THE EURO AS A CONSTITUTIONAL CURRENCY

L'euro come valuta costituzionale

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Abstract (En): *More than thirty years after the signing of the Maastricht Treaty (1992), which marked the establishment of Economic and Monetary Union (EMU), the structural tensions between monetary power – exercised in full independence by the European Central Bank (ECB) – and the democratic principle, particularly in its representative dimension, remain unresolved. This paper contends that such tensions originate in the constitutionalisation of money, that is, in the decision to regulate monetary policy through the Treaties, the Union's constitutional-level source of law. This process has resulted in the depoliticisation of liquidity management – not in the sense of rendering it neutral, since monetary choices are intrinsically political, but rather by removing them from the sphere of representative institutions and thus from democratic deliberation. Adopting this interpretive framework, the paper argues that the most credible –albeit ambitious – strategy for restoring coherence between monetary policy and the democratic principle lies in a project of de-constitutionalisation of money.*

Abstract (It): A oltre trent'anni dalla firma del Trattato di Maastricht (1992), che sancì l'istituzione dell'Unione economica e monetaria, le tensioni tra il potere monetario – esercitato dalla Banca centrale europea in condizioni di piena indipendenza – e il principio democratico, nella sua dimensione rappresentativa, restano tuttora irrisolte. Il presente contributo si propone di evidenziare come tali tensioni trovino origine nel processo di costituzionalizzazione della moneta, vale a dire nella scelta di affidare ai Trattati europei – fonti di rango "costituzionale" nell'ordinamento dell'Unione – la disciplina della politica monetaria. Tale opzione ha determinato, in concreto, una de-politicizzazione della gestione dei flussi di liquidità: non già nel senso di una loro neutralizzazione, giacché le decisioni monetarie restano intrinsecamente politiche, bensì attraverso un loro sensibile allontanamento dal circuito delle istituzioni rappresentative. Sulla base di questa chiave di lettura, si sostiene che la via più plausibile – ancorché ambiziosa – per ricomporre il divario tra politica monetaria e principio democratico consista in un processo di de-costituzionalizzazione della moneta.

Keywords: Monetary Governance; Constitution; European Central Bank; Democracy

Parole chiave: Governo della moneta; Costituzione; Banca centrale europea; democrazia

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1. Opening premise: the structural tensions between independent monetary power and democratic principle

The exercise of 'monetary policy'[1] by the European Central Bank (ECB) has been the object of sustained and in-depth analysis within public law scholarship.

The reasons for this pronounced attention are readily apparent: the ECB, acting with full independence, wields the power to manage money – an enduring symbol of sovereignty[2] – which pervasively influences the governance of the entire economy and, through it, the enjoyment of fundamental rights[3]. By means of its monetary instruments, the ECB takes discretionary decisions capable of shaping the dynamics and outcomes of distributive conflicts: conflicts that, by their very nature, are political[4].

Within this broader interest in the legal-constitutional dimensions of liquidity management, public law analysis has predominantly focused, in a critical key, on the tensions between the autonomous exercise of monetary authority and the democratic principle, particularly in its representative configuration[5].

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In principle, 'monetary policy', together with 'fiscal and budgetary policy', falls within the broader category of 'economic policy' (N. ACOCELLA, *Fondamenti di politica economica*, Roma, 2020, 17 ff.). However, under the EU Treaties, the term 'economic policy' refers exclusively to fiscal and budgetary dimensions. To maintain consistency with the European legal framework, the terminology adopted in the Treaties will be employed throughout this analysis. Accordingly, the expression 'economic policy' will be used to refer to the power to determine the amount and sources of tax revenue allocated to the public sector, as well as the criteria governing its distribution, beneficiaries, and purposes. Conversely, the term 'monetary policy' – along with synonymous formulations such as 'monetary governance' or 'liquidity management' – will refer to the authority to issue legal tender and to regulate the monetary base through various instruments, including interest rate adjustments and open market operations, namely the purchase and sale of financial assets on the markets. For a theoretical framework, see O. CHESSA, *La costituzione della moneta. Concorrenza, indipendenza della banca centrale, pareggio di bilancio*, Napoli, 2016, 266..

[2] G.U. RESCIGNO, *Moneta e Stato*, in *Diritto pubblico*, No. 2, 2017, 311 ff. On the historical evolution of money, see C. GIANNINI, *L'età delle banche centrali*, Bologna, 2004, 46 ff.

[3] G. REPETTO, *Responsabilità politica e governo della moneta: il caso BCE*, in G. AZZARITI (a cura di), *La responsabilità politica nell'era del maggioritario e nella crisi della statualità*, Torino, 2005, 303.

