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CORE ANALYSIS

Rethinking the EU'S 'Monetary Constitution': legal theories of money, the Euro, and transnational law

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Abstract

In recent years, legal scholars have dismantled influential economic accounts of the private nature of money, demonstrating that money is better understood as a 'governance project' and a public resource that is created and regulated by the state. Legal theories of money could lend support to the ECB's recent use of 'unorthodox' monetary policy to stabilise the euro, and could further support proposals for the innovative use of monetary policy to combat inequality. However, legal writing on money to date has primarily sought to challenge neoclassical economics – a body of thought that denies the impact that distributions of credit by the state play in shaping processes of value formation in the economy. Two further dimensions of the nature of money have received less attention from legal scholars to date: first, the question of how money comes to have an economic value (an important component of 'moneyness'), and, second, how the international functions of credit money as currency in international trade and finance may limit the capacities of governments to manage money differently. In this article, I offer a revised account of the legal nature of money that is more attentive to the transnational nature of the legal regimes and institutions that enable the production of sovereign credit monies in the contemporary global political economy. My analysis complicates both the suggestion that the ECB can address inequality in the eurozone by means of unorthodox monetary policy and the widely made counter-argument that the only solution to the constitutional crisis in the European Union (EU) is the creation of a political sovereign imbued with stronger fiscal powers. I find that unless the current transnational legal arrangements that enable the production and governance of money are addressed, no states will be able to act as 'centralised and legitimate political authorities' that can control capitalist credit money in accordance with democratic imperatives.

Keywords: EU law; money; transnational legal theory; value; derivatives; financialisation

The actions of the European Central Bank (ECB) with regard to the conduct of its monetary policy have provoked a latent constitutional crisis within the eurozone. On 5 May 2020, the Federal Constitutional Court (FCC) of Germany ruled that the ECB had acted *ultra vires* and had violated the Treaty on the Functioning of the European Union (TFEU)[1] when, in line with its Public Sector Purchase Programme (PSPP), the ECB authorised the central banks of its member states to purchase euro-denominated sovereign debt issued by governments in addition to private assets.[2]

[1]Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU) (2016) OJ C202/1.

[2]Art 123 TFEU prohibits both the ECB and national central banks from purchasing public debt instruments on the primary market. Secondary-market purchases of public debt instruments are allowed in principle, nevertheless, these purchases must not be used to circumvent the objectives of the prohibition on monetary financing, as Council Regulation (EC) No 3603/93

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The FCC saw fit to issue this ruling in spite of the fact that the PSPP programme had been previously ruled to be compatible with European Union (EU) Law by the Court of Justice of the European Union (CJEU).[3] In June 2021, the European Commission served the German government with written notice of violation of two central principles of European law, namely, the primacy of EU law above national laws and the binding nature of the rulings of the CJEU on national courts. The Commission subsequently closed the infringement procedures against Germany on December 2021 'based on formal commitments of Germany clearly recognising the primacy of EU law and the authority of the Court of Justice of the European Union'.[4] Neverthless, the judicial activism of the German constitutional court has provoked a furious backlash from scholars and commentators, many of whom have expressed confusion at the court's apparent misunderstanding of EU Law and concern over the consequences of the ruling for the future of monetary governance in the EU.

Although condemnation of the FCC's judgement has been widespread, there is far less agreement concerning the underlying issue of the legitimacy of the ECB's increased use of unconventional monetary policy to support indebted governments. The recent actions of the ECB are interpreted in some quarters as a further illustration of the much debated 'democratic' deficit in the EU. A too-powerful ECB is seen to be compensating for the failure to achieve a true political and, importantly, fiscal settlement within the EU through unorthodox monetary practices that have similar economic impacts to prohibited measures on monetary financing. Streeck recounts that for those constituencies who believe that the ECB's mandate should be limited to keeping the euro stable through a targeted inflation rate and keeping the payments system functional, the ECB is 'acting *extra legem* to fill the political vacuum created at the centre of the EMU by its founders'.[5] The creation of the European Stability Mechanism outside of the purview of the European Parliament by the European Council in 2011, and the subsequent finding of the CJEU in *Pringle*[6] that upheld the Council's reasoning is argued to have created a 'paradigm shift' in the EU's monetary constitution.[7] Likewise, bond-buying programmes by the ECB, including the PSPP and the earlier Outright Monetary Transactions (OMT) programme[8] are thought to breach the strict separation between monetary and fiscal policy in the EU's monetary order.[9] In response

clarifies. (Council Regulation (EC) 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Articles 104 [renumbered after the Lisbon Treaty as Article 123 TFEU] and 104b(1) [renumbered after the Lisbon Treaty as Article 125 TFEU] of the Treaty (OJ L 332, 31.12.1993, 1). The FCC relied on German constitutional law to defend its ruling, as this law holds that if EU institutions act outside the powers transferred to them by the German government the individual right to democracy is affected. See Feichtner for further analysis. I Feichtner, 'Policy Spotlight Working Paper: In the Name of the People? – The German Constitutional Court's Judgment on the European Central Bank's Public Sector Purchase Programme' (14 May 2020) <justmoney.org/in-the-name-of-the-people-the-german-constitutional-courts–on-the-european-centralbanks-public-sector-purchase-programme/> accessed 2 February 2022, 5–8.

