

Seminar Presentation

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**Some disturbing perspectives on post-Brexit Corporate
Governance and citizen rights in Britain**

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Brexit – a unique British cocktail of *nostalgia* and ideology

I Surface appearances may belie the real direction of travel

1. The debate about the decision of Britain to leave the EU (European Union) has focused mostly on important trade and economic arguments. These are not well understood by the public at large. The Brexit case during the Referendum campaign relied heavily on deliberate factual untruths and misrepresentations.¹ As a result of the Referendum decision – a narrow majority in favour of leaving - British citizens now face the prospect of leaving the largest developed and progressive social market economy² in the world. There are mounting fears that this may happen without a negotiated settlement – the so called *Hard Brexit* outcome. The underlying position of the *Hard Brexit* case will be explored with a view to better understanding their ultimate ideological goals and direction of travel. In doing so the very serious problems associated with British corporate governance in a post-Brexit world will also be examined.

2. The negotiations have so far established beyond any reasonable doubt that the remaining 27 members of the EU will not allow Britain to “cherry-pick” benefits. Cherry-picking in this context means taking things they would like to retain – like access to the single market - and ignoring the rest. This has been laid down as a clear red line from the EU negotiating side. Britain must accept the *four pillars*³ on which the single market *mutual* is based – or leave. The principles underpinning the *four pillars*, particularly those concerning free movement of labour⁴ within the EU are sacrosanct. They will not be fundamentally modified to suit Britain. The halting of free movement of EU citizens into Britain, identified as a source of concern during the Referendum campaign, is not negotiable. There is nothing of significance in-between - a reality which Britain will ultimately face.

3. Britain’s Brexit public negotiating position is heavily coloured by self delusion and *nostalgia* for a historic past - an observation clearly identified by the EU negotiating team. This has resulted in friction and difficulty over elementary points of negotiation. The position of the ruling Conservative government is seen widely to be flawed by its failure to set out a clear strategy on which it can credibly negotiate a fair and practical settlement.⁵ Failure to reach a negotiated settlement – the so called *Hard Brexit* - will result in sustained long term economic damage. But there are deeper motives at work. Disagreement and disarray within the ruling Conservative Party ranks may conceal other ideological objectives. These

¹ These untruths are well documented facts. Their use as “part of the campaign” has never been legally challenged.

² The social market economy may be defined as a set of arrangements, mostly found in Europe and Scandinavia, which aim to provide countervailing influence to the operation of free markets in determining economic and social outcomes.

³ At the heart of the European Union are four key principles: the free movement of goods, services, capital and labour. The “four freedoms” were enshrined in the 1957 Treaty of Rome and reinforced in the Single European Act in 1986, the 1992 Maastricht treaty and the Lisbon treaty of 2007.

⁴ A major, if unfounded complaint, was that EU citizens who enter Britain are a burden on social services and housing. The evidence tells a different story. There are fair and reasonable conditions governing access by other EU citizens to British tax-payer related benefits. There is no evidence that non British EU citizens take advantage of these benefits without being British tax payers. In the vast majority of cases such non-British EU citizens are in employment and are tax contributors **not** benefit claimants.

⁵ The British negotiating team have refused to offer realistic if negotiable terms for financial settlement estimated to be of the order of £60bn. This settlement will cover such things as collective pension commitments and other major inter EU projects.

objectives are not well understood. They have been mostly dismissed as journalistic *mischief-making*. The truth, as we shall see, may very well lie elsewhere.

II Brexiteers seek to blame the EU for stifling British potential for growth

4. Negotiations have been constantly distracted by a hostile “off-stage dialogue” which has sought to attack and misrepresent the EU.⁶ These outbursts from senior government ministers seek to blame the EU for Britain’s social and economic setbacks. It is implied that the EU is the cause of poverty, joblessness and industrial decline in Britain’s industrial heartlands. Specifically it is claimed that the recent weakness of the EU and the Euro zone in terms of economic performance has held back growth potential for Britain. These claims are not supported by the facts. But they are constantly paraded as evidence that EU membership is a handicap for Britain.