[4] O. CHESSA, *La costituzione della moneta*, 295. The redistributive – and therefore political – effects of the ECB's monetary decisions have recently been brought to light by E. MONNET, *Balance of Power. Central Banks and the Fate of Democracies*, Chicago, 2024, 151 ff. It should further be noted that, beyond managing the money supply, the ECB is also responsible for the prudential supervision of the credit system. This analysis, however, will focus exclusively on the former function – namely, the management of the money supply. This choice is justified by the fact that the monetary function exhibits distinctive features, insofar as it is grounded in decisions of a fundamentally political nature. As such, it raises specific constitutional issues that must be addressed separately from the scrutiny of prudential supervision, which is more properly classified as an administrative function. For further insights in this regard, see P.F. LOTITO, *Banca d'Italia e potere monetario. Profili Istituzionali*, Torino, 1998, 17 ff.

[5] See, for instance, the reflections of G. PASTORI, *Poteri delle banche centrali e principio democratico*, in *Banche centrali e principio democratico*, Napoli, 2007, 4-6, who emphasises that the independence of central banks from political power – while representing "a condition for the overall functionality, efficiency and impartiality of these institutions' activity" – must not degenerate "into the self-referentiality of the institutions themselves, in a condition of separation from the political-administrative system to which they belong." On the contrary, Pastori argues, such independence should guarantee "a relationship of coordination, not separation, between central banks and the institutions of democratic representation." More broadly, on the structural relevance of the relationship between democracy and economic power within democratic regimes, see D. FISICHELLA, *Denaro e democrazia. Dall'antica Grecia all'economia globale*, Bologna, 2005.

2. The core critical issue: the "constitutionalisation" of money

Building on the considerations outlined above, this paper seeks to demonstrate that the tensions between monetary governance and the logic of democratic representation are rooted in a critical – yet often neglected – element of the debate on monetary policy: the *constitutionalisation of money*[6].

This evocative notion refers to the transformation whereby the legal framework governing monetary policy – originally vested with ordinary legislative status in the Italian legal order, as well as in those of most other Member States[7] – has, with the establishment of Economic and Monetary Union (EMU), become an integral part of the supranational constitutional architecture[8]. The drafters of the Maastricht Treaty anchored the regulation of the single currency in the constitutional foundations of the European Union – namely, the Treaties – thereby establishing the euro as a constitutional currency, governed by an equally constitutional central bank[9].

This shift has resulted in the *de-politicisation* of monetary management: not in terms of its purported neutrality – since its effects remain profoundly political – but rather through its substantial removal from the sphere of representative institutions and, by extension, from the ordinary channels of democratic consensus and the general will[10].

Within the framework of EMU, the European institutions with a directly or indirectly representative mandate – those, in other words, that are responsive to public opinion – are effectively precluded from questioning the overarching objective that governs monetary policy: the *maintenance of price stability*[11]. They cannot, that is, subject to democratic deliberation whether this objective remains the most appropriate for the Eurozone in light of specific circumstances, unforeseen challenges, or the possible desirability of aligning the single monetary policy with the outcomes of supranational coordination of the Member

[6] For a more in-depth examination of this topic, see A. CONZUTTI, *Il governo della moneta nella prospettiva del diritto costituzionale*, Torino, 2024.

[7] M. DANI, *La banca centrale nel diritto pubblico europeo. Una prospettiva teorica e comparata*, Milano, 2024, 19-66.

[8] See Chapter 2 of Title VIII of the TFEU, which is dedicated to monetary policy. On this point, see also B. DE WITTE, *The Rules of Change in the European Union. The Lost Balance between Rigidity and Flexibility*, in C. MOURY, L. DE SOUSA (eds.), *Institutional Challenges in Post-Constitutional Europe: Governing Change*, Abingdon, 2009, 35.

[9] On the characterisation of the ECB as a constitutional body, see O. ROSELLI, *Banca Centrale Europea e processo d'integrazione dell'unione in un'epoca di crisi economica e politica*, in C. IANNELLO (a cura di), *Le autorità indipendenti tra funzione regolativa e judicial review*, Napoli, 2018, 96.

[10] On this point, see, in a critical vein, L. MELICA, *Il Sistema europeo delle banche centrali e la sovranità degli Stati membri della Comunità europea: riflessioni sull'ordinamento italiano*, in *Rivista italiana di diritto pubblico comunitario*, No. 2, 1995, 397. With a contrasting perspective, see S. ORTINO, *La Banca centrale nella costituzione europea*, in *Quaderni costituzionali*, No. 1, 1993, 65-66, who argues that the depoliticisation of the European governance of money – achieved through the prior entrenchment in the Treaties of the rules governing monetary policy – serves to safeguard the federative principle of parity among the Member States, a principle that would otherwise be jeopardised if monetary policy were made subject to discretionary decisions adopted by majority vote. From a broader theoretical standpoint, see the recent contribution by S. EICH, *The Currency of Politics: The Political Theory of Money from Aristotle to Keynes* (2022), trad. it.: *Teoria politica del denaro. Da Aristotele a Keynes*, Roma, 2023, 405. Eich notes that "the depoliticisation of money is an illusion that is the result of sleight of hand. Money never ceases to be political: it is simply removed from democratic politics".

