

# ECONOMIC GOVERNANCE IN A CONSTITUTION FOR EUROPE: AN INITIAL ASSESSMENT

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## 1. Introduction

The introduction of the euro gave rise to two problems for the European Union: how to adapt economic policy institutions to the Monetary Union and how to adapt the Union's economic policy institutions to a totally new structure that calls for a supranational institution, the ECB, to coexist with a system of economic governance entrusted mostly to national governments. This challenge goes hand in hand with the new goal that the Union set at the European Council in Lisbon: making the EU the most advanced knowledge-based economy. However, behind these visible macroeconomic aspects, far-reaching change processes in the economic and social structure are taking place, requiring equally complex governance mechanisms. In fact, there is no doubt that globalisation is generating new problems, which cannot be solved by the traditional economic and social actions taken by national states<sup>1</sup>.

In particular, a growing de-coupling has been occurring between production circuits, based on increasingly mobile resources, and citizenship circuits, which are still mostly tied to rights related to a fixed geographic dimension, such as national rights. The result is a basic mismatch between increasingly global market processes and forms of control and democratic governance, as well as of solidarity-based resource redistribution, of a national nature.

Concerning Europe in particular, since economic integration processes have historically been necessary to give impetus to the political integration process, there is a strong need to strengthen democratic decision-making circuits capable of shaping an economic governance consistent with community policies<sup>2</sup>. Surely, many of the chickens of a Europe that has introduced the single currency, but has left fiscal and economic policies in the hands of the Member States, have come to the Convention home to roost. As an example, reference can be made to the fiscal coordination problem, an issue that for all its importance has so far been neglected, compared with the attention devoted to the single market and currency and which we too shall not dwell on at this time.

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<sup>1</sup> Governance is not simply a descriptive term, nor is it a more appealing way to refer to the traditional methods utilised to manage an economy. In fact, the language of governance implies a change in modern government. It is a way of governing beyond the State, in terms of exercising power outside both traditional State structures and the "nation-state": cf. K. Armstrong, *Governance and the Single European Market*, in P. Craig-G. De Búrca, *The Evolution of EU Law*, Oxford, 1999, 746.; K. Armstrong-S. Balmer, *The Governance of the Single European Market*, Manchester University Press, 1998, 255 et seq.

<sup>2</sup> In the White Paper presented on 5 August 2001, the European Commission wrote that it refers to «rules, processes and behaviour that affect the way in which power is exercised at European level, particularly as regards the openness, accountability, effectiveness and coherence principles». In its opinion dated 6 November 2001, the Parliament stated: "The expression European governance has not been incorporated into the ordinary language of the citizens of Europe...it would be preferable to use a more understandable expression as democratic government".

Coordination should help the Member States to face the growing threat of erosion of their national tax bases. It does not intend to combat competition per se but its harmful and unfair forms<sup>3</sup>. In fact, if redistribution and social protection can no longer occur through political prices, but must be financed by general taxation, what can Member States increasingly engaged in tax competition do? As transaction costs and exchange-rate risks have disappeared, tax differentials will increasingly become a determinant in the allocation of resources, for both enterprises and savers. Tax competition will be fierce, enhancing the need for coordinating the relevant policies. Thus, it would have been necessary for the Constitution to attribute more competences to the Union, to be handled by the Council on the basis of a majority vote, instead of the current paralysing unanimity. However, plans to change this were strongly opposed by the English delegation, thus hindering any significant progress.

Against this background, “the introduction of the single currency implies a more thorough-going economic and financial cooperation» and raises the issue of «What forms might such cooperation take?»<sup>4</sup>. What the guiding principle of this should be is indicated by the Laeken Declaration: “In coordinating the economic, financial and fiscal environment, the basic issue should continue to be proper operation of the internal market and the single currency, without this jeopardising Member States’ individuality”<sup>5</sup>. It is clear that monetary policies and economic policies do not merely stand next to each other but they actually affect each other. This was recognised from the beginning by the Working Group on Economic Governance, tackling the politically topical and highly sensitive problem of assessing the effectiveness of the Stability and Growth Pact and the relevant taking “into account the difference between structural and conjunctural deficits”<sup>6</sup>. Another problem area is that related to the institutional profiles which appear to be “penalised” in the current community integration phase: a clarification is in order for «the attribution of responsibility within the areas of monetary and economic policy” and the adequacy of accountability levels including, in the first place, the “role for the EP in certain areas (e.g. the establishment of the Broad Economic Policy Guidelines or in improving ECB reporting to the EP(...))”; the assessment of the “the future status of the Eurogroup, particularly following enlargement” and that of the “more effective arrangements are required for Euro area representation in international fora”<sup>7</sup>.

<sup>3</sup> As pointed out by one of the Italian members to the Convention: L. Dini, *La costituzione economica dell’Unione Europea*, in *Affari Esteri*, 139, 2003, now also in *Riv. Studi Pol. Int.*, 4, 2003, 722-723.

<sup>4</sup> See K. Hänsch, *The introduction of the single currency implies a more thorough-going economic and financial cooperation. What forms might such cooperation take?*, (this is the Cover Note to the Mandate of the Working Group on Economic Governance, Secretariat of the Convention, conv 76/02, 30 May 2002 (03.06), Group IV, “Economic Governance” (this document, together with all the documents on the Convention, is available, unless otherwise indicated, on <european-convention.eu.int>).

<sup>5</sup> “Some commentators point to an asymmetry between monetary policy as an exclusive Community competence, implemented through the ECB, and economic policies which remain within national competence. They point to a potential or actual lack of coherence which might not be robust enough to withstand a recession. Others see the ability of Member States to continue to manage their own economic policies according to national circumstances as offering flexibility and therefore an essential corollary of a single monetary policy” (*ibidem*, 2).

<sup>6</sup> *Ibidem*, 3. Besides, the concept of Economic Governance implies coordination between economic and monetary policies. So much so, that some of them can be regarded as falling under either category, according to the view adopted (whether, for instance, in monetary policy matters one embraces the dominant theories). The mentioned Cover Note by K. Hänsch on the coordination of economic policies focuses on the possible adoption of “additional measures”, to “strengthen coordination”, on the inclusion of “social and occupational” profiles; on the different positions on whether to emphasise “tax harmonisation”; on the “regulation of financial markets”.