[3]Case C-439/17 Weiss and others v Bundesregierung (2018) EU:C–114.

[4]European Commission, 'December Infringements package: key decisions' (ec.europa, 2 December 2021) <https://ec.europa.eu/commission/presscorner/detail/en/inf_21_6201?fbclid=IwAR1w6wbHhdcA5vxlqXTohUjxcgF7mJbpSBxTXjxaNWXpMJ0MIzb9Zyuwv7I%20(3%20Dec.%202021)> accessed 7 October 2022 2022.

[5]W Streeck, *How Will Capitalism End? Esssays on a Failing System* (Verso 2016) 162.

[6]Case C-370/12 *Pringle v Ireland* [2012] CJEU–053.

[7]The CJEU affirmed that grants of financial assistance could be extended to Member States in need when the stability of the euro area as a whole is at risk, which many commentators nonetheless consider to be in breach of the 'no bailout clause' in Art 125 TFEU, P-A Van Malleghem, 'Pringle: A Paradigm Shift in the European Union's Monetary Constitution' 14 (2013) German Law Journal 141–68.

[8]Under the OMT, the ECB is authorised to purchase unlimited amounts of bonds issued by Eurozone states, as long as they are bought on the secondary market (ie, not directly from states) and as long as those states have signed a bailout agreement with the European Stability Mechanism (ESM). ECB 'Technical Features of Outright Monetary Transactions' (ECB.europa.eu, 6 September 2012) <https://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html> accessed 2 February 2022.

[9]Monetary policy is ordinarily understood as policy that influences the money supply, above all through the setting and management of interest rates. Fiscal policy concerns not only tax policy but broader economic policies relating to government

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to repeated examples of EU courts and institutions invoking exceptionalism and necessity to fabricate new frameworks for financial relief outside of the original frameworks of the TFEU, concerns have been raised that the EU is fast-becoming a legal and political order in which 'necessity rather than consent is the organising principle'.[10]

Others take issue with the understanding of the EU's 'monetary constitution' that underpins much of the ongoing furore over the actions of the ECB. De Grauwe argues that the common currency and monetary unit through which the EU is seeking to effectuate its monetary policy, the euro, has a number of 'design flaws' that result in unjust and inequitable impacts within the diverse political economies of distinct Member States.[11] A significant body of economic scholarship supports the view that the introduction of a common currency amplified a divide between European 'core' and 'periphery' states, contributing to the intensification of economic and social inequalities within the EU.[12] What is more, the complaint that the organs of the EU are overstepping their constitutional mandates is also made in countries that stand to benefit from 'looser' approaches to monetary policy. Critics of the conditionality imposed on states seeking emergency loans from the ECB argue that the troika has 'forced draconian fiscal measures onto indebted eurozone Member States such as Greece, Portugal, and Ireland, which were thus stripped of their fiscal sovereignty and budgetary autonomy'.[13] Here, complaints of the overreach of EU institutions extend beyond the recent actions of the ECB with regard to the PSPP and take aim at the broader structures of economic governance imposed to instil the fiscal discipline that, in line with monetarist-inspired economic theories on the nature of money, many policymakers and economists in Europe believe is required for a functioning monetary regime and an operational common currency. In its pursuit of price stability through fiscal austerity, the EU has been charged with going so far as to 'micromanage complete overhauls of labour and employment law as well as cutbacks of public-goods provisions ranging from health to education sectors', which Fischer Loscano argues is a violation of human rights.[14] On these accounts, the actions of the ECB' in recent years are a necessary corrective to compensate for flaws in the constitutional design of the euro.

In this article, I examine the recent crisis in the eurozone over the conduct of monetary policy by the ECB through the lens of legal theories of money. Legal theories of money share some

spending that are used influence aggregate demand in the economy. In the view of the FCC, the ECB was disguising a measure that should ordinarily be understood as a broader economic policy as a 'monetary' measure in order to maintain that it is within its competences. Feichtner offers a compelling critique of the impacts of the prohibition of monetary financing within the EU's constitutional order on member states, and her work puts in doubt the broader coherence of the distinction between 'monetary' and 'economic' measures upon which the FCC relies in *Weiss*. I Feichtner, 'Public Law's Rationalization of the Legal Architecture of Money: What Might Legal Analysis of Money Become?' 17 German Law Journal 879.