[11] See Articles 119(2), 127(1) and 282(2) TFEU; Article 2 ESCB/ECB Statute.

States' economic policies[12]. This limitation stems from the fact that the European monetary rules do not function as policy options open to political renegotiation in response to shifting democratic majorities, but rather as prescriptive imperatives enshrined in the Treaties, fixed a priori and largely insulated from contestation. To challenge them would be futile, if not counterproductive[13].

Moreover, the inclusion of the entire framework governing liquidity within the Union's primary law has conferred upon the ECB – entrusted with the management of monetary aggregates – an unprecedented degree of independence[14]. Given the formidable procedural thresholds required for Treaty revision, such amendments are, for all practical purposes, unattainable[15]. As a result, the ECB is effectively insulated from any attempt by the European legislature to counter its discretionary operational interpretations of the constitutionalised monetary objectives[16] by invoking the threat of altering its normative framework.

Taken as a whole, the EMU framework not only excludes representative institutions from the normative determination of monetary policy objectives, but also shields their practical implementation from any democratically grounded mechanisms of correction or accountability[17].

[12] On this consequence, as brought about by the constitutionalisation of the EU legal order, see J.E. FOSSUM, A.J. MENÉNDEZ, *The Constitution's Gift? A Deliberative Democratic Analysis of Constitution Making in the European Union*, in *European Law Journal*, Vol. 11, No. 4, 2005, 409-410.

[13] A. GUAZZAROTTI, *European Integration and Political Reductionism*, in *Costituzionalismo.it*, No. 3, 2020, 10. A form of "total constitution" appears to be at work in the sphere of European monetary policy: an expression coined by M. KUMM, *Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law*, in *German Law Journal*, Vol. 7, No. 4, 2019, 341 ff. This notion refers to a constitutional framework in which "politics is conceived as the continuation of law by other means. The constitution serves as a guide and imposes substantive constraints on the resolution of any and every political question" (*ibid*., 343).

[14] See Articles 282(3), 283(2), 123, 130 TFEU; Articles 7, 11(2) and (4), 21(1), ESCB-ECB Statute.

[15] P. BRENTFORD, *Constitutional Aspects of the Independence of the European Central Bank*, in *International and Comparative Law Quarterly*, Vol. 47, No. 1, 1998, 76.

[16] Because the primary-law rules governing European monetary policy are difficult to amend through ordinary political deliberation, they may – despite remaining formally unchanged – evolve in practice according to the ECB's interpretative choices (see M. IOANNIDIS, *Europe's new transformations: How the EU economic constitution changed during the Eurozone crisis*, in *Common Market Law Review*, Vol. 53, No. 5, 2016, 1237 ff.). The Union's legislative circuit could, however, mobilise a number of Treaty-based instruments to counterbalance such reinterpretations. First, under Article 125(2) TFEU, the Council – acting on a Commission proposal and after consulting the European Parliament – may adopt definitions necessary for applying Article 123 TFEU, thereby clarifying when government-bond purchases do not amount to the prohibited monetary financing of public debt. Secondly, pursuant to Article 129(3) TFEU, the Council and Parliament, following the ordinary legislative procedure, may amend Article 18 of the ESCB/ECB Statute so as to delineate more precisely the conditions under which sovereign-bond purchase programmes are permissible. Finally, by invoking Article 121(2) TFEU, the Council, on a Commission proposal and in light of the European Council's conclusions, may issue broad economic-policy guidelines that, inter alia, define the ECB's possible contribution to the Union's general economic policies, thus operationalising its secondary mandate. In this way, the Council would take an active role in clarifying how the ECB should manage the economic-policy effects of its operations. See further N. DE BOER, J. VAN'T KLOOSTER, *The ECB, the courts and the issue of democratic legitimacy after Weiss*, in *Common Market Law Review*, Vol. 57, No. 6, 2020, 1722.

[17] More generally, see the analysis by G. DAVIES, *Democracy and Legitimacy in the Shadow of Purposive Competence*, in *European Law Journal*, Vol. 21, No. 1, 2015, 2 ff., which argues that the constitutional predetermination of the Union's objectives impedes the development of meaningful democratic processes at the

Put in even starker terms, insofar as the legal order of the euro is entrenched in the Treaties, the European electorate is effectively precluded from expressing its will on matters of monetary policy through the exercise of the right to vote. Neither the outcome of supranational elections – through which the members of the European Parliament are directly chosen – nor that of national elections – through which ministerial representatives sitting in the Council of the Union are indirectly designated – can exert any influence over this domain[18]. The result is a form of monetary integration that present and future European generations are unable to revise, even should they collectively wish to do so[19].

All things considered, it is clear that, within the European Union, the constitutional source has assumed a level of centrality in monetary matters that had no equivalent in the Italian legal system or in those of the other Member States before Maastricht. This centrality, however, has come at the cost of a profound distortion of the very function of constitutional law[20]. Constitutional provisions are intended to legitimize and mediate political conflict – particularly on divisive matters such as the governance of monetary policy[21] – not to suppress such conflict by enshrining a predetermined programme or ideology, and even less by entrusting its definitive interpretation to a policy-making institution, such as the ECB, which stands outside the representative democratic circuit[22].

supranational level.