<sup>7</sup> *Ibidem*, 4. Italics in the original.

Therefore, as can be seen, “Economic governance” is a wide-ranging concept, whose intellectual underpinnings should be dealt with separately, given their multifaceted nature.

Besides, there is an awareness that the rules on economic governance cannot be properly interpreted without taking into account the entire constitutional draft (suffice it to think, for instance, about the provisions on the source system, the allocation of competences between the Member States and the Union and, in turn, among its Institutions, the Charter of Fundamental Rights, the development of a more complete political and participative circuit, as well as the provisions on the so-called “enhanced cooperation”<sup>8</sup> and on the careful attempt to implement decision-making mechanisms moving increasingly away from the still-resistant unanimity principle). By the same token, account has to be taken of the outcomes of the debates on general issues (e.g. the legal nature of a *Treaty establishing a Constitution* or that of the characters of the new Union)<sup>9</sup>.

This initial assessment of the activities of the Convention and their results will discuss only some of these issues, basically in line with the remit and the schedule adopted by the two working groups that focused on the theme: the Working Group on “Economic Governance” and the “Social Europe” Group. The discussion will be centred on a general theoretical profile and on two specific themes. I will focus on the model of social market economy and on selected issues – monetary policy and ECB accountability; the Union’s budget procedures and policies – to try to provide an overview of the positions emerged during the Convention’s debate and to highlight the main issues the Convention is confronted with.

## **2. Towards the constitutionalisation of the social market economy? Rethinking the model**

An accurate review of the complex debate on the European economic constitution is unfeasible in this context<sup>10</sup>. However, I will attempt to cast light on the possible implications of the innovations brought to the fore in the European “constituent” debate and the scope of such implications. The main starting point is the constitutionalisation, in Art. 3 of the draft Constitution<sup>11</sup>, of “social market economy” as a concept capable of containing the key features of the economic system. Perhaps it is because the idea lends itself to different interpretations that the Convention added the qualification “highly competitive”.

In the Convention’s text, at least in the initial version, where “highly competitive” had not been included yet, the formula seemed to capture the middle ground between economic values and social values, thus modifying the original model propounded by the community Treatises. In order to assess the significance of this expression, it is necessary to adopt a two-pronged approach: on the one hand, a systematic interpretation of the draft constitution is

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<sup>8</sup> Even though, pursuant to article 43, 1 c. of the Draft Constitution, these do not concern the Union’s exclusive competences.

<sup>9</sup> Including the provisions on joining and withdrawing from it.

<sup>10</sup> See: R. Miccú, *Forme di mercato e innovazione della costituzione economica*, Roma, 1997, 124 ss.; G. Maestro Buelga, *Constitución económica e integración europea*, in *Revista de Derecho Político*, 54, 2002, 35-111; M. Poiars Maduro, *We, the Court. The European Court of Justice and the European Economic Constitution*, Oxford, 1998, 12 et seq.

<sup>11</sup> Art. I-3, par. 3 The Union’s Objectives: The Union shall work for the sustainable development of Europe based on balanced economic growth, a social market economy, highly competitive and aiming at full employment and social progress, and with a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

undertaken, to find a meaning consistent with with the basic text of the constituent process, and, on the other, the theoretical and historical background of the formula “social market economy” is explored.

The inclusion of “social market economy” into Article 3, on the Union's objectives, is the result of proposals by the Working Group on “Social Europe”, XI, and, to a minor extent, by the Group on “Economic Governance”. Both suggested to include this formula into the draft Constitutional Treaty. However, the Group on “Economic Governance” does not advocate the inclusion of this concept in accordance with the same terms and meaning as the those attributed to it by the Group on “Social Europe”. To this end, the proposal outlined in the Group’s final report does call for the inclusion of social and economic objectives in the Constitutional Treaty but these “must be based on the contents of the European Constitutional Treaty” (ECT). Consequently, the “social market economy” model is defined by these precepts.

The Group on Social Europe spells out its proposal in different terms. In paragraph II of its report (transposition of the social objectives into the Draft Constitutional Treaty), its “social market economy” appears as a link between economic and social development when it refers to the “European social model” and grants equal, not subordinate, standing to economic and social objectives. Furthermore, the “social market economy” formula overlaps with the “open market economy” contained in Article 4 ECT, that is “open market economy with free competition”.

As already stated, the final expression in the draft submitted to the Thessalonica Council is different from that proposed in the Group XI report, in that it adds “highly competitive” to “social market economy”. Such addition seems dictated by the goal to weaken the compromise that, in the proponents' mind, already contained both the social and economic dimensions. The correction introduced by the new provision should be assessed, in particular, in light of the precepts on economic and monetary policies in part III. Basically, these provisions reproduce the current wording of the corresponding parts of the ECT and old Article 4, thus further assimilating the model to the formula “open market economy with free competition”. The debate on the core principles of the European economic constitution seems not to have gone beyond the contents of the current Articles 2, 3 and 4 of the ECT, whose fundamental traits are contained in Article 4 ECT.

On the other hand, the statement whereby, as a model for the relations between market and public authority, the “social market economy” is a compromise linked to the welfare State, and a response to the crisis of liberalism, bears scrutiny, though within the limits of this work. The tenets of the Freiburg School have been playing an influential role in the definition of the model since the beginning of European integration. They clearly shaped the rules on competition and the organisation of the common market. This leads inevitably to the evaluation of this School’s proposals in the debate on the link between the legal and political system and the economic order (“ordo”).

As discussed more exhaustively elsewhere<sup>12</sup>, the innovative nature of ordoliberalism constituted a sharp break from the liberal paradigm, giving rise to a new relationship between market and public authority<sup>13</sup>. It is the mark of the “theory of economic constitution” that it

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<sup>12</sup> R. Miccú, *Economia e Costituzione: una lettura della cultura giuspubblicistica tedesca*, in QP, 1996, 25 et seq.