[10]J White, 'Emergency Europe' 63 (2015) Political Studies 300–18, 304.

[11]P De Grauwe, 'Design Failures in the Eurozone: Can They be Fixed?' LEQS Paper No. 57 (2013) <http://eprints.lse.ac.uk/53191/1/LEQSPaper57.pdf> accessed 2 February 2022; O Stark and J Wlodarczyk, 'European Monetary Integration and Aggregate Relative Deprivation: The Dull Side of the Shiny Euro' 27 (2015) Economics & Politics 185–203; M Höpner and M Lutter, 'The Diversity of Wage Regimes: Why the Eurozone Is Too Heterogeneous for the Euro' 10 (2018) European Political Science Review 71–96.

[12]De Grauwe et al highlight the role of common nominal interest rates, the asymmetries imposed by the fixed exchange rate regime, and the prohibition on monetary financing by governments (which is seen to take away a necessary stabilisation mechanism that enables states to respond to inevitable cycles of 'boom and bust' in financial capitalism) as key failures of the EU's monetary order. De Grauwe et al argue that these foundational flaws require either the creation of a fiscal union, or, the formation of a banking union and forms of debt pooling to resolve. De Grauwe, ibid. I discuss these issues in greater depth in Section 1 of the article.

[13]C Kreuder-Sonnen, 'Global Exceptionalism and the Euro Crisis: Schmittian Challenges to Conflicts-Law Constitutionalism' in C Joerges and C Glinski (eds), *The European Crisis and the Transformation of Transnational Governance: Authoritarian Managerialism versus Democratic Governance* (Hart Publishing 2014), 76.

[14]Ibid., 77, drawing on A Fischer-Lescano, 'Competencies of the Troika, Legal Limitations of the Organs of the European Union' in N Bruun, K Lörcher and I Schömann (eds), *The Economic and Financial Crisis and Collective Labour Law in Europe* (Hart Publishing 2014) pp. 55–82.

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important commonalities with earlier tate and chartalist approaches to understanding money, as there is a shared emphasis that money is, fundamentally, a public credit medium created and administered by the government. However, recent legal writing on money advances beyond Chartalism in a number of important respects. One notable innovation is the recasting of money as a 'governance project' – one that is grounded in 'political determinations to represent value in a particular way'.[15] Writing on the euro, Feichtner demonstrates that the legal mandate of the ECB under EU Law to achieve price stability and to promote market efficiency has been formulated in line with a narrow, economistic understanding of the functions of money that eschews significant questions about the legal nature of money as a public credit medium.[16] By demonstrating that, even in its 21st-century form, purportedly private finance is nonetheless a public credit medium dependent on 'the full faith and credit of the sovereign', other legal theorists challenge the basis on which the current legal architectures for the governance of money are rationalised.[17] The work of legal scholars of money implies that the ongoing constitutional crisis within the EU concerning the governance euro may stem, at least in part, from the continued influence of orthodox conceptions of money on policymaking that fetishise price stability, as well as a failure to examine the role of public institutions in shaping the monetary order to prioritise the interests of financial institutions over other social groups. Legal writing on money can thereby provide support to the arguments that the ECB and other central banks should actively embrace the democratisation of the economy by regulating the distribution of credit in accordance with considerations of distributive justice and legal commitments to address climate change, among other goals.[18] Leading figures at the ECB have very recently publicly acknowledged that monetary policy can have distributive consequences,[19] and the question of whether the ECB should explicitly aim to address 'inequality' when making monetary policy is generating much discussion and debate.

The move by legal theorists to recast pervasively naturalised frameworks of law and regulation that reflect and entrench a false understanding of the private nature of money in terms of competing 'monetary designs' that are constructed to serve particular political agendas is essential to breaking the impasse over the management of the euro. I build on these insights to engage with two further dimensions of the nature of money in contemporary political economies like the EU that remain under-addressed in the legal literature on money to date. The first issue pertains to a question that has divided generations of economists and other social scientists writing on the nature of money, and it concerns the extent to which the state's role in producing and managing credit money substantially impacts upon the substantive value of money and the formation of market prices. A number of legal theorists who have engaged with the question of the relationship of money to economic value thus far have tended to adopt a quasi-chartalist line of thinking (Chartalism being a monetary theory that characterises money as a creation of the government that derives its value from its status as legal tender), and they stress that it is the state which ascribes value into its unit of account through its role in accepting certain monies in the payment of taxes.[20] The impact of extending powers over credit creation to commercial banks and financial

[15]C Desan, *Making Money: Coin, Currency, and the Coming of Capitalism* (Oxford University Press 2015) 1.

[16]Feichtner (n 9).