[18] See G. MAJONE, *Rethinking the Union of Europe Post-Crisis. Has Integration Gone Too Far?*, Cambridge, 2014, 314, where he observes: "If the public wants to trade some unemployment for a somewhat higher rate of inflation, it can make this preference known by electing candidates who stand for such a policy; but no such possibility is given to the citizens of the euro zone or to their political representatives". From this perspective, it becomes clear why the proposal – advanced by several scholars – to counterbalance the ECB's substantial lack of democratic accountability by strengthening its ties with the European Parliament, though commendable, is ultimately insufficient. As long as the Union's monetary governance remains shielded by constitutional entrenchment, elected representatives in the European Parliament –regardless of the introduction of more stringent mechanisms of institutional accountability – would still be entirely precluded from influencing either the definition of monetary objectives ex ante or their concrete implementation ex post in accordance with the preferences of their constituents.

[19] See M. VAN DER SLUIS, *EU law for a new generation?*, in *International Journal of Constitutional Law*, Vol. 14, No. 2, 2016, 484. For a more in-depth examination of the protection of the interests of future generations as an increasingly urgent challenge for contemporary public law, see R. BIFULCO, *Diritto e generazioni future. Problemi giuridici della responsabilità intergenerazionale*, Milano, FrancoAngeli, 2008.

[20] To borrow the terminology of G. ZAGREBELSKY, *La legge e la sua giustizia*, Bologna, 2008, 133-134, it may be said that, in the monetary domain, the Treaties have assumed the character of "instruments of government in constitutional form". More generally, on the process of "integration through law" – mainly through primary law – see the classic M. CAPPELLETTI, M. SECCOMBE, J.H.H. WEILER (eds.), *Integration Through Law: Europe and the American Federal Experience*, Berlin-New York, 1986.

[21] This, according to H. KELSEN, *Demokratie* (1927), transl. it.: *La democrazia,* in H. KELSEN, *Il primato del parlamento*, Milano, 1982, 29 ff., represents the ultimate purpose of a democratic constitution. In a similar vein, see G. AZZARITI, *Diritto e conflitti. Lezioni di diritto costituzionale*, Roma-Bari, 2010, 193; R. BIFULCO, *Le sfide della crisi economica alla Costituzione: differenziazione e globalizzazione*, in *Parolechiave*, No 2, 2012, 49-52; M. DANI, *Il diritto pubblico europeo nella prospettiva dei conflitti*, Padova, 2013, 68 ff.

[22] That a constitutional norm should abstain from taking positions on matters that give rise to reasonable disagreement is a point strongly emphasised by J. RAWLS, *Political Liberalism* (1993), transl. it.: *Liberalismo politico*, Torino, 1999, 192-193. This Rawlsian perspective has been applied specifically to the EMU by R. BELLAMY, A. WEALE, *Political Legitimacy and European Monetary Union: Contracts, Constitutionalism and the Normative Logic of Two-Level Games*, in *Journal of European Public Policy*, Vol. 22, No. 2, 2015, 266 ff. A

In light of the foregoing, the constitutional entrenchment of the single monetary framework – unchanged since its origin – emerges as a structural anomaly, entailing a substantial constraint on the effective operation of the democratic principle.

3. A potential remedy: the "de-constitutionalisation" of money

In order to overcome the equation outlined in the previous section – namely, the identification of the constitutional crystallisation of the European governance of liquidity with the erosion of its democratic dimension – the most plausible remedy appears to lie in a process of *de-constitutionalisation of money*[23].

Put differently, it would be desirable, at the European level, to pursue the common objective of removing from the Union's primary law all provisions that embed prescriptive monetary policy directives. This would not entail their abolition, but rather their downgrading to the level of secondary law, more precisely to the status of a regulation of the European Union.

More specifically, the proposed downgrading of sources could concern the following provisions:

(a) Articles 119(2)[24], 127(1) and 282(2)[25] TFEU, which establish the maintenance of price

parallel debate emerged during the "European Convention on the Future of Europe", in relation to the "Draft Treaty establishing a Constitution for Europe", where the recognition of constitutional status for norms grounded in contested premises was explicitly questioned. See, in this respect, T.V. OLSEN, *Europe: United under God? Or Not?*, in L. DOBSON, A. FØLLESDAL (eds.), *Political Theory and the European Constitution*, London-New York, 2004, 75 ff.