<sup>13</sup> See D. J. Gerber, *Protecting Prometheus. Law and Competition in Twentieth Century Europe*, Oxford, 1998, 244 ss.

ordains State and economy in accordance with a *functional differentiation principle*<sup>14</sup>, attributing a purely legal nature to their relationship. Consequently, the economic constitution is that part of the legal system that, on one side, draws a functional boundary between the political and the economic spheres and, on the other, makes both compatible on the basis of justiciable criteria.

This ordoliberal vision considers the economic and social orders as a system of rules, meanwhile rethinks the role of the State in the economic constitution that is called upon to determine the legal framework. This framework looks like a political decision on the global order of the economic life of a community, as a systemic decision. Certainly in this context rest the autonomy of individual action, but the State is given a strong role, and if neutral, on the monitoring of fair functioning of the competitive process, that, if left alone, degenerates into monopolistic tendencies, adding the imbalance of private powers<sup>15</sup>. However the free market is seen as a partial order embedded with other partial orders of the social-political life in a related system that creates an interdependence between the diverse orders. Thus the market is not able to regulate alone all of social life and needs external elements of balance, a balance with elements of social policy, guaranteed a priori from the State, that for this reason is called Welfare State.

According to German neoliberals, the notion of economic constitution should be linked to a peculiar concept of “social” and “economic order”. They regard this as a *rule system* that forces the players interacting within the society governed by it to adopt a given set of choices, thus generating a model of actions and transactions<sup>16</sup>. This idea marked an innovative departure from traditional *laissez-faire*.<sup>17</sup> It emphasised both the importance of the legal and institutional framework – the “economic constitution” – and particularly the role of the State as overseer of the legal system in preparing such framework, which is essential for the proper working of the price mechanism<sup>18</sup>.

This new relationship, however, is not determined by the introduction of the social constraint which, as a limit to the market, warrants state intervention, but it is the only guarantee for the market as an institution at the core of the economic system. The Freiburg school is mainly concerned with protecting competition, thus public authority becomes paramount. Ordoliberalism does solve the liberal State-market dichotomy, though not by using state in-

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<sup>14</sup> See E. J. Mestmäcker, *Macht - Recht - Wirtschaftsverfassung*, now in: E. J. Mestmäcker, *Recht und ökonomisches Gesetz*, Baden-Baden, 1984, 15, 24 et seq.

<sup>15</sup> See D. J. Gerber, *Constitutionalizing the Economy: German Neoliberalism, Competition Law and the “New” Europe*, in *AJCL*, 1, 1994, 25 ss.

<sup>16</sup> This concept of order (*rule-based order*) differs from that which F.A. von Hayek famously characterised (*Rechtsordnung und Handelsordnung*, in *Freiburger Studien*, Tübingen, 1969, p. 161 et seq.) as action-based order, or a model of actions and transactions arising from the spontaneous combination of multiple human decisions within a defined social context.

<sup>17</sup> Neoliberals voiced strong criticism against the idea of capitalism championed by historic liberalism, which is just a variant of the archetypal “market economy” and is responsible for the alteration and distortion of the free interplay of market forces. They set the “social market economy” as a countervailing force which, “even though it does not question the “natural” axiom of private ownership of the means of production, aims to establish a market where competition against monopolies and the freedom of consumers to choose their products are protected”.

<sup>18</sup> T. W. Hutchinson, *Walter Eucken and the German Social-Market Economy*, in idem, *The Politics and the Philosophy of Economics - Marxians, Keynesians and the Austrians*, Oxford, 1981, 162, underscored *inter alia* that the classical economists already had a dual approach to the competition-based market economy: the abstract and pure Ricardian model of competitive equilibrium and Smith’s model which takes into account the overall social and political order, as well as the foundation and the legal framework of the economic order.

tervention as a way to introduce the social constraint to the market. State intervention is required to protect competition, which is key to market freedom. It is not surprising that some scholars identify ordoliberalism, despite its innovative aspects, with liberal currents more than regarding it as a break away from them. In short, the “social market economy” proposal clearly considers the social element as subordinate and incapable of affecting the market. In light of this, by effectively allocating resources, the free market, which works properly only thanks to state intervention, can achieve satisfactory well-being for society as a whole.

The potential of the market to meet the demand for well-being is recognised and attributed to the common market by the Treaty of Rome, thus reflecting in its contents the initial plan for a “social market economy”. Therefore, by striking a balance between the social and economic dimensions, the constitutionalisation of a “highly competitive social market economy” is the brain child of the original proposal by the Freiburg School. This means that, even though taking place in a changed historic and legal context, this course of action reflects a “choice”, a “systemic decision” that actually was inherent in the original “economic constitution” of the European Communities, as it was the fully conscious expression of what was rightly called the post-WWII institutional compromise of embedded liberalism<sup>19</sup>.

### 3. Monetary policy and the accountability of the ECB

Concerning monetary policy and its governance institutions, it is relatively easy to point out the prevailing stances of the Economic Governance Group<sup>20</sup> which were eventually included in the final Plan drawn up by the Convention. In fact, it was immediately clear that, at least at government level, with the “natural” convergence of that which is the most important among the community institutions involved<sup>21</sup> there was an implicit agreement to regard as untouchable the provisions on monetary policy in the Treaty in force.

A review of articles I-29 and from III-77 to III-85 shows that the new constitutional treaty maintains the current structure for the governance of the single currency set out in the Maas-

<sup>19</sup> Thus recently – with significant references to historic and legal literature - S. Giubboni, *Diritti sociali e mercato*, Bologna, Il Mulino, 2003, 26 et seq.

<sup>20</sup> Final report of Working Group VI on Economic Governance, Secretariat of the Convention, conv. 357/02, WG VI 17, 21 October 2002 (29.10).