[17]R Hockett and S Omarova, 'The Finance Franchise' 102 (2017) Cornell Law Review 1143, 1210.

[18]Gabor argues that the ECB should 'learn to love "brown inflation"' and should 'green its monetary policy by removing the preferential treatment to brown assets and promoting green financial instruments'. D Gabor, Speech to the European Parliament at the Public Hearing on COVID19 Outbreak (June 2020) <http://www.europarl.europa.eu/cmsdata/208990/Speech_Gabor.pdf> accessed 3 February 2022. For further discussion of the potential of using monetary policy to address climate change in the eurozone, see F Drudi et al, 'Climate Change and Monetary Policy in the Euro Area' Occasional Paper Series 271, *European Central Bank* (September 2021) <~https://www.ecb.europa.eu/pub/pdf/scpops/ecb.op271~36775d43c8.en.pdf> accessed 3 March 2021.

[19]'Monetary Policy and Inequality', Speech by I Schnabel, Member of the Executive Board of the ECB, at a Virtual Conference on 'Diversity and Inclusion in Economics, Finance, and Central Banking' (Frankfurt 2021) <~https://www.ecb.europa.eu/press/key/date/2021/html/ecb.sp211109_2~cca25b0a68.en.html> accessed 3 February 2022.

[20]See the discussion in Section 2.

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institutions is also considered. Nevertheless, the main focus has beenon how legal rules configure the creation and distribution of credit by banks and financial institutions.[21] I agree with Desan and others who have dismantled neoclassical theories of the relationship between money and value creation based on how they cannot account for how a particular unit becomes valuable in a given society.[22] Nonetheless, I argue that while state authority is key to money's *validity,* this is not the same as its economic value, which must be understood to be produced through a much broader spectrum of legal entitlements that allow private actors to draw on sovereign's money of account, to create near-money equivalents, and to impact on the value of money relative to a universe of prices. Importantly, the relevant legal frameworks are not limited to those governing the public administration of the *issuance* of credit money but also comprise a much broader range of legal entitlements, often contractual in nature, that enable private actors to *create demand* for credit money, and that empower those actors to both influence the economic value of the sovereign's unit at a given moment in time and to collectively shape future directions in economic policy through the threat of capital withdrawal. As Strange underlines in her work on capital liberalisation and currencies, 'The financial structure really has two inseparable aspects. It comprises not just the structures of the political economy through which credit is created but also the monetary system or systems which determine the relative values of the different moneys in which credit is denominated.'[23]

The second problem for legal theories of money is that many of the laws that comprise contemporary monetary 'constitutions' are now transnational in character, which complicates the argument that money is, fundamentally, a public resource and a governance project of the state. As Cutler and Dietz underline, transnational legal ordering can be identified with activities performed by what have been described as 'governance communities' or 'global law communities', in which the resulting legal regimes of private law are responsive to the rationality of the sector-specific community.[24] These legal regimes never fully 'take off' from domestic legal orders,[25] as domestic courts play a role in authorising and interpreting contracts used by transnational financial communities.[26] However, many of the contracts through which forms of private credit, collateral assets, and near-money equivalents in contemporary financial markets are created are grounded in just two legal regimes: those of the global financial centres, New York and London (law of England and Wales), in which specialist financial courts offer market-friendly interpretations of financial contracts. By considering how legally-constituted markets for currencies, forex instruments, derivatives, and sovereign debt impact on the monetary constitution of the eurozone, I find that the euro, as with other currencies, is governed in accordance with logics of commodification, as opposed to being an administered public credit medium: it is ranked and traded in accordance with its value in exchange on markets dominated by financial actors who have considerable leverage in terms of withdrawing capital to influence policy responses. My analysis suggests that

[21]This thinking is also central to increasingly influential work on Modern Monetary Theory (MMT), which supports the extension of the mandates of central banks to enable monetary financing (printing money) based on the argument that monetarist arguments that inflation will be the inevitable result of this action are flawed. L Randall-Wray, *Understanding Modern Money: The Key to Full Employment and Price Stability* (Elgar 1998); S Kelton, *The Deficit Myth: Modern Monetary Theory and the Birth of the People's Economy* (Public Affairs 2020).

[22]C Desan, 'The Key to Value: The Debate Over Commensurability in Neoclassical and Credit Approaches to Money' 83 (2020) Law and Contemporary Problems 8.

[23]S Strange, *States and Markets* (Bloomsbury Publishing 2016), 98.

[24]A. Claire Cutler and T Dietz (eds), *The Politics of Private Transnational Governance by Contract* (Routledge 2017). See further R Michaels, 'The True Lex Mercatoria: Law beyond the State' 14 (2007) Indiana Journal of Global Legal Studies 447; G-P Callies and P Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (Hart Publishing 2010).