5. The facts inform otherwise. Britain’s membership has brought with it very significant benefits, which have not been seriously debated or even recognised. British economic under-performance has attracted very large volumes of FDI (foreign direct investment) – the largest of any OECD country.⁷ This has greatly improved industrial productivity and strengthened industry-university networks, supply chains, industrial *clusters* and innovation. What once flowed strongly into Britain because of its EU membership will inevitably move elsewhere after Brexit. Economic growth will, as a consequence, weaken along with investment - with unemployment higher.

6. But running alongside there are occasional glimpses of an alternative agenda. Its central feature is that seeking to negotiate exit terms from the EU is a waste of time. The promoters of this view know that there will be a very significant cost to the economy if a negotiated settlement is to be secured. The question that arises is how, given the huge weight of the economic evidence which supports Britain’s continued membership of the EU, this can be dismissed. To understand that reality we need to better understand this mostly concealed alternative ideology.

II Global Britain – the renaissance of a diminished economic power

7. The alternative ideology relies on one central assumption in the case of the EU: this is not the place for Britain to be. Britain must never forget its historic destiny. It must again ensure that *Britannia rules the waves* and do so. But it can only do so by being *Great Britain* again.⁸ The implications of this position have several strands. Britain sees itself – if others don’t - as the creator of the free trade system *as we know it today*. That is indeed partly true but is misleading in a number of fundamental respects. The free trade system that emerged after the Second World War - the so called Bretton Woods system⁹ - had three central planks: the progressive abolition of tariffs between trading nations; the introduction of fixed exchange rates against the US dollar in turn pegged to gold; and the IMF playing the role of the central bankers’ bank.

⁶ The British Foreign Secretary has dismissed EU financial claims stating that they can “go whistle for their money”.

⁷ A legitimate fear is that “the goose that lays the golden eggs” will stop laying! This needs to be put in context. The long term decline of Britain’s domestic industrial base has stimulated a spectacular inflow of FDI (foreign direct investment). In the period 2010 to 2015 non-British ownership of companies has risen dramatically in value from around £168bn to in excess of £1tr currently in 2015.

⁸ Similar sentiments can be identified in the Trump mantra “Make America great again.”

⁹ The Bretton Woods Conference in 1944 in New Hampshire, US settled these matters.

8. The British had a key role to play along with the US in making Bretton Woods a reality and a success. But as so with so much else the world has moved on apace since then. A key consideration is that trade agreements today are less a reflection of “free trade” as such, as “tightly managed and comprehensive negotiated agreements”. These matters were not aspects of the Bretton Woods system as such. They have emerged and crystallised in the long period thereafter. The EU and its members - by far the biggest bloc trading within and between themselves - have driven the pace of these developments. The signing of the Treaty of Rome in 1957 created the European Economic Community¹⁰. This marked the first step in the creation of the single or internal market of the EU as we see it today. In this evolution the European Commission (the European civil service) has developed the most comprehensive approach to the structuring and negotiating of trade deals with third party countries. It is often referred to as the Gold Standard in terms of the high aspirational standards of social and economic “sustainability” that are part and parcel of the approach.¹¹ The role of Britain during the long period of its evolution has been mostly that of the back seat passenger. A detached disdainful on-looker at events rather than a fully engaged player.

9. In assessing the importance of the EU and the single market it is important to remember that British businesses currently benefit from uncomplicated access to the single EU market of 500 million consumers – the largest in value in the world. The EU also facilitates trade further afield with deals providing preferential access for EU members to many global markets. British business benefits from being able to trade easily within the single market and also with many other countries. The EU is the top trading partner for 80 countries. This compares with 20 for the US.