<sup>21</sup> Reference is made to the hearing of the President of the ECB held in September 2002 before the Convention’s Working Group on Economic Governance. On that occasion, Mr. Duisenberg expressed his views on the Convention’s approach to economic and monetary policy. In his opinion, the present framework for economic governance set-up is sound and capable of meeting the Union’s challenges in the future and recommended that the Treaty’s “monetary principles”, i.e. Central Bank independence and the primary objective to maintain price stability, be preserved, “as they are the founding pillars of the monetary constitution of the EU”. Cf. Annual Report 2002, European Central Bank, 106. Subsequently, in the Plenary Session of the Convention held on 7-8 November 2002, the recommendations of the Working Group on Economic Governance were discussed and generally adopted, particularly that which favoured the preservation of the ECB’s structure, independence and remit and the priority attributed to price stability. On the other side, proposals for the definition of new objectives for the EMU, calling for a greater transparency of the ECB and a broader remit for its activities, so as to include growth and employment, met with a mild reception, cf. European Convention, proceedings of the plenary session 7-8 November 2002, Brussels, 13 November 2002, CONV 400/02. Also numerous amendments to article I-21 on the ECB (article I-29 in the version of the Draft Constitution dated 12 June 2003) involved a radical change and broadening of the ECB’s objectives, so as to include not only sustainable growth and full employment but also a greater control on the ECB by the European Parliament through opinions, cf., inter alia, the amendments submitted by Borrel and Carnero y Lopez Garrido, Vytenis Povilas Andriukaitis, Esko Helle. Esko Helle recommended the establishment of the obligation by the ECB to take into account the “influence of its decisions on the Union’s citizens”.

tricht Treaty<sup>22</sup>. The framework outlined in the Draft Constitution is the same as that in the Maastricht Treaty (and the Protocol on the statute of the European System of central banks, which is referred to also in the Draft), also with reference to the constitutional role attributed to monetary institutions, the ECB and the ESCB. However, it should be underlined that while in the Preliminary Draft Constitutional Treaty of October 2002<sup>23</sup>, the European Central Bank was included in Title IV, together with all the other “Union Institutions”<sup>24</sup>, eventually a decision was made to “remove all references to the European Central Bank”<sup>25</sup> and “place the ECB...as a support body for the Union”<sup>26</sup>. Whilst in the Thessaloniki text the ECB was not defined as a mere “support body for the Union”, it was not included under Chapter I which, under Institutional Framework, includes in article 3 among Union Institutions only the policy-making bodies and the Court of Justice are included. The European Central Bank is placed in the following Chapter, among Other institutions and bodies, together with the Court of Auditors, the Committee of the Regions and the Economic and Social Committee, that is with the two advisory bodies.<sup>27</sup>

Perhaps, this choice was determined not so much by the absence of a full assessment of the role of central banks in general and the European Central Bank in particular, but by fears of criticism by those who think that the role of the monetary institutions in the European integration process is being overestimated<sup>28</sup>. Monetary policy since Maastricht has been understood as a form of discipline contributing to define the model of economic Constitution outlined in the Treaties rather than an instrument of economic governance.

The objectives of monetary policy (now Article III-77), are clear: based on the current wording of the provision, price stability, also in terms of support to general economic policies, suffers from the strong influence of the basic objective of Article III-69. Clearly, when

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<sup>22</sup> Obviously, for the transposition into the draft Constitution of the monetary policy provisions of the Maastricht Treaty, it is necessary to take into account that the transition phase to the single currency is over and that many rules either lapsed or have been partially re-written. To this end, while it refers to a more advanced phase of the Convention, compared with the final report by the Governance Group, see for instance Part two of the Constitution - Report by the working party of experts nominated by the Legal Services of the European Parliament, the Council and the Commission conv 618/03, 17 March 2003 (24.03) and conv 618/03 add 1, section on economic and monetary policy, 20 March 2003 (28.03).

<sup>23</sup> European Convention Secretariat, conv 369/02, 28 October 2002.

<sup>24</sup> A detailed list of proposed amendments presented at an advanced stage of the activities [(Convention Secretariat, conv 709/03, 9 May 2003 (14.05)] showed that the European Central Bank had been included in a “single institutional framework”, from which the consultative bodies had been removed but which included the European Parliament, the European Council, the Council of Ministers, the European Commission, the Court of Justice of the European Union and the Court of Auditors (ibidem 3). In this area, the Convention did not seem to proceed in a completely straightforward manner: for instance, in the document dated 28 May 2003 (conv 724/1/03, rev 1, Draft Constitution, Volume I – First part of the text revised), title IV on the institutions was unchanged compared with doc. Conv 691/03 dated 23 April 2003, as it continued to address all the Institutions, including the ECB as well as the consultative bodies, due to an inability to define the overall institutional framework. Even though there was no final position yet, in soc. Conv 770/03 dated 2 June 2003, Part I, title IV (Institutions) – revised text, the ECB had been removed from the list of institutions that were part of the “institutional framework” and placed among the “other institutions and bodies”, See, among others, doc. Conv 797/03, 10 June 2003 – part I of this version revised – which contributes to firm up this position.

<sup>25</sup> See, doc. 709/03, 9 May 2003, cit., *De Villepin (em.10)*, 5.

<sup>26</sup> *Abitbol (em.1)*, *ibidem*, 5.

<sup>27</sup> Art. 29 (The European Central Bank), art. 30 (The Court of Auditors), art.31 (The Union’s advisory bodies).

<sup>28</sup> For some considerations on this issue, see: O. Roselli, *Profili costituzionali dell’integrazione monetaria europea*, in *RDPE*, 2003, n.2, § 1, 6.1 e 7, forthcoming.

these provisions make reference to the general context of the model “open market economy with free competition”, they reflect the compatibility between public action based on a monetary policy aimed at keeping inflation under control and on the protection of an open and competitive market. The key principles in Article III-69.3 outline a system of economic discipline that introduces the economic constitutionalism model into the power-sharing system between Union and Member States, thus anticipating a mechanism underlying the integration of the States into the European economic Constitution. The objectives of economic policy are then completed by the procedure for the monitoring of excessive budget deficits (III-73) which, despite the criticism levied, is a mere reproduction of Article 104 ECT.