[25]JP Braithwaite, 'Standard Form Contracts as Transnational Law: Evidence from the Derivatives Markets' 75 (2012) The Modern Law Review 779–805; J Biggins, '"Targeted Touchdown" and "Partial Liftoff": Post-Crisis Dispute Resolution in the OTC Derivatives Markets and the Challenge for ISDA' 12 (2012) German Law Journal 1297–328.

[26]F Cafaggi, 'New Foundations of Transnational Private Regulation' 38 (2011) Journal of Law and Society 20–49.

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a much broader spectrum of laws and regulations are involved in the creation of the purportedly 'fully fiat' monies of contemporary countries – or indeed monetary unions like the EU – than is commonly supposed, and that many of these dynamics are conditioned through the operations of legal regimes that do not originate in the EU, even if they are tacitly sanctioned through EU financial regulation and governance.

I begin the analysis in Section 1 with an introduction to the single currency and an overview of current debates on the nature of the EU's monetary constitution. In Section 2 of the article, I then turn to contextualise the arguments made by legal scholars about the nature of money by first rehearsing 'orthodox' and heterodox' perspectives on money, and by seeking to locate legal theories in this broader debate, assessing in particular how legal scholars understand the relationship between money and value. Next, in Section 3, I move to advance legal theories of money by trying to understand how the legal perspective relates to the question of how money comes to have an economic value, and by reflecting on the role of transnational legal regimes in shaping the administration of money. I conclude with a discussion of what my revised legal conception of the nature of money means for debates about the EU's 'monetary constitution' and for the ECB's role in monetary governance going forwards.

The analysis that I carry out in the article yields a number of important findings with respect to both contemporary debates about the nature of money, and the ongoing constitutional crisis in the eurozone. First, in terms of its theoretical contributions, the article demonstrates that when monetary constitutions are approached from a governance perspective, in addition to examining how credit issuance is legally configured, greater consideration must be paid to the laws and legal structures that impact on the endogenous demand (and, thereby, creation) of credit in capitalist circuits of production and exchange. In particular, there is a need to confront the fact that a permissive approach by political authorities to the development of a wide range of financial contracts has, in line with the shift to financialised capitalism, produced a situation in which a networked community of transnational financial actors is able to exert pressure on the exercise of economic policy by elected governments through their routinised valuations of currencies and sovereign debt. The legal capabilities granted to a range of actors to demand public credit money, and to thereby influence both the economic value of the sovereign's unit at a given point in time, and to impact the relationship between money and price formation (which also influences inflation and price stability) must be understood to form part of contemporary monetary constitutions. The activities of private banks that have been rationalised and legitimised under a monetarist regime of monetary governance (in and beyond the EU) have led to forms of market-generated credit creation being normalised that have fundamentally altered the relationship of states to the money supply, creating a situation in which central banks such as the ECB are only able to enact policies by effectuating transactions in markets as monetary technocrats reacting to developments in global financial markets.[27] On a strong reading of this account, governments and central banks have 'little or no choice' to provide the reserves of state money needed to accommodate any level of endogenous demand for money'.[28] Thus, when the relationship between money and the broader political economy is appreciated, it becomes clear that money should be understood to be created not only at the behest of the state through the creation of credit, but by a state responding to demand from a wide range of economic actors who are legally enabled to command state money in particular ratios in return for the provision of services (wages) or trade in goods and services, or from other ways of generating income, including rents and investments.[29] It may

[27]Klooster has recently argued in a similar vein. J van't Klooster, 'The Politics of the ECB's Market-Based Approach to Government Debt' (2022) Socio-Economic Review mwac014, 1–21.

[28]G Ingham, *The Nature of Money* (Polity Press 2004), 53.

[29]My analysis here will correctly lead to the complaint that I am arguing that legal theories of money must accommodate the legal structure of the whole economy, but, after all, the most sophisticated accounts of the nature of money, such as those of Keynes or Minsky, did consider money as a creature of a much more complex capitalist political economy.

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still be the case that an activist central bank could try to steer this process through the creation and distribution of credit – by spending or loaning it to *different* hands'[30] to paraphrase Desan – but, under current transnational structures, the risk is that private actors react to a threat to their investments by devaluing the currency.

