

The Jean Monnet Seminar Series

**THE EU CONSTITUTION AND WHAT IT
MEANS FOR BUSINESS**

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Malta
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Studies
Association

Editor

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The Jean Monnet Seminars

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THE EU CONSTITUTION AND WHAT IT MEANS FOR BUSINESS

PETER G. XUEREB*

1. Our “Malta in Europe” Strategy as a Nation

Looking back over the first year of EU membership, the scene seems to me to have been marked too often by a ‘defensive’ stance brought about, in my view, not by any external factors but rather by our own *modus operandi*. This is not good for business, and it is not good for the country as a whole. I make *three points* on this.

The first relates to the question of human resources in key places that matter to planning and management. We are in perpetual danger due to our propensity to skimp on human resources of casting our approach in the mode of managing by crisis or managing the moment. I am not one of those who believe that this is inevitable for us due to our small size and lack of resources, especially human ones. If we need to put more people on the job then we should do so. I believe we have the educated and trained people; it is that sometimes we try making do with one where five are needed. If necessary let us train people up.

But, and this is my *second point*, we need to know what role we wish to play. And this needs the consensus of all, a national sense of direction or even vocation inscribed in the minds and hearts of all, almost an identity, our European identity. Without this sense of self as a Union Member our efforts are bound to appear ragged, or worse our membership of the Union become a settled management by crisis existence. Our image is vital, not least our mental image of ourselves, and we should take charge of our image. This does not mean hype. It means agreeing on our identity, and how we wish to be known. To achieve this we need to be far more pro-active; we need to anticipate developments and position ourselves in advance

* An earlier version of this paper was presented at the Conference organised by the Malta Business Bureau on 6th May on the theme: “EU Accession, One Year On - Quo Vadis Malta?”

- according to *our* desired model. Let us call it the “Malta Model”- that complex of values and policies and their interaction that together hang together and distinguish our way of life in all its facets. I do not say that it will be written in stone, but we cannot make a positive contribution to decision-making at European level (or even develop properly at national level) unless we know who and where we are. This is the point of departure. And this calls for mature study and debate. We have not been used to studying ourselves, to being tolerant of different viewpoints within our own society, to being self-critical and applying intellectual rigour and real honesty to our problems. This must change.

As part of this ‘cultural change’ we need to educate ourselves on issues that until now have been treated, if at all, as if they were issues that concerned every one else but us. This may still be true of rail transport or inland waterways, and is no doubt true of the EU space policy, but it is certainly not true of most issues. We are now members and have at least a say and therefore an opportunity and also a responsibility to make our contribution. The old mentality (what can you do? The big guns will decide) that flowed from a sense of powerlessness in the face of regional and global issues, even shared issues, has gone for ever; before decisions are made, our partners will have to listen to us, and take our arguments into account, and justify their own; we are in a position to ask for the justification or even to provide it.

We need to get beyond the ‘adoption of the *acquis*’ mind frame and move to a ‘shaping of the *acquis*’ mindset. We need think-thanks to do this in various spheres. We may even need new policy and research institutes to assist. But you will forgive me for saying as chairman of the European and Documentation and Research Centre, that centres such as mine do exist, have proven their worth and require only support to build on their achievements, which in our case include being recognized as a European Centre of Excellence under the Jean Monnet Project of the European Commission. As Chairman I stand ready to explore all manner of fruitful collaboration. Centres such as mine can contribute to a proper debate on national and international issues, helping to brief decision-makers and society at large about the big issues, assisting

in the finding of common ground, and helping society to evolve the Malta Model.

So at a national level what we need is to gear ourselves up to taking the medium and long-term approach, with the short-term approach decided accordingly; rather than the other way around.