This does not necessarily mean ruling out *a priori* that the inclusion of old provisions in a text qualified as “Constitution” or “Constitutional Treaty” does not have additional implications for rules that might be (and mostly are) the same as the previous ones.

First of all, it should be noted that the large number of constitutional provisions on monetary policy and institutions in the European Draft Constitution is an exception among contemporary constitutions: all basic features of monetary governance in the EU have constitutional import<sup>29</sup>. However, the significance of this “choice” is that, at this particular time in history, more than ten years after the Maastricht Treaty, «the objective....to maintain price stability»<sup>30</sup> and the right-duty for monetary institutions to remain independent, at both national and community levels<sup>31</sup>, are deemed as key objectives and requirements and a cornerstone for the firming up and progress of the European integration process. Obviously a large majority in the Convention thought, for instance, that the slightest difference in the definition of independence for the monetary authorities could undermine the foundations of the process

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<sup>29</sup> As a summary non-exhaustive reference, see art. I-12 which includes, among the Union’s exclusive competences, “monetary policy, for the Member States which have adopted the euro”; article I-14, paragraph 2, which, in the area of coordination of economic and employment policies, lays down that “specific provisions shall apply to those Member States which have adopted the euro”; article I-29, on the European Central Bank; article III-48 on the exceptional circumstances to adopt safeguard measures with regards to movements of capital; the highly comprehensive chapter II (Economic and monetary policy), with article III-69 which is almost a preamble to the following five sections (economic policy; articles III-70/III-76; monetary policy articles III-77/III-83; institutional provisions, articles III-84/III-87; provisions specific to Member States which are part of the euro area, articles III-88/III-90; transitional provisions, articles III-91/96). Furthermore, see article III-228 which calls for, among other things, the possibility consistent with the “objective to maintain stable prices” to “conclude formal agreements on a system of exchange rates for the euro in relation to currencies other than those that are legal tender within the Union” (paragraph 1), and that “where agreements or matters relating to the monetary or exchange-rate system are to be the subject of negotiations between the Union and one or more States or international organisations, the Council of Ministers, acting on a recommendation from the Commission and after consulting the European Central Bank, shall decide the arrangements for the negotiation and the conclusion of the agreements. These arrangements shall ensure that the Union expresses a single position. The Commission shall be fully associated with the negotiations” (paragraph 3). That “the currency of the Union shall be the euro” is clearly indicated in article IV-1, which deals with the symbols of the Union. It should also be noted that the Protocol on the euro group which, as all protocols annexed to the Draft Treaty establishing a Constitution for Europe, is an “integral part” thereof.

<sup>30</sup> Second sentence, paragraph 2, article I-29 of the Draft.

<sup>31</sup> In transposing article 107 of the Maastricht Treaty, article III-80 plainly mandates that “When exercising the powers and carrying out the tasks and duties conferred upon them by the Constitution and the Statute of the European System of Central Banks and the European central Bank, neither the European central bank, nor a national central bank nor any member of their decision-making bodies shall seek or take instructions from Union institutions, bodies or agencies, from any government of a Member State or from any other body. The Union institutions, bodies or agencies and the Governments of the Member States undertake to respect this principle and not to seek to influence the members of the decision-making bodies of the European Central Bank or of the national central banks in the performance of their tasks”.

toward a political Union. The constitutionalisation of a large number of aspects, related to both the implementation of monetary policy and the institutions responsible for monetary governance, attest to the significant number of checks and balances that came into being around the single currency and the role the euro plays in fostering the political integration process.

On the other hand, it should be said that an initial assessment of the Thessaloniki Draft revealed a tendency to underestimate the constitutional import of part III of the Draft – that on the Union’s policies and operations – thinking that only «parts I and II (...) make up the actual European Constitution» (together with part IV), since part III is a «duplication of provisions included in the treaties in force which have been modified and adapted to fit them into the new rules laid down in part I»<sup>32</sup>. One should not be quick to forget, however, that a provision in a text qualified as constitutional does entail legal effects, on one side, and that also part III reflects the condition of the constitutionalisation process, on the other (including, as a matter of fact, to give a constitutional basis to important aspects of Union policies)<sup>33</sup>.

In other words, in addition to the provisions on the single currency and its institutions, constitutionalising, for instance, the prohibition to run “excessive budget deficits”<sup>34</sup>, «the basic tasks to be carried out through the European System of Central Banks»<sup>35</sup>, detailed rules on institutional profiles of «monetary governance»<sup>36</sup>, the different position of the Member States which have adopted the euro<sup>37</sup> and of those which have not adopted it<sup>38</sup>, contributes to determine the same characters of the Union at this particular juncture in history. Nor can one play down the meaning of the inclusion in the draft constitution of such provisions as those included in articles 104, 104A and 104C of the Maastricht Treaty, whose content appears to be purely technical<sup>39</sup>. Actually they are a way to reiterate the non-negotiable nature of an oft-repeated constitutional principle of the Union: monetary and economic integration must occur in an “open market economy with free competition”.

If there is a rule in the Convention that should be re-worded, to maintain consistency with the framework of the Maastricht Treaty adopted by the European Draft Constitution, that would be the second part of Article I-29, paragraph 1, which perhaps is not properly phrased. As everyone knows, this paragraph establishes that «The European Central Bank, together with the national central banks, shall constitute the European System of central Banks» and that «the central bank and the *national central bank of the Member States* which have adopted the

<sup>32</sup> Thus in a footnote of the *Draft Treaty establishing a Constitution for Europe*, where part III is not included, in *Una Costituzione per l'Europa*, edited by F. Bassanini-G. Tiberi, Bologna, Il Mulino, 2003, 177.

<sup>33</sup> O. Roselli, *Profili costituzionali dell'integrazione monetaria europea*, in *RDPE*, 2003, n.2, § 6.1-6.2, forthcoming.

<sup>34</sup> Art. III-76, paragraph 1.

<sup>35</sup> Art.III-77, paragraph 2.

<sup>36</sup> See Section 3 (Institutional Provisions) of charter II, part III of the Draft (articles from III-84 to III-87).

