Documentation

The following are excerpts from Prof. Giuseppe Guarino's forthcoming pamphlet, translated from Italian. Emphasis is in the original.

Giuseppe Guarino is professor of Comparative Law at Rome University. He was Minister for Industry in the first Amato government (1992-93), and the author of a far-sighted modernization plan for state industries, which was rejected in favor of the "Britannia" scheme of rampant privatization.

To the reader:

Italy, along with 26 other countries in the European Union, has been called on to ratify the Lisbon Treaty. This is not a question of ordinary administration. It is a very significant decision. It is no exaggeration to compare it to the decision facing the peoples of the preunification states which had not been annexed by Italy, almost 150 years ago, who had to decide whether or not to join the new Kingdom....

In 2004, an ambitious draft of a new Treaty was approved, entitled the "European Constitution." France and Holland, once they studied the text of this Treaty, rejected it. The Lisbon Treaty has abandoned the name "European Constitution." Although a comparison between the two is laborious, it seems that, essentially, the Lisbon Treaty is a reproduction of the previous document; and it goes even further on certain points. This is yet another reason which suggests we should be careful in going forward.

The Lisbon Treaty is not easy to read. Certain stereotypes have been formed concerning European Community material. Over time, they have taken on the character and form of ideologies. They lead to distortions. In order to avoid them, it is advisable to strictly follow the text of the documents. Thus, precise information is indispensable in order to make the right decisions.

In order to reach a high level of objectivity, I have not hesitated to include in my presentation a long list of specific competences of the Commission, and the cases in which the ordinary legislative procedure is used. Each of these competences, and the indication of the European Community institution which is to carry it out, corresponds to a restriction of the range of national powers. It is useful to keep them in mind, to understand the entity of the limitations on sovereignty which we are being asked to grant.

But I have also trained the spotlight on certain types of actions, which are formally less important, or of minimal significance. These are unknown to the public at large (and also to the governing class), have been omitted in manuals, yet they produce wide-ranging and long-lasting effects; with an impact in limiting sovereignty that is even greater than that produced by the formal competences....

I have not set myself the goal of examining all of the aspects of the Lisbon Treaty. The deadline for ratification is looming. I have concentrated on a single theme: whether the institutions, as governed by the Treaty, meet the mandatory conditions set by the Italian Constitution for the limitation of sovereignty.

II. The Euro and the Large European Market

9. The ratification of Lisbon is the last opportunity that each of the Member States will have to decide on their own future in an independent and deliberate manner.... If there is a problem, it needs to be addressed immediately. We cannot be under the illusion that it will be possible to amend or improve the provisions which harm us in the future, simply upon request. Such a change requires the consent of all 27 member countries....

We need to take into account the provisions of Art. 48 of the TEU. In the simplified revision procedure, the dissent of a single national Parliament would be sufficient to block any provision proposed to protect a specific Italian interest, even if it has been recognized that harm has been done, and that the situation is unjust....

However, I will only deal with the question of legitimacy. The aim is to determine if the regulations in the Treaty meet the conditions set by the Constitution on limitations of sovereignty. This is an essential aspect, which, paradoxically, has been entirely disregarded. I hear people say that the question is moot. The treaties have been in force for years. We certainly cannot challenge now, what we have already accepted in the past.

This argument ignores the fact that in constitutional matters, the institution of acquiescence does not apply, and a challenge to constitutionality must be brought regarding every new implementing act, and may affect the law which ratifies each new treaty....

Reflections which have been prompted by the specific circumstances of Italy, could also be useful for other countries.

If there are questions of constitutionality, which are well-grounded or at least plausible, it would certainly be improper not to inform the other countries.

IV. The Competences of the Union

18. The competences of the Union ... *cover almost every aspect of national collective life*....

26. The Union's objectives and purposes, which are evoked in many provisions, are often generic, indistinct, and all-inclusive. They allow for unexpected expansions. We must add Art. 308.... "If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures."