In short we need to have a clear picture of

1. Where the Union seems to be headed in its policies;
2. Our position on the various issues, and the reasons for those positions;
3. How our positions and reasons fit in with those of our Partners;
4. How these positions fit in with those of our Neighbours especially in the Mediterranean region;
5. How other regional and international organisations (Council of Europe, OECD, UN) are moving on those issues and in their own re-organisation and re-orientation;
6. Where the Constitution puts the Union, the Union institutions, and the Member States on those issues (Union/national competences; principles, values, safeguards, solidarity) and what room for addressing those issues it gives each of these players, collectively and singly;
7. How we intend to exercise our national competencies;
8. How we intend to push for initiatives and ultimately vote if it comes to it.

Answering these questions will put us well on the way to evolving the Malta Model.

I pick on two scores by way of example of the sort of thinking we need to do after a national consciousness of the Malta Model begins to emerge. The needs on this score emerge on two main lines, valid now just as they will remain valid if and when the Constitution comes into force:

A. Voting:

1. Where we have QMV, the need to make full use of the participation/solidarity mechanisms.
2. Where there is unanimity, the responsible use of the veto
3. Where there is the possibility of abstention, early formulation of Maltese policy on an issue in order that a consistent stand be taken from start to finish

B. Contribution to EU Policy Development:

1. The Euro-Med/Neighbourhood Policy dimensions. We used to talk of Malta as a ‘bridge’, though other epithets might include ‘interlocutor’.

Finding our role:

- (a) Bridge: for what? ‘Financial’ bridge? (Second Basket, Euro-Med Partnership)
- (b) Political/International Relations bridge? (First Basket)
- (c) Contributor to Intercultural dialogue (Third basket)

No such roles can be played out unless we first have the relevant national ‘debates’ about the context and our perceived roles.

2. A general ‘values’ approach feeding into internal/external policy making:
 - (a) Social values: a middle ground approach: championing the Social Market model
 - (b) Family values: for example, an internal debate needed re the role of women (and men), balancing work/family
 - (c) Area of Freedom, Security and Justice: Towards a just and workable framework especially re immigration policy of the Union.
 - (d) Upholding the rule of law and of International Law: speaking out as an actively neutral country and as a Mediterranean country in the

development of CFSP. Related initiatives. [linked to 1 above]. The Constitution enables us to be there, to participate in debate even if not actively ‘engaging’. We should where possible engage but knowing the strategies for ‘opting out’ and forcing decisions up to a higher level. We should never ‘disengage’ in my view, on the basis of some abstract notion of neutrality. But what is our neutrality?

- (e) Acting as an internal bridge wherever we can: for example, Malta is the only member State with a long association both with the UK/Commonwealth and with the Continental mainland (even Cyprus does not have this). We can ‘speak both languages’. But discretion is needed and much thought and study of the main issues of contention in terms of approach, tradition, and bias. We can assist in the enhancement of the influence either of the UK or that of the Continental leaders, and articulate either position or a compromise position. This could develop into a useful role. But we need to take positions ourselves on some of the ‘great questions’ [Corporate Governance? Corporate Social responsibility? The limits of the public sphere? Trade Unionism at European Level and the role of Social Dialogue etc]
- (f) Christian values: Not least importantly. We should ask ourselves whether proposed European measures-even policy assumptions- are Christian-value friendly or not, and just how a Christian country should act in a largely ‘a-religious’ entity or organization. It is important for us to work this out with our partners-in-religion such as Ireland and Poland. But again, can we be convincing if have no mature debate on the major moral dilemmas of the age?
- (g) Taking up a role as the ‘Solidarity Conscience’ of the Union.

Of course we stand to gain from the newly expressed value of solidarity and the specific manifestations of it (e.g. re financial solidarity and burden-sharing in the context of immigration policy). But beyond our own needs, we should absorb the implications of this value and principle, and support any other Member in need of solidarity in action. It is a natural role for a small state, but also it is a role that, judiciously pursued, can transform it into a 'big' state in terms of influence through persuasion. Let us study the mechanisms of solidarity and seek to have the Union institutions apply them both internally and externally. In the vernacular, we may have the least to give in material terms, but we have a natural role therefore in persuading others to recognize our common responsibilities.