[23] The proposal to de-constitutionalise the Treaties in order to enable a re-politicisation of the Union, understood as a strengthening of the role of the supranational legislative circuit, has been advanced – albeit with different emphases – by D. GRIMM, *The Democratic Costs of Constitutionalisation: The European Case* (2015), now in D. GRIMM, *The Constitution of European Democracy*, Oxford, 2017, 104; F.W. SCHARPF, *De-constitutionalisation and Majority Rule: A Democratic Vision for Europe*, in *European Law Journal*, Vol. 23, No. 5, 2017, 321 ff. In line with these broader visions, a more specific proposal to de-constitutionalise the Treaties – limited to the provisions shaping the constitutional architecture of the EMU – has been formulated by M. DANI, *Deconstitutionalising the Economic and Monetary Union*, in *Continuity and Change – How the Challenges of Today Prepare the Ground for Tomorrow. ECB Legal Conference 2021*, Luxembourg, 2022, 283 ss.; and M. DANI, *The Reform of European Economic Governance in the Perspective of Constitutional Law*, in *Quaderni costituzionali*, No. 3, 2022, 633-634. For further analysis of the de-constitutionalisation scenario, see also R. IBRIDO, *Parlamenti e Banche centrali: presentazione della ricerca*, in R. IBRIDO (a cura di), *Parlamenti e Banche centrali: separazione o interazione?*, Torino, 2024, 14; S. BARTOLE, *Prefazione*, in A. CONZUTTI, *Il governo della moneta nella prospettiva del diritto costituzionale*, XIII ss.

[24] With regard to Article 119 TFEU, the initial portion of the provision ("Concurrently with the foregoing, and as provided in the Treaties and in accordance with the procedures set out therein, these activities shall include a single currency, the euro, and the definition and conduct of a single monetary policy and exchange-rate policy") could be retained within the framework of primary law. By contrast, the second part ("the primary objective of both of which shall be to maintain price stability and, without prejudice to this objective, to support the general economic policies in the Union, in accordance with the principle of an open market economy with free competition.") should be removed from the Treaties and relegated to the level of secondary law.

[25] With respect to Article 282(2) TFEU, the first sentence ("The ESCB shall be governed by the decision-making bodies of the European Central Bank") could remain in the Treaties as part of primary law. By contrast, the second sentence ("The primary objective of the ESCB shall be to maintain price stability. Without prejudice to that objective, it shall support the general economic policies in the Union in order to contribute to the achievement of the latter's objectives") should be removed and downgraded to the level of secondary law. In line with this approach, it would also be appropriate to expunge from primary law all residual references to price stability. These include, in particular, Article 3(3) TEU (limited to the words: "and price stability"); Article

stability as the primary objective of monetary policy, and the support of the Union's general economic policies as a secondary objective;

b) Article 119(3) TFEU, which enumerates the goals to be pursued through monetary policy[26];

c) Article 127(2) TFEU, which entrusts the definition of monetary policy to the ECB[27];

d) Articles 123[28], 130, 282(3)[29], and 283(2)[30] TFEU, which enshrine the independence of the ECB from the democratic-representative circuit;

e) Protocol No. 4 annexed to the Treaties, which sets out the Statute of the ESCB/ECB[31].

At the same time – and drawing, at least in part, on the rationale underlying the Spinelli

219(1) TFEU (limited to the clause: "in an endeavour to reach a consensus consistent with the objective of price stability"); and Article 219(2) TFEU (limited to the sentence: "These general orientations shall be without prejudice to the primary objective of the ESCB to maintain price stability"). In addition, the current convergence criteria for assessing a Member State's eligibility to adopt the single currency should be revised in order to eliminate any parameters that refer, directly or indirectly, to monetary stability. This would imply, on the one hand, the deletion of those passages of Article 140(1) TFEU that refer to price stability ("the achievement of a high degree of price stability; this will be apparent from a rate of inflation which is close to that of, at most, the three best performing Member States in terms of price stability") and to the level of long-term interest rates ("the durability of convergence achieved by the Member State with a derogation and of its participation in the exchange-rate mechanism being reflected in the long-term interest-rate levels"), and, on the other hand, the repeal of Articles 1 and 4 of Protocol No 13 on the convergence criteria, which specify in detail the parameters laid down in Article 140(1) TFEU.

[26] The references to the concepts of "stable prices" and "sound monetary conditions" currently enshrined in Article 119(3) TFEU should be removed from the Treaties and downgraded to the level of secondary law. By contrast, the existing references to the guiding principles of "sound public finances" and "a sustainable balance of payments" could appropriately be retained within the framework of primary law.

[27] In view of the proposed relocation of the sedes materiae of Article 127(2) TFEU, it would also be appropriate – on grounds of systematic consistency – to de-constitutionalise paragraph 3 of the same provision. This paragraph provides that "The third indent of paragraph 2 shall be without prejudice to the holding and management by the governments of Member States of foreign-exchange working balances".