<sup>37</sup> By laying down a specific Section, 3a (Provisions specific to Member States which are part of the euro area), in chapter II of Part III of the Draft Constitution (articles from III-88 to III-90), addressing, *inter alia*, “the euro’s place in the international monetary system” (article III-90) and a Protocol on the Euro Group, of which more later.

<sup>38</sup> See Section 4 of Chapter II in Part III of the Draft entitled “Transitional Provisions”, to signify that it is only a matter of time before these States adopt the euro (articles from III-91 to III-96).

<sup>39</sup> These are rules, as everyone knows, which proscribe the extension of “overdraft facilities or any other type of credit facility” or the authorisation establishing “privileged access to financial institutions” in favour of Union institutions or bodies or agencies or national, regional or local institutions or bodies (or other bodies governed by public law or public undertakings) by the ECB or by national central banks which may not, as a rule, assume “commitments entered into by these”. For more accurate wording of these provisions in the Draft, see articles III-73, III-74, III-75, respectively.

Union currency, the euro, shall conduct the monetary policy of the Union». Were the meaning of this sentence be taken literally, the entire monetary framework would be distorted: the national central banks of the States which have adopted the euro participate in monetary policymaking as community, not national, bodies as they are members of a larger community body, the European System of Central Banks (but also because they have their own representatives in the ECB's governance bodies). As national banks, these central banks implement monetary policy as "agent banks". Thus, when it comes to competence to conduct monetary policy, it does not seem appropriate to refer to the role of the national central banks in the euro area without an express mention of their being part of the ESCB.

Thus, a different wording might be in order, possibly along these lines: "The European Central Bank and the European System of Central Banks shall conduct the monetary policy of the Union". Since according to the Draft Constitution the national central banks participate variously in the ECB's (and the ESCB's) governance bodies, depending on whether they have adopted the single currency, a reference to the ESCB would be tantamount to a reference to the national central banks of the euro area (though an indirect reference, as they are part of a community body: the European System of Central Banks). In concluding this brief review on the agreements reached in the final text, it is appropriate to draw attention to the broad consensus also on the need to modify, following the Union's enlargement, "article 10, section 2 of the ECB's Statute on the rules of the Governing Council's meetings". Tellingly, it was deemed appropriate not to constitutionalise the growth and stability Pact, since this is considered a simple "policy tool" which could not be crystallised in a constitution<sup>40</sup>.

#### **4. The debate on the identification of the main objectives of the ECB and its constitutional role**

Nevertheless, despite a seemingly modest final result, since it is nothing more than an endorsement of the current monetary policy framework, the debate during the Convention did make room for more complex positions, which did not shy away from strongly criticising the Maastricht set-up. On the other hand, equally strong arguments put forth by advocates of the "Maastricht philosophy"<sup>41</sup> and a tendency to expand the objectives of monetary policy<sup>42</sup> can

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<sup>40</sup> Final report of Working Group VI on Economic Governance, op-cit., 2, 3, 5 and, furthermore, 7/8.

<sup>41</sup> Also because at times the proposals presented appear as an attempt to reorganise "resolutions adopted by the European Parliament" and "to reform" community "Treatises" in relation to important aspects of the Union's constitution. This is the case of the proposition d'amendment by Mrs. Elena Ornella Paciotti, secretary of the Convention, conv. 335/02, contrib 117, 10 October 2002.

<sup>42</sup> Among the proposals mentioned in the following footnote, for instance, Contribution from Mrs. Pervenche Beres and Mr. Klaus Hänsch, members of the Convention, Secretariat of the Convention conv. 63/02, contrib 32, 23 May 2002 (27.05), 12; Contribution from certain members of the Convention, Secretariat of the Convention, conv.189/02, contrib 64, 12 July 2002 (15.07), 4; Contribution from Mr. *Josep Borrel*, member of the Convention, and from Messrs. *Carlos Carnero* and *Diego López Garrido*, alternate members of the Convention: "A constitution for a social Europe and a Europe of employment", Secretariat of the Convention, conv 394/02, contrib 138, 12 November 2002, 4, where a proposal is submitted for the "directorio" of the ECB to be elected by the "Parlamento europeo a propuesta del Consejo".

be found in the different contributions – more or less exhaustive – included in the Convention proceedings<sup>43</sup>.

In particular, during the Convention several proposals addressed the need to achieve consistency between the objectives of monetary policy and ECB independence on one side and plans for greater openness and balance in the social and economic dimension on the other. In reality the diverging opinions on the economic and social dimensions affected the model itself. As for monetary policy, the proposals concern both the definition of its principles (old Article 4) and the ECB's duty to comply with the new principles that put more emphasis on the social constraint.

An example of this are the views<sup>44</sup> of those who think that “Les objectifs sociaux de l'Union européenne sont soumis à la réalisation du marché commun et de l'union économique et monétaire”; thus, “Dans une politique monétaire européenne très centralisée dans le cadre de l'euro, la coordination de la politique socio-économique des Etats membres est impératif pour éviter un dumping social et pour réaliser les objectifs stratégiques de Lisbonne”. From this it follows that “les articles de base du Traité Constitutionnel” should expressly contemplate that “le marché commun et l'Union économique et monétaire (UEM) doivent servir les objectifs sociaux comme le plein emploi, un niveau élevé de protection sociale, l'égalité et la qualité de vie”. This affects the definition of the objectives of the European Central Bank which should include “non seulement [...] la stabilité des prix, mais aussi de promouvoir la croissance économique durable, le plein emploi et la cohésion sociale”<sup>45</sup>. Such views are critical of the prevailing theories on the role of central banks and, in some cases, go hand in hand with demands for transparency for the ECB in its conduct as well as its accountability “devant le Parlement européen”<sup>46</sup>.