Regarding the specific policy implications of my findings for the debate in the EU, the argument that the ECB should have the mandate to consider inequality when exercising monetary policy is strengthened through legal analysis, as the EU is already impacting substantially on dynamics of inequality between as well as within states through its monetary design, which affords financial actors a considerable license to create liquidity and to make investments. On the other hand, the expanded legal theory of money that I develop here upsets the assumption that more distributive monetary policy responses can have their desired impact, as the capacity of private actors to evade the influence of monetary policies are considerably extended owning to the transnational character of the EU's monetary constitution. Relatedly, the widely made argument that the solution to the constitutional crisis at the EU is the creation of a political sovereign imbued with stronger fiscal powers is weakened,[31] as no state under the current transnational legal arrangements can meaningfully act as a 'centralized and legitimate political authority[32]' that can administer money in accordance with egalitarian aims that counter the interests of financial markets. When it comes to the matter of whether activist monetary policy can address inequality, the relevant concern is not only to show that it is a political sovereign that is backstopping a private system of credit creation, as the constitutional and governance literature seeks to do, or, in the specific case of the EU, that a political sovereign with fiscal powers is a necessary component of a functioning monetary order, although this is an important step. Addressing inequalities in and beyond the eurozone requires paying closer attention to the operations of financial capitalism, which necessitates consideration of the legal capacities that *the collective of political authorities* in the global political economy is conferring on financial actors with regard to insulating their wealth from redistributive policies.

1. The Euro and the EU's 'monetary constitution': overview of existing thinking and key debates

In order to appreciate the current controversy in the eurozone and how this relates to a fraught debate about the nature of money and its relationship to the state, it is first necessary to understand the character of the EU's monetary order. I begin this discussion with an overview of the historical context in which the project for a single currency was concretised. Importantly for the subsequent arguments that I will make about the need to pay attention to the capacities bestowed on private actors to challenge the authority of central banks and governments in the making of monetary and economic policies, the analysis highlights that part of the rationale for a currency union was the need to protect lone economies from the destabilising impacts of increasingly liberalised capital markets. I then outline the key features of the monetary order that was constructed in the EU, and I discuss the ongoing debate over the 'structural flaws' in the EU's monetary architecture.

A. Background to the creation of the euro

While many accounts of the creation of the European Monetary Union (EMU) focus predominantly on the internal politics among EU Member States, a critical part of the context for the

[30]Desan (n 22), 5.

[31]See Otero-Iglesias for a recent chartalist account on the required role of fiscal sovereignty in making money functional. M Otero-Iglesias, 'Stateless Euro: The Euro Crisis and the Revenge of the Chartalist Theory of Money' 53 (2015) Journal of Common Market Studies 349–64.

[32]Ibid., 350.

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formation of EMU was an earlier sea change in the governance of money on an international level. In addition to being a mechanism designed to promote monetary stability in the European Economic Community (EEC) in advance of joining the euro, the creation of the European Exchange Rate Mechanism (ERM) in 1979 was a direct response to the economic and monetary instability that many countries were experiencing as a result of 'turmoil' in international currency markets that followed the breakdown of the Bretton Woods system of fixed exchange rates in 1973.[33] The increased liberalisation of capital controls by states, and the development of global forex markets as a market-based mechanism for valuing the exchange rates of currencies that were no longer pegged to the gold-backed US dollar, had created a situation of volatility in exchange rates that was having negative effects on the internal market: sudden changes in exchange rates could affect imports and exports, and this volatility was having a particularly detrimental impact on the common price system of the Common Agricultural Policy (launched by the EEC in 1962).[34]

The ERM created a new system of pegged exchange rates within Europe whereby the diverse currencies of European states were based on the European Currency Unit (ECU), the European unit of account, the value of which was determined as a weighted average of the participating currencies.[35] It is widely agreed that the ERM worked to the benefit of Germany, as the Deutchemark became the 'nominal anchor of the ERM'.[36] Indeed, the United Kingdom (UK) initially refused to join the ERM in part due to the competitive advantage that it gave to the German currency. The UK subsequently joined the ERM in October 1990, but was forced to exit just two years later under the pressure applied to the pound sterling by currency speculators.[37] The UK Chancellor, Norman Lamont, announced in September 1992 that the Government 'could no longer hold the line at the end of a day of desperate and futile attempts at propping up sterling', which had involved spending an estimated £10 billion from Britain's reserves and mandating a two-stage rise in interest rates to 15 per cent.[38]

The influence of Germany preferences with regard to the future shape of the EU's monetary arrangements was transferred into the governance of the euro through its dominance in the ERM. As Feichtner underlines, 'The current legal architecture of the European Economic and Monetary Union replicates and further consolidates the separation of monetary and economic policy, of money and public finance that had characterised the legal architecture of money in Germany already prior to European monetary integration.'[39] In addition to mimicking the monetary culture in Germany, lobbyists from strong currency states in the ERM also 'saw the market as a salutary source of financial discipline' and pushed for 'an inflation-focused independent central bank and for strict fiscal rules in order to clip the wings of undisciplined governments'.[40] That being the case, competing factions – federalists; ordoliberals, and neoliberals – had very different visions of what the political formation of the currency union should look like, and what role law should

[33]'The Euro: History and Purpose' <https://european-union.europa.eu/institutions-law-budget/euro/history-and-purpose_en> accessed 4 February 2022.