III The creation of *Singapore on Thames*¹²

10. The question that then arises is how do *Hard Brexiteers* - whose ulterior aim is to force a non negotiated exit if all else fails – imagine that Britain will survive the impact of such a self-inflicted damaging event. The International Trade Secretary¹³ – who has no practical experience of how trade agreements are negotiated - constantly dismisses the difficulties that Britain will face in a post Brexit world in negotiating fresh trade deals. He brushes aside at least one vital strategic fact. The EU has already negotiated trade deals with most of the major third party economies. The question that this in turn poses is what possible gain can be achieved from seeking to replace these EU trade arrangements which have been

¹⁰ It was signed on 25 March 1957 by Belgium, France, Italy, Luxembourg, the Netherlands and West Germany and came into force on 1 January 1958. It remains one of the two most important treaties in the history of the European Union (EU).

¹¹ It is important to remember the background history. In 1974 the then Conservative Prime Minister Edward Heath decided to seek membership of the EU after several earlier re-buffs. He did so in the passionate hope that this would fundamentally alter British poor economic performance - “the sick man of Europe” as Britain was then referred to - for the better.

¹² The so-called ‘Singapore on the Thames’ solution for post-Brexit Britain envisages a country that has abandoned the “red tape” of EU regulation, adopting an unfettered approach to trade together with minimal regulation and a low corporate taxation regime.

¹³ Liam Fox is a former medical doctor and a member of the British Conservative Party. He serves as Secretary of State for International Trade and President of the Board of Trade in the Conservative government. He is a strong supporter of the US movement for deregulation and sympathetic towards chlorine washed US chicken carcasses currently banned from the EU market.

put in place steadily over the past forty years by better ones. To this he offers no credible answer.¹⁴ But there is another motive.

11. The trade arrangements that the EU have successfully put in place are seen by the *ideologues* as hindering the development of something better described as *unfettered trade*. Unfettered trade is, according to that argument, trade which is unrestricted by provisions designed to protect consumers and producers alike - and the environment – *red tape* in the words of its supporters. These provisions, for example, currently prohibit the use of unfairly exploited labour¹⁵ by the country seeking to export its produce into the EU. The provisions equally are designed to protect EU citizens from the import of hazardous products. Examples of the latter would include *genetically modified* foods where there are reservations about the science which may not have researched carefully enough the potential threats to life that might be posed by such developments.¹⁶ Or to address a more topical matter: the manufacture and sale of autos which are judged by their tail-pipe emissions to aggravate climate change.¹⁷ These will in due time be banned from sale in favour of electric cars.

12. According to this free trade ideology such restrictions on trade are opposed on the grounds that it is not for the state to interfere in these matters.¹⁸ It is for the market and consumers to decide and settle them on the basis of free choice. This ideology of free trade can be extended almost without limit. This gives a lie to the ultimate *Hard Brexit* solution. Britain sees itself championing a world with the fewest possible restrictions on corporations, their employment and health and safety practices, and their behaviour as corporation tax payers. This is sometimes referred to in terms of Singapore - a jurisdiction widely praised for the strength of its *laissez faire* traditions. In the case of Britain this would be vigorously challenged by EU negotiators. This explains why *Hard Brexit* is the preferred solution to a negotiated settlement. The EU will never agree to settle with Britain on these terms – so crashing-out instead is the preferred solution!

IV Corporations and their governance – difficulties with the Anglo American model

13. How, we need to ask, will corporations and their behaviour be impacted by a *Hard Brexit* Singapore-like outturn? To make sense of this complicated question we need to recall the status of the corporation under British and American law. A company “incorporated” under the provisions of corporate law exists as a legal person independent from its shareholders (or members).¹⁹ This has far reaching consequences in all English-speaking jurisdictions which have been formatively influenced by English corporate law. It has been instrumental in shaping the development of capital markets in English-speaking jurisdictions.