Another comprehensive proposal to that effect calls for a form of economic governance mindful of the Welfare State tradition<sup>47</sup>. The old Article 4 (III-66) has been completely rephrased: the principles of economic policy have been thoroughly redefined by means of an explicit reference to full employment, which becomes the core objective of macroeconomic policy. The reference to the model is reflected on the open market economy with free competition that attributes a defining role to “social welfare”. In such a context monetary policy is affected, since its primary goal has to be growth and full employment. Price stability is not of minor importance and is another primary objective. Monetary policy is therefore bound to the social objective of full employment.

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<sup>43</sup> Where there is no shortage of innovative proposals such as the establishment of an “advisory commission made up of stakeholders, including social interlocutors”: cf. Contribution by Josep Borrell, member of the Convention, Carlos Carnero and Diego López Garrido alternate members of the Convention: “A European Constitution for peace, solidarity and human rights”, Secretariat of the Convention, conv 329/02, contrib 115, 8 October 2002 (10.10), 27; Contribution by Mr Emilio Gabaglio, Observer at the Convention: “A Constitutional Treaty for a Social and Citizens”, Europe Secretariat of the Convention, conv. 433/02, contrib. 155, 10.

<sup>44</sup> In particular, this view was expressed repeatedly with respect to the European Central Bank's objectives during the discussion on the amendments to the Draft Constitution.

<sup>45</sup> Contribution from Ms Anne Van Lancker, member of the Convention: socio-economic governance in the constitutional treaty, Secretariat of the Convention, Conv. 86/02, Contrib. 41, 10 June 2002, cf., also for the parts not mentioned above, 2, 3, 4, 5, 9, 10, 11. «Cela implique également un réaménagement du pacte de stabilité afin de pouvoir mener une politique monétaire active stimulant l'emploi et la cohésion sociale» (*ibidem*, 11).

<sup>46</sup> *Ibidem*, 11.

<sup>47</sup> Contribution by C. Einem and M. Berger Conv. 232/02 Brussels 4-9-2002.

The monitoring mechanism for excessive government deficit is affected: it changes from a discipline tool to becoming part of a socially-oriented macroeconomic policy. The reform of Article 104.2, (now III-73) is justified in the light of the subordination of monetary policy to the social objective of employment, thus losing its technical autonomy. «The ECB should become responsible for full employment, growth and price stability and the budget policy should guarantee a stable labour market, thus creating an infrastructure for the promotion of growth», so that the anti-inflationary primacy may lose its relevance<sup>48</sup>.

The reduced role and the increased flexibility of the government budget policy, maybe one of the most criticised and compromised elements in the present economic situation, is completed by including the “golden rule” that excludes from this principle investments in infrastructures financed through government borrowing. As a logical consequence, the character of the ECB changes and its nature of “independent authority” is weakened, since it becomes an instrument of monetary management subject to the objective of an economic policy of full employment. There is no doubt that those who propose to add the pursuit of other paramount objectives (in terms of social and economic policies) to the traditional objective of price stability actually intend to check the excessive role of an independent authority.

The idea is to affect actions and objectives of the ECB by placing further (constitutional) purpose-related constraints. The evident risk is that, even though the purpose is to direct the effort of the ECB to achieve various objectives, the actual result might differ from that hoped for. In fact, in light of the multiple objectives it would be required to attain, the ECB might be compelled to perform a balancing act in the implementation of monetary policy, thus diminishing its influence on social and economic policies<sup>49</sup>. This would not be the place to assess the soundness of these objections from the point of view of economic theories or, more generally, the economic consequences of the institutional choices adopted on the basis of macroeconomic theories which are currently prevailing, at least in Europe<sup>50</sup>. However, some considerations seem to be in order. It is a fact that scholars did point out that the objective of price stability does not have to be the main priority in all economic cycles and regardless of the historic context. This is particularly clear when account is taken – though in another constitutional context – of the difference with the situation in the United States<sup>51</sup>.

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<sup>48</sup> As evidence to the role of the multiple objectives of the ECB in the debate among community bodies, it should be noted that the same issue has been addressed by the European Economic and Social Committee: cf. Avis sur “La gouvernance économique dans l’Union européenne” (Economic Governance in the EU). The Committee’s Avis was submitted to the Convention’s attention as an annex (actually it is the full text) to: Contribution from Ms Anne-Marie Sigmund, Mr. Göke Frerichs and Mr Roger Briesch, observers to the Convention – “Economic Governance in the European Union” conv 513/03, contrib 213, 28 January 2003 (31.01). This included such statements as “politique économique et monétaire doit contribuer à la réalisation de l’objectif de croissance et de plein emploi”. The Committee’s proposals included a “dialogue macroéconomique .....deux fois par an entre le Conseil, la Commission, la BCE et les parntenares sociaux européens”, though only for mutual information purposes (id. 19).

<sup>49</sup> In other words, monetary policies might be based on more discretionary standards than those expounded in the past by monetary theories, which think (or expect, depending on the point of view) that discretionality applies only to the extent that it is conducive to the achievement of their mandatory objective (for a more in-depth discussion on this aspect see, for all, a F. Papadia, *L’Unione economica e monetaria*, in *Affari esteri*, 1991, n.89, 3 et seq.

<sup>50</sup> Objectives and role of the central bank in the prevailing economic theories: O. Roselli, *Governo valutario, liberalizzazione ed unione monetaria europea. Profili istituzionali*, Giappichelli, Torino, 1996, 182 et seq.

<sup>51</sup> To this end, see the conclusions in the essay by O. Baroncelli, *Bilanciamento dei poteri e federalismo nell’assetto della Federal Reserve*, in O. Roselli (Ed.), *Europa e Banche centrali*, cit., forthcoming.

First of all it seems that, in creating the ESCB and the ECB, the Treaty drafters did attribute these bodies a constitutional role and the utmost independence, though only with respect to the functions normally performed by a modern central bank, that is the control of monetary and price stability, setting for prices a maximum yearly increase of two percent. The ESCB and the ECB are not vested, neither by their Statute nor by the Treaty, with the power to control credit within the EU. Thus, neither the ECB nor the ESCB, which governs it, is tasked with the duty to stabilise the financial market. In creating the Federal Reserve System, the approach in the United States was quite different. The law expressly assigned to that central bank the responsibility for controlling the stability of the financial market; price stability did not fall under its remit, neither as a primary objective nor as a secondary objective, even though in practice it has become a priority for the Federal Reserve.