[34]Ibid.

[35]F Palm, 'The European Exchange Rate Mechanism and the European Monetary Union' 144 (1996) De Economist 305–24.

[36]'The Exchange Rate Mechanisms of the European Monetary System' Bank of England Quarterly Bulletin Q1 (1991) <https://www.bankofengland.co.uk/quarterly-bulletin/1991/q1/the-exchange-rate-mechanism-of-the-european-monetary-system-a-review-of-the-literature> accessed 4 February 2022.

[37]Billionaire investor, George Soros, famously earned over one billion pounds in his defeat of attempts by the Bank of England, which spent over six billion pounds trying to keep the market valuation of its currency within the accepted bands for the ERM. 'European Exchange Rate Mechanism'(Wikipedia) <https://en.wikipedia.org/wiki/European_Exchange_Rate_Mechanism> accessed 4 February 2022.

[38]L Elliot, W Hutton, and J Wolf, 'September 17 1992: Pound drops out of ERM' *The Guardian*, 17 September 1992 <https://www.theguardian.com/business/1992/sep/17/emu.theeuro> accessed 8 June 2022.

[39]Feichtner (n 9) 881.

[40]N Jabko, 'The Hidden Face of the Euro' 17 (2010) Journal of European Public Policy 318–34, 320.

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play within it.[41] Indeed, as Streeck has also highlighted, Maastricht was sold to diverse European electorates based on different campaigns to get the treaty ratified in different countries: promises that the euro would be as 'stable as the mark' to German voters, and an emphasis on flexibility to Southern voters, creating an understanding that the treaties and governance arrangements could be modified in response to changing circumstances 'in practice, if not on paper'.[42] Current developments reveal a partial truth in both narratives. A large body of legal scholarship has debated whether legal rules governing monetary arrangements should create stability or be interpreted teleologically in accordance with the purposes of the EU. These issues go to the heart of the current debate over the ECB's mandate to authorise practices that effectively loosen the constraint on monetary financing, as well as the debate over its potential role in considering inequality when formulating monetary policy.

In response to accounts that maintain that the development of the euro and the design of its legal frameworks was solely a neoliberal 'market-conforming' project designed to advance 'the "central" importance of Germany's preference for "fiscal rectitude above other concerns such as growth and unemployment"',[43] Jabko argues that many policymakers saw the euro and the move away from flexible exchange rates in the eurozone as a way to regain some political control in a world of mobile capital and hegemonic financial markets,[44] and to 'regain monetary sovereignty from the global financial markets and the Bundesbank'.[45] Thus, in addition to the influence of different European states and different ideological positions on the frameworks governing the euro, the creation of this common currency was also a response to developments in the international global political economy, and, in particular, to how exchange rates and flows of capital influenced production and trade in diverse political economies *in spite of how individual European states chose to issue credit and conduct monetary policy when they were still able to do so*. The significance of this point will become clearer in my discussion of legal theories of money and the transnational dimensions of the EU's monetary constitution below. For now, I want to echo Otero-Iglesias and underline that, in addition to the impetus that the post-Bretton Woods shift to a world of mobile global capital provided for the creation of a common currency, this external context also influenced the character of the governance structures of the euro. In the absence of the political will to establish a European superstate – a much lamented failure of the EU, particularly in the eyes of aspiring federalists – 'the founders of the euro agreed that the credibility of the "stateless euro" … in front of the increasingly speculative foreign exchange markets in London should be based on an *extremely rigorous monetary framework that excludes the possibility of the monetisation of sovereign debt*'.[46] The need to ensure that '[T]he euro represents depoliticised and hence stable money',[47] a point underlined by Issing, a founding member of the executive board of the ECB, was argued to be required to assure increasingly mobile investors that sovereign governments would not be able to utilise their capacity to 'print' money to erode the value of their debts, or to implement practices that might lead to generalised inflation, impacting on the value of financial investments denominated in the new currency.

[41]'There were federalists who favored the transfer of tax powers to the EU, ordoliberals who aspired to a process of gradual economic convergence leading to monetary union, and neoliberals who placed their faith in the logic of the market. These differences were overcome by an implicit agreement on the convenience and feasibility of a "modest" monetary policy, exclusively aimed at ensuring "price stability" and entrusted to a central bank insulated from democratic politics.' M Dani et al, '"It's the Political Economy … !" A Moment of Truth for the Eurozone and the EU' 19 (2021) International Journal of Constitutional Law 309–27, 311–2.

[42]Streeck (n 5), 175.

[43]Jabko (n 40), citing Jones (E Jones, *The Politics of Economic and Monetary Union: Integration and Idiosyncrasy* (Rowman & Littlefield 2002) 144).

[44]Ibid., 359.

[45]Ibid.

[46]Otero-Iglesias (n 31).

