain the behaviour observed, but there may be other reasons. In the search for additional drivers of error, the experience of writing Monograph 1 may be enlisted. This author found that one of the strongest features of the argument supporting the utility of the Liechtenstein solution came with the realisation that safeguard measures were not a peculiarity of the EEA Agreement. They were a commonly used addition to most treaties covering trade and related matters. Thus the idea of Article 112 being invoked, or used as leverage, becomes nothing out of the ordinary.

This idea is reinforced by Isabel Feichtner in her work on another form of safeguard measure, the WTO waiver.²⁷ She writes of tension between international governance and domestic government, with the role of the WTO waiver being used to "flexibilise" international law. It defuses potential conflict between domestic needs and international requirements by suspending the law before the tensions escalate to the point where nations may be forced to choose between one and the other.

²⁴ *Op cit.*

²⁵ <http://www.peterlilley.co.uk/publications/1898/myths-about-trade-single-market>

²⁶ Richard A.E. North, Jim P. Duguid, Michael A. Sheard, (1996) "The quality of public sector food- poisoning surveillance in England and Wales, with specific reference to salmonella food poisoning", *British Food Journal*, Vol. 98 Iss: 2/3, pp.1 - 109

²⁷ *The Law and Politics of WTO Waivers: Stability and Flexibility in Public International Law* by Isabel Feichtner, Assistant Professor of Law and Economics at Goethe University Frankfurt am Main https://www.amazon.co.uk/Law-Politics-WTO-Waivers-International/dp/B00L6YQPLC/ref=sr_1_1?s=books&ie=UTF8&qid=1471986988&sr=1-1

Feichtner is surprised that waivers have not received much attention, especially since they are extensively used. But, given that lack of attention, it is hardly surprising that the similar concept of the safeguard measure is seen by the non-specialist as novel. In the Brexit discourse, it is probably being met for the first time. The ignorance of the commentators prevents them accepting the concept of safeguard measures as a normal, routine part of treaty law. It needs "affirmation, repetition, and contagion" before being generally accepted. Without that, it is more plausible to believe that the Liechtenstein solution is exceptional.

Finally, looking at the broader context of the debate, we see innumerable high-prestige figures having constantly repeated that free movement of persons is "non-negotiable". For the Liechtenstein solution to be valid for the UK, all these people must be wrong, misinformed, or even engaged in a conspiracy to mislead. For most people, this is far too much of a conceptual leap. That there is a straightforward solution is almost an impossible idea to accept.

Conclusions

In le Bon's treatise, he writes that: "crowds always, and individuals as a rule, stand in need of ready-made opinions on all subjects. The popularity of these opinions is independent of the measure of truth or error they contain, and is solely regulated by their prestige".

The support by *Newsnight* and Lilley of an erroneous version of the Liechtenstein option more than adequately illustrates that observation. It is manifest in an unwillingness to diverge from a narrative supported by high-prestige persons in the context where personal prestige depends on conformity with the peer group view. This is "bubble-speak", often labelled group think.²⁸

As to lessons for the broader Brexit debate, the essence must surely be that people in a position of influence must recognise that they are individuals, and act accordingly. Only they can break free from the "domination of mind" that hinders free thinking.

For the many who seem incapable of breaking free, robust treatment is required. In a debate dominated by the internet and social media, slavish conformity to peer group viewpoints is highly visible. When it is highlighted and dissected by the internet "community", the erosion of prestige can be considerable, for which peer group approval may not be sufficient compensation. And it is the erosion of prestige that eventually enables other voices to be heard.

In his book on group think, Irving Janis suggested other ways of countering the phenomenon. He argued that policy-making groups should have "critical

²⁸ https://www.amazon.co.uk/Group-Think-Irving-Lester-Janis/dp/0395317045/ref=sr_1_1?s=books&ie=UTF8&qid=1463483886&sr=1-1&keywords=group+think

evaluators", with groups giving high priority to airing objections and doubts. They should also adopt an impartial stance instead of stating preferences and expectations, to promote an atmosphere of open inquiry. Then, independent groups should work separately on the same questions, each carrying out deliberations under a different leader.

That advice, however, applies to organised groups. It is less appropriate to the informal interest groups that dominate the Brexit debate. But here, group think is just as powerful and militates against the free exchange of ideas. Advocates tend to close ranks and retreat to their "comfort zones" whenever they are exposed to dissident voices.

In such an informal environment, much has been made of the need to obtain and respond to feedback.²⁹ When people cut themselves off from self-correcting information, as in the "bubble", the effect can be to perpetrate errors. This replicates the behaviour of the incompetent, who are incapable of responding to feedback. Another self-excluding filter occurs when people with an excessive regard for their own worth reject feedback from what they regard as an inferior source. They too will present as incompetent.

The other side of the coin is the reluctance to proffer negative feedback. Dunning and Kruger note that even young children are familiar with the notion that: "if you do not have something nice to say, don't say anything at all". Yet criticism is vital if people are to understand the flaws in their own arguments. Thus, not only must pundits be more open to feedback, those on the receiving end must be more willing to give it – and to react when it is ignored.

It is here that the internet and social media have their greatest value. Those perpetrating errors need to be robustly and continuously challenged. But, taking a cue from Janis, we might also demand of pundits that they take more critical views of their own work. Simply to assert a position, without supporting it with good evidence should become socially unacceptable. We should expect pundits to be their own most strident critics. If they fail in that, they should have no cause to complain if others do the job for them.

Too often, also, a double standard is applied – as was seen with both Lilley and *Newsnight*. Both felt entitled to contradict heavily supported information with nothing more than unsubstantiated opinion. In any debate, there needs to be an equality of arms. If evidence is required for assertion, it should also be required for rebuttal.

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²⁹ <http://www.jerwood-no.org.uk/pdf/Dunning%20Kruger.pdf>