Again, then, how can we contribute to the European debates unless we first have our own 'internal' or national debates on such issues?

My *third point* is that this direction, this identity, the Malta Model, can only emerge if we treat each other with respect, if we talk as adults, defending our patch but meeting each other half way. It was a tragedy that we were unable to conclude a social pact, and this calls for soul-searching and new efforts. It calls for consultation by those with the power of decision. Above all it calls for preparation and goodwill.

In conclusion to this first part of this paper then, I argue that we must:

1. Educate ourselves on the big issues via research and policy analysis and full, frank and mature debate from which no part of society is excluded.
2. Agree common ground and basic positions shaping a common identity, a Malta Model.
3. Make effective use of our 'voice' in the Union to assert our identity and agenda for ourselves and for Europe.

2. What the Constitution Means for Business. Does it ‘Mean’ as Much as the Above?

In writing for a business audience I am conscious that a business audience will listen to views from a podium but only if they come from podium-occupiers who speak the language of business. I therefore avoid a technical legal presentation of the contents (or lack of content) of the Constitution and present this content or lack of it mainly through the words of business leaders. I have thought best to discover and, as it turns out, contrast the positions taken by business in the UK and in Ireland. There are enough pointers there for readers to follow and make up their own minds, if they have not done so already. I do not elaborate on the contexts as they differ in the UK and in Ireland for they are well known to all and readers will be perfectly capable of putting all the comments and quotes that follow into their specific business and political contexts.

There have probably been *two main complaints* against the Constitutional Treaty from the perspective of business. They have both come *principally from the UK*, whose business representatives have a record of making these same objections at every opportunity. They are:

1. The Constitution will heighten bureaucracy.
2. The Constitution will alter the industrial relations ‘settlement’ achieved in the UK by favouring employees and trade unions to the detriment of productivity and business in general.

Typical of the first kind of reproach is the plaintive cry of *Hakan Gomer*, Director of Arkwright Assets, who wrote:

“A large Brussels bureaucracy, accompanied by bloated public sectors throughout the Continent is a menace to entrepreneurship and prosperity as well as to political self-determination....(t)he proposed Constitution, no matter how intellectually satisfying to its creators, is at best another annoying, wasteful Brussels irrelevance”.

In a recent survey of IOD members in the UK, it emerged that 86% of businesses surveyed expected regulation to increase under the Constitution, while 49% were opposed to the Constitution, with 29% in favour, but with only 25% declaring their voting intentions to be settled.

This can be contrasted with the results of a survey conducted by the financial services firm *Bibby* last December which showed that 71% of 300 small businesses surveyed said that keeping up with ‘government’ red tape would be their biggest challenge in the coming year. But to this *the European Movement* countered that claims by the government itself that half of the new regulations introduced in Britain emanate from the EU are nonsense; only 10% do and Brussels is not the ‘phantom regulator’, for most red tape is home-grown. David Stephen has claimed that in 2002 alone 833 regulations were actually removed by ‘Brussels’.

So bureaucracy will always be with us, but the Union is conscious of the need to keep this to a minimum, and the Member States themselves need to address their own side of the bureaucratic problem. One thing appears irrefutably clear: there will be far less cause to accuse the EU of being a ‘phantom’ anything; under the Constitution, transparency is set to increase to a degree only dreamt about by democrats in the past.