¹⁴ Perversely the Trade Secretary argues that Britain exiting the EU without a negotiated settlement will change nothing since Britain in any case enjoys trade relationships with every country the EU has negotiated trade deals of which Britain is a beneficiary. What this specious argument assumes is that Britain outside the EU will in every important respect continue to benefit from these arrangements once it has left the EU. This is not correct.

¹⁵ Examples include workers subject to conditions of work which do not meet UN or ILO standards.

¹⁶ A current and topical example is the EU ban on chlorine washed chicken carcasses from the US. These are not allowed into the EU because they do not represent “best practice” in terms of poultry husbandry. The EU argues that with proper and sustainable animal care chlorine washing can be avoided. Chlorine is used to cut costs in the intensive rearing of chickens by US producers. It is a restriction hotly contested by US producers.

¹⁷ The phasing out of the internal combustion engine in favour of electric autos is an example. But climate change deniers everywhere challenge the significance of these causes a fact which explains in part the decision of the US government to distance itself from the Paris Climate Change Accords.

¹⁸ The current British Foreign Secretary, Boris Johnson has, over the years, ridiculed EU initiatives designed to protect EU citizens – a measure of Conservative hostility to the aims of the social market economy.

¹⁹ This was finally settled by the ruling of the House of Lord in *Salomon v Salomon* 1897.

It has also moulded corporate codes of behaviour in respect of the governance of publicly traded²⁰ corporations. But things are not the same everywhere as we shall discover.

14. The principal effect is the detachment of the shareholders from the company. Significantly this leaves the company – a mindless, inanimate fictional entity in law - without any clear ownership or control. Remember prior to limited liability the corporation was literally an *aggregate* entity which unambiguously reflected the membership of the corporation. Limited liability, fundamentally, changes this relationship. This concept of the corporation is crystallised in English law. It has also shaped the institutional regulatory environment. Not only has the corporation's status as an independent entity been firmly entrenched. Shareholders have been increasingly marginalised in the face of an accretion of directors' powers.

15. The single most important development in common law is that the duty of care of the directors is to the company and not the shareholders. Breathtaking in itself this is further reinforced by the dilution of shareholder powers to exercise any *ex ante* (before the event) control over the actions of the directors. The British government is a huge shareholder in banks nationalised following the financial crisis of 2008. In this period it has discovered that it has limited powers to influence the commercial priorities of those banks rescued by taxpayers. The fact is that shareholders have few powers even though the directors (with the support of the media) portray themselves as being the “handmaidens” of the shareholders. Very specifically shareholders cannot appoint directors to the board. They can recommend but have no powers to appoint. They have no influence over commercial actions. Even on directors pay: they can only recommend. This hollows out any notion that the shareholders have any credible powers of ownership. Their role of “primacy” in the affairs of the company is mostly illusory.²¹ But the illusion of shareholder ownership persists in the public mind. Father Christmas continues to capture the public imagination!

V How this problem is addressed in other jurisdictions

16. Remember that the corporation in its earlier existence prior to limited liability was widely viewed as an *aggregate* entity comprising the shareholders or stock holders. We have examined briefly the history of these developments under English law. But in many parts of Europe and elsewhere the public policy response to limited liability has been very different. In Germany (and other Rhineland countries) and in Scandinavia the consequence of limited liability in respect of larger corporations was foreseen with great prescience. In order to maintain the notion of the corporation as a true *aggregate* entity laws were enacted which ensured that all larger corporations would be required to put in place separate independent supervisory boards comprising the interest of shareholders and other stakeholders including employees. The role of the supervisory board would be to offer *ex ante* supervision of the actions of the executive board. This creates a huge difference in terms of governance and corporate culture.

17. As a consequence these jurisdictions have developed differently. The Principal/Agent problem – an abiding concern in Anglo American and English - speaking jurisdictions – has scarcely arisen. Shareholders and other stakeholders are represented on the Supervisory Board. They are effectively represented at the highest reaches of decision taking. No better

²⁰ Publicly traded corporations are those whose shares trade on stock markets and are inevitably larger corporations whose actions are subject to more searching public scrutiny.