[28] In order to render the de-constitutionalisation of Article 123 TFEU – which prohibits the monetary financing of public debt – fully effective, it would also be necessary to amend Article 125(1) TFEU by expressly excluding the applicability of the no bail-out clause to the ECB. As it currently stands, this clause prohibits the Union from assuming liability for the financial obligations incurred by any public authority of a Member State. Only by combining the downgrading of Article 123 TFEU to the level of secondary law with a corresponding amendment of Article 125 TFEU, in the sense just described, could the European legislative circuit acquire genuine discretion to determine whether, under what circumstances, and according to which conditions the monetisation of public deficits – through the direct acquisition of government bonds by the ECB – may be authorised.

[29] With regard to Article 282(3) TFEU, it would be appropriate to retain in primary law the initial part of the provision ("The European Central Bank shall have legal personality. It alone may authorise the issue of the euro"), while the second part ("It shall be independent in the exercise of its powers and in the management of its finances. Union institutions, bodies, offices and agencies and the governments of the Member States shall respect that independence") should be downgraded to the level of secondary law.

[30] In particular, the downgrading of Article 283(2) TFEU – which governs the composition and appointment procedure of the ECB's Executive Board – to the level of secondary law could enable the European Parliament and the Council to exercise, where necessary, a form of institutional pressure akin to a "Bank-Packing Plan", aimed at realigning the ECB with the prevailing political orientation of the European legislative circuit. In essence, such a strategy would rest on the possibility of modifying the composition of the Executive Board itself, for instance by increasing the number of its members and appointing new individuals more attuned to the policy direction endorsed by the Union's co-legislators. For some reflections in this regard, see C. MANGER-NESTLER, M. GENTZSCH, *Democratic Legitimation of Central Bank Independence in the European Union*, Cham, 2021, 95.

Project[32] –, it would be appropriate to introduce into primary law a special *enabling clause*: a legal basis that would empower the European Parliament to amend the de-constitutionalised monetary provisions through the ordinary legislative procedure, that is, by co-deciding with the Council on a proposal from the Commission (pursuant to Article 289(1) TFEU), following consultation with the ECB[33].

The combined effect of these two specific reform measures would enable a transition from Treaties conceived as a direct instrument for governing monetary policy to Treaties understood as a constitutional framework for the democratic and pluralistic exercise of monetary power. In other words, it would mark a shift from a prescriptive and closed constitutional order to one characterised by openness to socio-economic transformation and political pluralism, consistent with the spirit that had originally inspired the drafting of Article 47 of the Italian Constitution[34].

In such a scenario, it would no longer fall to primary law to predetermine – once and for all – the objectives guiding the management of monetary levers, the degree of independence of the ECB, or the admissibility of sovereign debt monetisation. Rather, the definition of each of these issues would be regarded as a legitimate matter of democratic deliberation, open to a plurality of political alternatives and situated within the institutional framework of the European legislative process[35]. As a consequence, both the European Parliament and the Council would enjoy broad discretion and ample room for manoeuvre in recalibrating the

[31] In this regard, it would be sufficient to amend Article 129(2) TFEU by replacing the current reference to the ESCB/ECB Statute as a protocol annexed to the Treaties with a reference to its incorporation into a regulation of the European Union.

[32] The reference is to the 1984 "Draft Treaty Establishing the European Union", commonly known as the "Spinelli Project", after its rapporteur and principal architect, the long-standing federalist Altiero Spinelli. For a more detailed analysis, see J.-P. JACQUE, *The Draft Treaty Establishing the European Union*, in *Common Market Law Review*, Vol. 22, No. 1, 1985, 19 ff.

[33] Once the first three paragraphs of Article 127 TFEU have been de-constitutionalised, the resulting new paragraph 1 –placed at the head of Chapter 2, Title VIII TFEU (Monetary Policy) – could be recast as an enabling clause: "The European Parliament and the Council, acting by regulation in accordance with the ordinary legislative procedure, shall adopt provisions in the field of monetary policy for the Member States whose currency is the euro." Under this arrangement, the present paragraph 4 of Article 127 (which would become the new paragraph 2) would continue to require that the ECB be consulted on any proposed Union act within its remit. The same consultative safeguard is already afforded by Article 282(5) TFEU, which entitles the ECB to be heard on draft Union or national measures falling within its powers. Because the enabling clause would introduce a single, general procedure for adopting monetary provisions, the special mechanisms now contained in Article 129(3) and (4) TFEU – as well as the corresponding Articles 40 and 41 of the ESCB/ECB Statute – would become redundant and should therefore be repealed. Systemic coherence would further require the deletion, in both the Treaties and the ESCB/ECB Statute, of all cross-references to provisions that have been de-constitutionalised. In particular, the references to be considered would include: the reference to Art. 129(4) TFEU in Art. 132(1) TFEU; the reference to Art. 127(1) TFEU in Art. 2 ESCB-ECB Statute; the reference to Art. 127(2) and (3) TFEU in Art. 3(1) and (2) ESCB-ECB Statute; the reference to Article 130 TFEU in Article 7 ESCB/ECB Statute; the reference to Article 127(2) and (3) TFEU in Article 9(2) ESCB/ECB Statute; the references to Article 283(2) TFEU in Article 11(1) and (2) ESCB/ECB Statute; the reference to Article 123 TFEU in Article 21 ESCB/ECB Statute.