As to the second critique, a report by *SJ Berwin* says the following (www.altassets.com):

“It had been feared that the Constitution could have significant implications by expanding existing social and employment rights and protection, as it allows for the Charter of Fundamental Rights to become legally binding. Many thought that this could restrict the flexibility of the labour markets and impose greater administrative burdens on the very type of companies that the private equity and venture capital industry seeks to fund and develop.... Encouragingly, the final text has been cautiously welcomed by Digby Jones, director general of the CBI, as, according to government (UK), it includes a reference that ensures that the Charter does not create any new employment rights. Also

welcomed by UK companies and industry is that the final text maintains the veto in relation to social security, foreign policy, defence and decisions affecting budget contributions....The areas of shared competence are of particular concern as these relate to issues of keen business interest such as consumer protection, social policy, energy, environment, transport, which potentially could lead to significant additional burdens on business....However such concerns are countered, in part at least, by the explicit provision that powers not conferred on the Union remain with the Member states and the fact that, for the first time, the constitution gives national parliaments a power to scrutinize and send back proposals from the Commission at the draft stage if Parliaments are not satisfied that action is needed on the part of the Union.”

In support of the Constitution, besides that of the UK government itself, other voices have been raised in the UK, notably that of *Andrew Duff*, the liberal democrat who contributed (‘significantly’, his webpage says) to the Convention and who argues that the Constitution is in fact “good for business”. He argues that the *re-formulation of the objectives of the EU took into account the need for a more competitive environment for business and for less and better regulation.*

Duff in fact sees the following as *the main advantages for business of the Constitutional Treaty over the current treaties:*

1. strengthening the Commission’s effectiveness in enforcing compliance with EU law;
2. creating a new class of secondary legislation delegated to the Commission under the scrutiny of the Parliament and the Council, whereby industry will have greater influence over Commission decisions;
3. encouraging better consultation at the pre-legislative stages as well as stricter financial and regulatory assessments by the EU institutions themselves (see the Subsidiarity and Proportionality Protocol No.2);
4. improving direct access to the European Court of Justice for individual citizens (and companies) when they are

- adversely affected by a regulation that is not directly aimed at them but affects them;
5. installing the Charter of Fundamental Rights, with mandatory effect, within the Constitution.

Duff's points may be perceived as rather general and apparently removed from the rough and tumble of day-to-day business life, but on analysis they go to the core of the giving of real status and citizen power to the individual business operator in the EU regime.

His 'accusation' (with all due account for political rhetoric) against his political opponents: "The Charter sends the CBI and the Tory Party into apoplexy because they fear the dismantling of Thatcherite legislation on trade unions. This is ridiculous. The Charter is binding only on EU institutions and member states when and in so far as they implement EU law and policy...The right to strike is recognized in the Charter in accordance with national laws and practices. In industrial relations, the EU can only support and complement national policy." His conclusion: "British business should welcome the streamlining, rationalisation and clarification that the Constitution brings forward." (Speech delivered in May 2004).

But perhaps the UK is different, not to say a special case?

What is the View in Ireland?

It seems appropriate to refer on this to the declarations of *Arthur Forbes*, Assistant Director European Affairs, *Irish Business and Employers' Confederation*. He has had a paper published by the European Institute of Public Administration titled "What Does Business think of the EU Constitution?" and I give a reference for it at the end of this paper. The Constitution, Forbes asserts, is essentially about clarification, transparency, legitimacy, and efficiency.

First his conclusion, then some more about his reasons.

His conclusion:

“Irish and European business has already welcomed the outcome of the IGC in Brussels on 18th June 2004.....Notwithstanding our concerns that legal confusion may arise from the decision to incorporate the Charter of Fundamental rights into the Constitution, Irish business can be very pleased that its core priorities were satisfactorily addressed. These bottom lines included: maintaining unanimity in tax policy and key areas of social policy, reaffirming the overriding EU objective of competitiveness, and introducing the need for greater proportionality in Union legislation...IBEC will therefore strongly support the adoption of this Constitution in the referendum in Ireland in 2005”.

As to his reasons in some more detail, he declared Irish business to be generally in favour of the strengthening of the following policy fields: intellectual property, services of general economic interest, energy, health, trade, security and defence policy and freedom, security and justice policy.