²¹ There are of course the activities of Hedge Funds and the like who are starting to throw their weight about the place as they position themselves as strategic shareholders (as little as a 5% holding will do the trick). But this is not a development which will improve corporate governance.

authority than the Wharton Business School, in a published research paper,²² states that Rhineland and Nordic jurisdiction companies are better at protecting shareholder wealth and better equipped to address longer term strategic challenges than their Anglo American counterparts. Again the problem of *short-termism* which characterises Anglo American capital markets is absent in these jurisdictions. Shareholders along with other stakeholders and employees are able to play a fully engaged role in shaping *ex ante* the development of the corporation and its co-determined future.

18. This enables us to understand that the true *aggregate* nature of the corporation can be maintained and enhanced. Only in this way can the corporation play its role in promoting co-determination and the generation of viable and sustainable commercial value. This can only be achieved by power sharing with independent supervisory boards monitoring closely the actions of executive directors. This is the reality of democracy not only in the workplace but in wider society. Until this challenge is addressed the abuse of corporate power will continue and the debate over how best to address these challenges will be further politicised, distorted and ultimately swept under the carpet. Corporations must be seen to be responsibly owned and governed.

VI What happens after a *Hard Brexit*?

19. We now address the most fundamental challenge that *Hard Brexit* poses for the British economy and its citizens. During the period of its membership of the EU British governments have generally dragged their feet over EU initiatives designed to improve worker rights and benefits and strengthen related social protections either through stricter Health and Safety provisions or higher environmental standards.²³ EU moves have been a progressive force for good. But the social reaction in Britain has been mostly lukewarm even if the benefits are tangible – an odd paradox.²⁴

20. The real social and economic challenge Britain faces is that *Hard Brexit* will encourage a more *free-wheeling* approach to corporate governance paying lip service to the basic tenets of credible *corporate social responsibility*. In this way the *Hard Brexit* zealots will be empowered to push back the reforms that have been introduced as a result of EU membership. Britain will progressively adopt the more unsavoury aspects of the “gig economy” characterised by zero hour contracts, low pay, the casualisation of work, the abandonment of employee rights and the promotion of “a race to the bottom” aimed at attracting *footloose* inward capital. These outturns must be resisted by alternative progressive forces in Britain if this social and economic calamity is to be prevented.

XII What of the EU and its future – some final thoughts

21. The EU and the Euro area are far from perfect as man-made institutions. The tensions between the ideals of deeper political and monetary integration and the sheer practical and

²² See Allen F and Gale D A *Comparative Theory of Corporate Governance* December, 2002.

²³ The Thatcherite opposition to market intervention retains a powerful residual influence in policy making especially where companies and their governance is concerned. This accounts for the hostility towards *self determination* in the work place.

²⁴ The evidence that British citizens have benefitted from EU interventions have been largely ignored in the debate. But these interventions have brought about very significant improvements notably in environmental standards (air and water pollution), social housing and other measures aimed improving life prospects in areas of high social deprivation. Paradoxically the Brexit vote was higher in poorer areas like Cornwall and the North West of England which have been major beneficiaries of progressive EU policies.

operational difficulties are ever present.²⁵ Whilst the introduction of the Euro has brought with it many economic benefits and provided greater cohesion to the single market it has also created difficulties. These difficulties arise in part because economic and financial perspectives and levels of economic development vary significantly across the region.²⁶ The particular problem of Greece remains a constant reminder of difficulties ahead²⁷ along with the dominance of German policy predilections.²⁸

23. There is much further work to be done if the objectives of the social market economy are to be advanced.²⁹ The potential of the EU Fifth Directive to foster wider co-determination in the workplace and higher standards of stakeholder-inclusive corporate governance, for example, has not been fully realised.³⁰ This is in no small measure a consequence of British resistance.³¹ But the honest assessment must be that the EU reflects a fundamental realism about how best the European region and its people can best manage the complex economic, social and political global environment in which it operates. Its achievements - across a wide front - have been impressive but not flawless. It has however brought greater economic and political benefits to many millions of EU citizens and will continue to do so.