In the European legal framework, the independence of the ECB and the strict definition of the scope and the main objective of its activities are necessary to avoid the monetisation of deficits, thus to prevent, as correctly argued by the Constitutional Court in Germany, politicians eager to be re-elected or interest groups from hijacking monetary control. In this way, however, European lawmakers have taken no account whatsoever of what is the most dynamic aspect of the international financial markets, and that of Europe in particular, the increasing importance of a private cross-border financial market. Failure by the Maastricht Treaty to address the problems of financial stability in Europe and to grant the ECB or the ESCB the power to act as lender of last resort on a Europe-wide basis, after this has been taken away from the national central banks together with the power to create money, is another example of negative integration, yielding additional ground to the sphere of free negotiations among private parties. On the other hand, it would be appropriate to remark that broadening the ECB's intervention and control areas, along the lines of the US model, would be possible to the extent that there would be the same checks and balances in place attributed to other constitutional bodies, particularly the U.S. Congress, to take the example one step further.

In other words, broadening the scope of the ECB's intervention and control activities would require substantial progress toward a federal model, in particular attributing much greater representation and powers to the European Parliament. Of course, this would be such an innovation as it would make it necessary to remove those undefined elements from the form of government and economic governance of the Union which still stand in the way to a full political Union. But at least a serious debate should start on how to remedy a power gap determined by the failure to consider the importance of discretionary money creation functions, thus the inherent potential for financial destabilisation, and by prohibiting any EU institution to act as lender of last resort through the exercise its discretionary power to create money.

What needs to be underlined is that this gap brings into sharper focus the negative integration character of the provisions of the Maastricht Treaty on monetary policy, as they reduce even more significantly Governments to the role of economic agents, placing them on the same footing as private persons. By promoting the ECB and the ESCB to an almost sacred role of guardians of price stability, the Maastricht Treaty took away an instrument from economic policy, while it is uncertain whether it was able to eliminate even one of the objectives. Or perhaps it did, by eliminating full employment as a goal of economic policy and mandating that this should be pursued only by acting on the labour market.

## 5. The Union's budget

This is probably one of the least discussed issues in the Convention's draft Constitutional Treaty, even though a "Reflection Circle" on budget procedures and financial projections was established within it. This oversight is all the more striking if account is taken of the fact that the European "constitutional moment" coincides with the enlargement of the Union. The maintenance of a weak instrument, quite a remarkable issue in economic terms, may be justified only by reasons of coherence with the model and partly by the divisions of scopes of action between Union and States that have been outlined in the economic policy. A weak budget, the expression of an intentional self-restraint, stands in marked contrast with the role this instrument plays in the Keynesian model. It means opting for a weak intervention in macroeconomic management, thus hindering *de facto* the implementation of counter-cyclical policies.

These constitutional choices, however, were virtually inevitable and have deeply influenced the Convention's debate. It is a well-known fact that the Union's budget is influenced by equally strict multi-year planning. The agreement reached in Berlin in 1999 for the 2000-2006 period (Agenda 2000) traces the evolution of the budget for the next few years and firms up the position of this economic instrument in the European context. According to uniform data, the European budget will be slightly expanded in the next few years but only to include the expenditure anticipated for the enlargement. Were it not for these outlays, the budget would suffer severe cuts from 2000 to 2006. On the other hand, with the exception of the agricultural policy, the expenditure that may finance macroeconomic actions is very low (32.6 % of the budget for different structural actions) and lower than in the previous phase.

A weak economic governance, whose macroeconomic actions are confined to general guidelines that confirm the centrality of the monetary policies, is coupled by a weak budget. Only in the Resolution of the EESC (19 September 2002) has the focus been put on the need for the Union's revenue to suit the commitments undertaken. This call for a new financing system, which would make it possible to expand the resources available to the Union, is more urgent and necessary in a Europe that wants to have not only greater social and economic cohesion but also a greater degree of constitutional homogeneity.

The features of the budget in the Convention's draft do not introduce any significant innovation, if compared to Articles 268 and following of the ECT. The most important innovations, in our opinion, are the structure and the procedures, especially because they shift the institutional balance toward the European Parliament. First of all, based on article I-55, the Parliament and the Council must approve the budget by a European law. So far, the budget did not have these requirements and financial projections were simply one of the many atypical acts carried out in community practices, that is an "inter-institutional agreement". Now, according to the new rules enacted by the Convention, the budget law is one of the sources of European law.

Another innovation is the multi-year financial framework, which covers a period of at least five years, setting annual ceilings for commitment appropriations by category of expenditure (I-54). The multi-year budget is approved by a European law by the Council of ministers. Thus, the European budget becomes a potential planning tool (which can affect, for instance, revenue policies and the governance of structural funds). A substantive innovation is the repeal from the budget procedures of the distinction between mandatory expenditure and non-

mandatory expenditure (I-52). Before the Council alone had decision-making powers on mandatory expenditure; now co-decision powers extend to all expenditure<sup>52</sup>.

## **6. A Wish Upon a European Star (Instead of a conclusion)**

As an Italian I have a twofold wish: not only that the signature of the new Constitutional Treaty may come full circle so to speak, *from Rome to Rome*, but that the Community's economic constitution may do so by going back to an updated version of that form of *re-embedded liberalism* that is to be found in the original spirit of the Treaties and that represents Europe's social and economic identity. This because I am strongly convinced the "social self" of Europe holds on Kierkegaard-like to its opposite, i.e. the economic order – to use the beautiful figure of speech of our host Miguel Maduro<sup>53</sup>.

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<sup>52</sup> See M. Carabba, *Il bilancio dell'Unione*, in F. Bassanini-G. Tiberi, *Una Costituzione per l'Europa*, cit., 159 ss.

<sup>53</sup> M. Piores Maduro, *Europe's Social Self: "The Sickness unto Death"*, in ConWeb, N. 2/2000 <les1.man.ac.uk/conweb>.