28. In conclusion, it is no exaggeration to say that everything, or if we want to be cautious, *almost everything, which*

belongs to the collective life of the peoples of the Member Countries, is subject to some influence from the Union....

It is no coincidence, and actually, it is a very revealing indication, that Art. 3-b TEU, in listing "essential State functions," which the Union "shall respect," lists only three of those functions: "ensuring territorial integrity," "maintaining law and order," and "safeguarding national security." What should be added, is the well-being of the collectivity. Later, we will see why this wasn't mentioned. If we think of the Union's powers in the fields of foreign policy and defense, as well as military matters, the doubt also arises that in these fields as well, the State's exclusive authority is neither total, nor absolute.

VI. A Specific and Significant Political Power of the Commission

Art. 104 TF (Lisbon text) states, "If the Commission considers that an excessive [budget] deficit in a Member State exists or may occur, it shall address an *opinion* to the Member State concerned and shall inform the Council accordingly." (No. 5). After having received the observations from the Member State, the Commission can decide, *based on an overall assessment*, whether an excessive deficit exists. The Commission then follows up on its assessment by making a proposal to the Council. The Council adopts the decision on the existence of an excessive deficit, and following the recommendation of the Commission, adopts, *without undue delay,* recommendations which the State is obligated to follow....

For States within the euro system, which lack monetary sovereignty, the simple communication of the Commission's opinion regarding the existence of an excessive deficit produces serious consequences. It influences the evaluation of financial markets regarding that State's creditworthiness, and thus affects interest rates, imports and exports, the trade balance, the potential of capital flight, and economic policy decisions more in general. The mere possibility that the excessive deficit procedure may reach the decision phase in the Council, is a strong deterrent for States. There are two consequences: on the one hand, an expansion of the Commission's authority; and on the other, the more frightful and at the same time scrupulous subjugation of the euro States to the Commission's criteria....

48. The Commission's powers have de facto taken on a clear and unquestionably political nature. This is due to two factors: regulations regarding the verification of excess deficits are elastic (e.g., borrowing which is diminishing *substantially* and *continuously*, and reached a level that *comes close* to the reference values; if the excess is only exceptional and temporary; or that the debt/GDP ratio is sufficiently diminishing, at an adequate rate).

The criteria adopted and imposed by the Commission determine, both in general and in the exercise of the power of supervision regarding an individual State, the level of debt and borrowing which is actually allowed. A power which sets the maximum amount of discretion that a State's annual budget may contain. And thus, this power of the Commission, which is limiting, is at a higher level than the powers of the national Parliament....

The responsible person is identified as the Economics Minister, whose austerity policy would suppress development. However, in the search for the responsible person, we must go a bit higher....

Above all, it is the Commission which sets the criteria for calculating revenues and spending....

De facto, the power of the Commission prevails over the Treaty itself. Its binding effect is such that the States comply with its directions without even asking if they are correct or not, and thus follow those directions even if they diverge from the provisions of the Treaty, to the point of even being inconsistent with it.

52. The shift of the principal role from the Council to the Commission does not regard only the distribution of competences. It has changed the nature of the powers. The Council is made up of a representative of each State at the Ministerial level (Art. 9C, No. 2, TEU). Each Member State, through its representative, legitimately protects its own political interests. In the Council, the State's political interests, consistent with the nature of the body, have equal standing with respect to the institutional interests of the Union. The Union is added to the States, it does not abolish them. The Ministers consider the consequences which the decisions may have not only for the individual State affected at that time, but also for their own States in the future. Mutual understanding can help to solve one State's own problems, including of a different nature, which are already under consideration, or which will arise in the near future. With the transfer of the dominant role to the Commission, this ends. The Commission is charged with pursuing only the institutional interests of the European Union. The interest of the states are cancelled. They cannot break through this barrier.

For a State such as Ita ly, which is naturally exposed to the danger of excessive deficit due to the size of its debt, it is impossible to relinquish the political protection inherent in the location of the competence in the Council.

The changes introduced by Lisbon to Art. 104 TEU, Nos. 5, 6 and 7, cannot be accepted by our country.