[34] On this point, see A. CONZUTTI, *L'esclusione della 'costituzionalizzazione' della politica monetaria. Una rilettura dell'assetto italiano avant Maastricht*, in *Rivista del Gruppo di Pisa*, No. 1, 2023, 184 ff. In the legal literature, see also the reflections offered by R. BIN, *Che cos'è la Costituzione?*, in *Quaderni costituzionali*, No. 1, 2007, 20-21, who, with general reference to the Italian Constitution, observes that "the regulation of the conflict between irreconcilable interests corresponds exactly to the 'social object' of the constitution, which does not purport to resolve such conflicts once and for all, but rather seeks to establish rules and procedures capable of identifying, in the future, acceptable points of equilibrium among competing interests"

monetary framework in light of evolving economic conditions and shifting political majorities[36].

The two European co-legislators, for instance, would be in a position to combine price stability – no longer enjoying constitutional pre-eminence following its source downgrade[37] – with a broader set of equally significant objectives, such as full employment[38]. They would also hold the authority to determine the conditions under which the ECB may exercise its function as *lender of last resort*. In addition, the European Parliament and the Council would be empowered to define the institutional prerequisites and procedural arrangements aimed at reducing the ECB's isolation, thereby fostering a more substantive and structured interaction between monetary authority and representative institutions[39].

Moreover, the involvement of the Council – an institution that also plays a central role in the coordination of European macroeconomic policy[40] – in the legislative procedure would make it possible, at least in part, to reconcile the logic of liquidity governance with the broader rationale of economic governance[41]. In effect, the Council, in agreement with the European Parliament, could, through legislative acts, align the management of monetary levers with the general policy orientations adopted for the supranational coordination of budgetary choices by the democratic institutions of the Member States (Articles 5, 120, 121, and 136 TFEU), thereby re-establishing a synergic connection between monetary policy and

[35] In other words, what would emerge is that "perspective of non-predetermination, of non-predictability of the outcome" to which A. ORSI BATTAGLINI, *L'astratta e infeconda idea'. Disavventure dell'individuo nella cultura giuspubblicistica (A proposito di tre libri di storia del pensiero giuridico)*, in *Quaderni fiorentini per la storia del pensiero giuridico moderno*, No. 17, 1988, 597, refers in relation to the notion of pluralism as embedded in the principles underlying the Italian Constitution.

[36] On closer examination, the adoption of the ordinary legislative procedure to regulate the European monetary framework would offer a twofold advantage. On the one hand, it would allow for greater flexibility in amending the rules governing the currency, as opposed to the considerably more rigid procedure required for Treaty revision. On the other hand, by necessarily involving both the Council and the European Parliament, it would nonetheless guarantee a degree of stability in the regulation of monetary matters. Any modification would, in fact, require the joint approval of both Union legislative bodies, thereby preventing excessive or overly frequent changes in the monetary discipline. For a detailed analysis, see M. VAN DER SLUIS, *In Law We Trust: The Role of EU Constitutional Law in European Monetary Integration*, Doctoral Thesis, Florence, European University Institute, 2017, 15.

[37] Some valuable insights on this point can be found in P. KAPTEYN, *EMU and Central Bank: Chances Missed: Articles EC 4 and 98 ff.; Draft Convention I-29, II-69 ff., III-289a and b*, in *European Constitutional Law Review*, Vol. 1, No. 1, 2005, 128 ff.

[38] Within the framework outlined above, it would be the European legislator who assumes responsibility for defining the appropriate balance between price stability and a high level of employment. Such an arrangement would, in principle, allow for the exclusion of both a rigid monetary policy focused exclusively on price stability to the detriment of labour, and, conversely, a monetary policy oriented solely towards employment at the cost of inflationary pressures and monetary instability. On the interplay between price stability and full employment, see A. PREDIERI, *Euro. Poliarchie democratiche e mercati monetari*, Torino, 1998, 230-231.

[39] Such a solution would address the issue of how to maintain, simultaneously, both the separation and the substantial interdependence between political power and money, an issue that, according to N. LUHMANN, *Grundrechte als Institution. Ein Beitrag zur politischen Soziologie* (1999), transl. it.*: I diritti fondamentali come istituzione*, Bari, 2002, 185, is ontologically linked to the "legal institution of autonomous central banks"

[40] On this topic, see A. GUAZZAROTTI, *La politica monetaria: il modello ibrido dell'UEM*, in *Diritto Costituzionale*, No. 1, 2021, 47 ff.

[41] The attribution of certain competences in the field of monetary governance to the Council has been advocated, for instance, by J.P. FITOUSSI, *La Règle et le Choix. De la souveraineté économique en Europe* (2002), transl. it.*: Il dittatore benevolo. Saggi sul governo dell'Europa*, Bologna, 2003, 27.

the overall framework of economic policy[42].