22. Time for Britain to wake up to the reality of its place in the world. It could choose to play a much more positive role in strengthening the EU from within. It looks likely to cause through *Hard Brexit* serious self harm to British citizens whilst attempting, in parallel, to destabilise the EU. Time for Britain invest its talent and focus its energy on helping to build a better and more secure place for all citizens of the EU. The vision of a unified Europe is the right vision. Britain should ensure that it plays its part in progressing this worthwhile project – not abandoning it for the most dangerous of neo-liberal fantasies.

²⁵ Franco/German ideas of a two-speed EU with a more closely integrated Euro zone running alongside non Euro-zone EU members - awaiting accession to the Euro-zone - will be a source of friction if Britain remains in the EU.

²⁶ This has encouraged “sweetheart” deals in some EU jurisdictions where corporate taxation is concerned. An example is the belated move by the European Commission to oblige Ireland to enforce common Irish corporation tax obligation on Apple the US multinational company with an assembly plant in Ireland. Illegal concessions were granted by the Irish government to Apple doubtless in a bid to attract the inward investment.

²⁷ Greece was admitted to membership of the Euro without adequate independent assessment of its serious fiscal and monetary problems. These problems eventually triggered a financial crisis in Greece and more widely in the Euro-zone.

²⁸ German fiscal and economic instincts are judged in some quarters to be unhelpful. Critics see this as a form of political heavy handedness which makes greater pooling of sovereignty more difficult. From the German stand point it is only fair to say that there is no political appetite to assume the role of EU paymaster. Each member state has to put its own house in order remains the conventional wisdom in Germany.

²⁹ Tension also arise where traditions of “co-operative federalism” at member state level on matters of state-aid to industry and the heavily centralized decision-making structures and the policy of the MEA (most economic approach) in the European Commission collide.

³⁰ Recent events in the VW emissions scandal may suggest that the deeply embedded norms of “monitory democracy” - a vital aspect of effective German corporate governance - may have been undermined. This is a consequence of a European Commission intervention in changing the veto powers of Lower Saxony, a VW shareholder. These changes have in turn compromised important public interest provisions in German corporate governance. Globalisation and the prevailing culture of global capital markets have done the rest.

³¹ The aim of the Directive was to promote harmonisation and co-ordination between the states of Europe with a view to fostering political union as well as the single market. An important objective was the harmonisation and co-ordination of the divergent company laws of the Member States which impact upon corporate governance. These moves were resisted by the British.

Key economic facts and figures on the British Economy 2016

All in current value US dollars and British Pounds

GDP Current Market Prices	\$2.36tr	£1.82tr
Total Exports	\$699bn	£511bn
Total Imports	\$707bn	£548bn
EU Exports	\$287.6bn	£223bn
EU Imports	\$375.3bn	£291bn
Non EU Exports	\$372bn	£288bn
Non EU Imports	\$331.5bn	£257bn

Key inferences – the EU is the biggest single market for British exports. Brexit will threaten a significant proportion of exports if a “soft” Brexit is not secured. Prospects for a soft Brexit are low - less than 5%.

“Soft” means – retaining access to the Single Market which entails recognition of the four pillars.

“Hard” – means reverting to basic WTO terms which would entail tariffs against British exports but nobody is yet sure of how damaging these might be.

MFN (most favoured nations) principles would prevent the EU from enforcing disproportionate tariffs against Britain.

A serious Hard Brexit issue is likely to be massive disruption to British exports to Europe which would be subject to customs scrutiny and delays.

Population 65.64m

Per Capita Income \$42,651

Government Debt 123.2% of GDP

Household Debt 152.5% of GDP