While QMV is extended, the most welcome feature of this, he says, is that this entails the fullest involvement of the European Parliament as co-legislator with the Council under the new ordinary legislative procedure, while the Constitution maintains the veto in areas of tax and sensitive areas of social policy, social security, some areas of environmental policy, and anti-discrimination measures.

Regarding the ‘better regulation’ agenda, the subsidiarity and proportionality principles are indeed strengthened through the obligation on the Commission to produce quantitative and qualitative indicators in support of its justification for advancing the proposed measures at all. One could add that national parliaments are given a clear role in monitoring and objecting to proposals, which they consider violate these fundamental principles.

So: *What is the Irish view of the social policy provisions in the Constitutional Treaty? Are these any different from the perceptions of British Industry?*

I invite you to refer to Arthur Forbes' paper (page 12), in which he summarises *the changes in the employment and social policy field*:

1. The charter will be incorporated, and made legally binding on the Institutions and on the Member states when they implement Union law.
2. The Union's core values will now expressly include human dignity, equality, and the rights of minorities, with sanctions potentially applying for breach
3. The Union's objectives will be extended to include: the aim of 'full employment' (but see 4. below re 'goals'), protecting the rights of the child, combating social exclusion and discrimination, promoting social justice, and solidarity between generations
4. A new "horizontal" social clause will be introduced, according to which the Union shall take account of social policy goals in the definition and implementation of all other policies. These goals are listed as; a *high* level of employment (more realistic than 'full' as stated under 'objectives'), adequate social protection, the fight against social exclusion, and a high level of education and training, and protection of human health.

Readers will have noted that these changes essentially do no more on the face of it than articulate with far more clarity than the current treaty texts the values that we all share.

Duff points out that:

Beyond these developments, it should be stated that the Constitution does not specifically give the Union any new defined power to legislate in further areas of social policy. In other words, the old Treaty articles on precisely what laws can be adopted in the social field remain exactly the same. Furthermore, the so-called "excluded competences" where the Union cannot legislate remain

as at present (i.e. pay, right of association, the right to strike and the right to impose lockouts). Similarly, there is no significant further extension of qualified majority voting, with the exception of mutual recognition of diplomas for self-employed persons and social security measures for migrant workers. In the latter case, namely the aggregation and payment of benefits to migrant workers and their dependents, the move to QMV is subject to the new ‘emergency brake’ safeguard procedure under which a Member State that believes that a proposed measure would infringe the principles of its social security system or would affect the financial balance of that system may request that the issue be referred to the Heads of State and Government. Crucially, unanimity will remain for legislation on social security, the social protection of workers, the representation and collective defence of workers’ interests and the conditions of employment of third-country nationals and for general anti-discrimination rules. Finally, a Declaration confirms in which areas the EU may promote ‘coordinating measures’: the fields of employment, labour law and working conditions, vocational training, social security, the prevention of occupational accidents and diseases, occupational hygiene, and the right of association and collective bargaining. In the words of the Constitution, all of these “fall essentially within the competence of the Member States”, that is to say that any EU action can only be a complementary nature, strengthening co-operation between Member States and not harmonizing national systems. So no major substantive changes, but improvements as listed in 1-4 above.

The ETUC Position

The ETUC had given the Constitutional Treaty a reasonably warm welcome, saying that “*clear progress had been made in areas on the trade union agenda...the benchmark values of social justice, equality and solidarity, and the Union’s objectives of full employment, a social market economy and sustainable development are in line with our demands*”. Predictably, it *praised the incorporation of the Charter*, though it should be clear from the above that not too much can be read into this, due to limits on

competence, unanimity requirements, and various caveats that continue to apply.

The ETUC also *praised the enhanced role given to the role of the social partners and to social dialogue*. It did in fact complain about the failure to extend QMV to certain areas.

UNICE

UNICE went on record as stating re the Draft Treaty that the Draft Treaty represented a “*satisfactory balance between economic and social aspects*” and was also particularly pleased with the heightened role of social partners and the social dialogue process. These are the essential positions carried through to the final text.