In a de-constitutionalised monetary context, the European legislative circuit would assume the crucial role traditionally assigned to the legislature within the constitutional framework of the Italian Republic and of most other European Member States prior to their accession to the Eurozone: namely, that of the ultimate instance of closure within the monetary system. From this perspective, the European Parliament and the Council would occupy a central position in evaluating and, where necessary, censuring instances of inadequate fulfilment of the responsibilities entrusted to the ECB's autonomous governance, particularly where such conduct results in an overreach of its mandate, potentially generating tensions with national economic policy-makers.

Indeed, through the latent threat of reformulating the applicable regulatory framework[43] – which, from a corrective standpoint, could reduce or even eliminate the ECB's margins of autonomy – the supranational legislative authority would acquire the capacity to bind the central bank to its own policy orientation and to politically enforce any ensuing responsibilities[44]. In this way, the prerogative to deliver the last word on the monetary policy pursued by the ECB would no longer fall to the judicial circuit[45], but rather to democratically legitimised constitutional bodies entrusted with political direction, thereby restoring monetary governance to the domain of democratic legitimacy[46].

In conclusion, it is essential to dispel any misunderstanding concerning the effects of a potential de-constitutionalisation of the single currency. Removing the Treaties' prescriptive

[42] In this perspective, G. REPETTO, *Responsabilità politica e governo della moneta*, 285 underscores that it is precisely the strengthening of the Council's role in coordinating economic policies that can create the conditions for the ECB's action to become less isolated and, as a result, more receptive to the influences arising from the political circuit. For further insights on this issue, see also N. DE BOER, J. VAN'T KLOOSTER, *The ECB, the courts and the issue of democratic legitimacy after Weiss*, 1722.

[43] In this regard, G. REPETTO, *Responsabilità politica e governo della moneta*, 309 observes, with specific reference to the ECB, that the exertion of influence over an institution with the aim of inducing a change in its line of conduct constitutes one of the possible expressions of political responsibility. For a broader theoretical framework, see also P. CARETTI, *Responsabilità politica*, in *Enciclopedia giuridica*, XXVII, Roma, 1991, 2. From the perspective outlined above, it may be argued that the mere prospect of a reform of the ECB's legal basis could produce a form of "nudging" effect. On the notion of "nudge", see R. THALER, C. SUNSTEIN, *Nudge. Improving Decisions About Health, Wealth, and Happiness*, New Haven, 2008, 6, where the authors discuss the possibility of subtly steering individual behaviour towards certain outcomes without resorting to formal coercion or explicit commands.

[44] This would restore the two-way correspondence between the exercise of political power and the principle of political responsibility. On this correspondence, see D. NOCILLA, *Brevi note in tema di rappresentanza e responsabilità politica*, in *Scritti in onore di Vezio Crisafulli*, II, Padova, 1985, 565. In this regard, G. REPETTO, *Responsabilità politica e governo della moneta*, 308 ff. explicitly stresses that the ECB's independence from the representative-political circuit should not be construed as grounds for excluding forms of political responsibility. On the contrary, he advocates the recognition of a form of "responsible independence".

[45] On this point, see A.C. VISCONTI, *Banca centrale europea e sovranità economico-finanziaria*, Bologna, 2023, 203 ff. For a critical analysis of the jurisdictionalisation of monetary policy, see also F. MEDICO, *Il doppio custode. Un modello per la giustizia costituzionale europea*, Bologna, 2023, 235-238.

[46] Moreover, the prerogative to amend the legal framework of an independent central bank is regarded as the most significant instrument for reintroducing its action within the democratic-representative circuit. See F. AMTENBRINK, R.M. LASTRA, *Securing Democratic Accountability of Financial Regulatory Agencies - A Theoretical Framework*, in R.V. DE MULDER (ed.), *Mitigating Risk in the Context of Safety and Security. How Relevant is a Rational Approach?*, Rotterdam, 2008, 129.

provisions on monetary matters would by no means undermine the legitimacy of the ECB's liquidity-management operations, and thus of the Union's monetary action[47]. On the contrary, downgrading those provisions to the level of secondary law would open monetary policy to unfettered debate within the Union's legislature, thereby reaffirming, at the European level, the intrinsic connection between money and democracy[48].

[47] On this point, see M. DANI, *La riforma della governance economica europea nella prospettiva del diritto costituzionale*, 633.

[48] As observed by M. DANI, *Diritti fondamentali e conflitto politico nell'Unione europea*, in A. SOMMA (a cura di), *Diritti fondamentali e conflitto sociale. Un dialogo tra le discipline*, Roma, 2024, 157-158, such an opening of the European constitutional framework would imply that "the objectives of the Union would no longer be imposed on the European institutions or the Member States but would become contestable within the discussions and decisions of the European Parliament and the Council". As a consequence, once relieved "of its cumbersome teleological baggage, the Union could begin to operate as a regional organisation open to a plurality of alternative political developments".