

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 – has 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



The news was not received well and a number of people objected to it, including Monnet professor Michael Dougan, who called it an "armchair lawyers' argument". Dougan mistakenly describes the solution as "an emergency safeguard provision for highly specific situations".

The Observer, and the Irish Times noted this and the Daily Telegraph website reported in July 2016 that Liechtenstein "had a transitional arrangement on free movement of people which effectively gives it control over immigration from the EU". John Redwood and Steve Baker were equally hostile. "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".

In this monograph **two critiques of the Liechtenstein position will be analysed**.

Peter Lilley MP.

This is his view of Monograph One which discusses the Liechtenstein position: "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".



It strikes him as "a bit of a pipe dream". Since even for Mr Cameron, 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**".

It is not clear why Lilley suggests that **the UK** would be "lured" into the EEA in which it **already** full participates as **a full member**.

He positions Article 112 as a concession. This is an important mistake. Lilley is wrongly implying that Liechtenstein can only act with the permission of other parties.

Mr Lilley extrapolates Mr Cameron's disappointing negotiations before the referendum, averring that the UK, having left the EU and having 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 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.

Lilley goes on to note that current measures "are subject to **review by the EEA Council every five years**". This is from a citation in the Monograph of a 1992 Commission proposal on implementing the EEA

¹ This was discussed in detail in two blog posts on eureferendum.com

Agreement which does not appear to have been adopted. 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.**

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.**

BBC Newsnight.²

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". This assumed 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**.

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."



Dr Josephine van Zeben proceeded to fortify previous errors, declaring that the Liechtenstein solution: "doesn't set a legal precedent given 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. With these **errors firmly part of the narrative**, Thomas interviewed Adrian Hasler: **Prime Minister of Liechtenstein**. Hasler tells Thomas: "Twenty years ago it was different, but I think when (ie if) 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.

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**". **Thomas had the last word**, again contradicting this author's statement that the solution "**doesn't just apply to Liechtenstein**".

Common factors between Mr Lilley and The Newsnight programme:

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. Both have relied on Monograph 1 as one of their sources, yet they share the same agenda in wanting to **invalidate the thesis in Monograph 1**.

Such is the closeness of the views held by each party that **coincidence seems unlikely**³. Contemporary media reports tend to position the Liechtenstein solution as an "emergency brake" of limited scope and duration; that

²Newsnight, 17 August 2016, <https://www.youtube.com/watch?v=Z3TqhGM5Khs>

³ 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.

"particular reality" having been lodged, it is very hard to shift.

Why is this? Gustave le Bon⁴: "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**...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 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. 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.



Yet one of the strongest features of the argument supporting the utility of the Liechtenstein solution is 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.⁵

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.

Conclusion:

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. This is **"bubble-speak", often labelled "group think"**.

Policy-making groups should have **"critical evaluators"**, with groups giving high priority to airing objections and doubts. **Advocates tend to close ranks and retreat to their "comfort zones" whenever they are exposed to dissident voices.**

They will present as incompetent.

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.

⁴ <https://socserv2.socsci.mcmaster.ca/~econ/ugcm/3ll3/lebon/Crowds.pdf>

⁵ Isabel Feichtner, for instance, in her work on the WTO, writes of tension between international governance and domestic government, with the role of the WTO waiver being used to "flexibilise" international law. Feichtner is surprised that waivers have not received much attention, especially since they are extensively used.