What of the Internal Market Provisions in General? Any Radical Changes?

This question is also addressed by Forbes and I refer you once again to his full EIPA Paper.

As the Information Dossier No 6, initially published by the Commission in summer 2004 and updated in early 2005, puts it: “... *the Constitutional treaty does not constitute a great increase in the EU’s competences or significant policy changes in most areas. Apart from introducing new institutional arrangements and- crucially- providing for a more efficient and transparent decision-making procedure, it essentially re-arranges existing provisions to make the overall structure of the EU’s legal framework more coherent, transparent and workable*” (page 32). I have made available to the organisers pages 31 and 32 of this Dossier for passing on to participants in this conference to save me having to list the main changes as therein set out. *Earlier pages of this dossier detail the changes in CFSP, which I have commented on in the press and in the EDRC’s latest book, and also on justice and home affairs and economic and monetary union.*

Lobbying

Finally, I point out that one of the great ‘gainers’ in institutional terms under the Constitution will be the European Parliament. The implications for lobbyists are clear, as was pointed out by Mark Harwood, Laurence Gormley and others at the EDRC conference in April - again I refer you to our recently published book: *The Constitution for Europe: An Evaluation*. No doubt the implications will not have been lost on Maltese lobby groups and certainly not on the Malta Business Bureau.

The Union’s Role in the World

I end by saying that the Constitution seeks as a major objective to put the Union on the world stage as a global player with economic and political clout to match its ambitions for prosperity and peace.

Its new legal personality is an important part of that. Its internal institutional reforms, such as that of involving the European Parliament fully in external commercial policy, are a major ingredient also. So also are the new provisions on the common foreign and security policy and defence policy, including the new figure of the Union Minister of Foreign Affairs. The clear reference to a new Neighbourhood Policy for the Union presaging ever-closer relations with its Neighbours speaks in that direction.

All this must surely be “good for (European) business” in principle. Will it also be good for the world? The Constitution gives the Union the tools to work to eradicate poverty, by addressing the root causes of poverty and spreading democracy and respect for human rights, as allied to economic co-operation and the spread of free market principles. The ‘new generation’ third-country agreements that could flow from the principles and processes of the Constitution would more easily build the stable conditions required for free trade and investment coupled with development and societal advancement. I would argue that the internal and external policies of the Union, if based on the values set out in the Constitution *and* on the social market model capable of emerging from it in linear development with the current *acquis*, have the

potential to harness the power of capitalism to the overall benefit of mankind, and with that parting shot I now leave the business community in Malta to ponder its role in this high task, while aware that this room holds others who would not define themselves primarily or at all as members of the business community while yet knowing that they are in fact a very important component of it.

3. Closing

In conclusion then I say that the Constitution means some very good things for peace and prosperity in Europe and beyond, and it does not mean as much of the bad things that have been claimed by some. What means more for business in Malta perhaps is what was said in the first part of my presentation. Neither the current EU system nor the (in my view improved) system that the Constitution will usher in if ratified by the Member States mean or will mean as much to Malta and business in Malta as they should unless we learn to work better together to secure the real benefits of membership. If we can adopt *a more united approach* to the challenges that face us as a community, *and above all if we can prepare well and take communal responsibility for establishing our agenda*, I feel that while we may lead a duller existence in some ways (confrontation is always more thrilling than serious study and collaboration) we can find a more secure and prosperous future for ourselves, and be proud of Malta and of its distinctive contribution as a member state of the European Union. Thank You.

References:

Arthur Forbes, *What Does Business Think of the EU Constitution?* EIPA Working Paper 2005/W/06. It is available on the EIPA website: <http://www.eipa.nl>

EDRC Publications on the Constitution:

P.G. Xuereb (ed), *The Value(s) of a Constitution for Europe* (EDRC, 2004)

P.G. Xuereb (ed), *The Constitution for Europe: An Evaluation* (EDRC, May 2005)