[47]O Issing, *The Birth of the Euro* (Cambridge University Press 2008) 234.

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I will now present a brief overview of some of the key features of the EU's monetary constitution before moving on to discuss competing accounts of the current crisis within the eurozone.

B. Features of the EU's monetary constitution

The arrangements for the governance of the EMU were first set out in detail in the Maastricht Treaty in 1992 and came into operation on 1 January 1999 in 11 Member States. Pursuant to Title VIII, Economic and Monetary Policy TFEU, those Member States which have completed the final stage of monetary integration transfer their monetary policy powers to the EU, meaning that monetary policy for those states is now the exclusive competence of the European System of Central Banks (ESCB), consisting of the ECB and the national central banks.[48] The conduct of the single monetary policy is defined in Articles 119, 127 and 130 TFEU. In exercising its tasks, the independent ECB and the national central banks must, as their primary objective, pursue the maintenance of 'price stability'.[49] The mandate of the ECB in conducting monetary policy is strictly limited with regard to monetary financing (funding state budgets by 'printing' money). The 'no-bailout clause' impedes the EU and its Member States from assuming the financial obligations of governments,[50] and the prohibition of monetary financing mandates that neither the ECB nor central banks of participating states may extend credit to governments, which includes a prohibition from buying government bonds on the primary market.[51]

The separation between 'monetary' and broader 'economic' and 'fiscal' policies in the EU's monetary constitution reflects a monetarist understanding of the role of government institutions in the management of the economy.[52] Monetarists stress the importance of a steady increase in the money supply for sustainable economic growth and consider that this increase should extend from the use of monetary policy by central banks to control inflation. The mode of growth expansion envisaged by monetarists is a supply-side model in which independent central banks utilise technical monetary policy to assist the activities of private banks and private markets. This is in contrast with Keynesian perspectives that dominated in the 1970s which posited that governments should spend liberally to stimulate consumer demand, and should boost economic growth by strengthening the position of labour via wage supports. The monetarist basis of the EMU imposes fiscal discipline on Member States through the convergence criteria for joining the EMU,[53] and through the Stability and Growth Pact, which obliges Member States to avoid excessive deficits and stipulates enforcement procedures to discipline errant states.[54]

In response to the sovereign debt crisis in 2010, the EU shifted substantially away from monetarist ideas towards a 'pragmatic' approach that incorporated an increased use of monetary

[48]Art 3(1)I, 127(2) TFEU.

[49]EU primary law does not define price stability, however, the ECSB has stipulated that they must aim for an inflation rate below, but close to 2 per cent in the medium term.

[50]Art 125 TFEU.

[51]Art 123(1) TFEU.

[52]As a Briefing Note prepared for the European Parliament confirmed in 2016, [T]he independent status of the ECB towards national governments, but also its monetary transmission mechanism and price stability goal are in line with Monetarist principles'. European Parliament Briefing Note, 'The ECB and the Financial Crisis: Rigid Theory vs a Pragmatic Approach' (July 2015) <https://www.europarl.europa.eu/RegData/etudes/BRIE/2015/565876/EPRS_BRI(2015)565876_EN.pdf> accessed 9 June 2022, 4.

[53]In order to join the euro, European member states were required to adhere to the criteria set out in the Maastricht Treaty, which defined the convergence criteria required for membership, namely, a stable inflation rate (1.5 per cent above the inflation rates in the three best performing member states), stable interest rates (an average nominal long-term interest rate of no greater than two per cent above the interest rates of the three best performing economies), limited exchange rate fluctuation (within a narrow band of ERM of less than two and a half per cent around the central rate), no currency devaluation in the ERM for at least two years, and low budget deficit and low debt levels. Art 140 (1) TFEU and Protocol No. 13 on the convergence criteria TFEU.

[54]Arts 121 and 126 TFEU.

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policies that offered fiscal benefits for governments and sought to stimulate demand, as opposed to fixating only on the money supply. ECB Vice President, Vítor Constâncio, admitted in 2016 that 'without the significant use of fiscal policy in 2008 and 2009' including the OMT and PSPPs programmes, 'stimulating our economies and supporting the banking sector, the meltdown of the financial system could not have been avoided'.[55] He further noted that there is a 'misguided argument that the euro area problem is almost exclusively a supply side question'.[56] Nevertheless, the attempts by the European Council and the ECB to create greater flexibility and to authorise novel approaches to emergency credit provision and monetary policy have been subject to a number of legal challenges, leading to the cases in *Pringle*[57] and *Gauweiler*.[58] In *Pringle*, the CJEU subsequently justified the actions of the Council in finding within Article 125(1) TFEU the ultimate telos of maintaining the financial stability of the monetary union. The CJEU continues to support the actions of the ECB and EU institutions, rationalising its approach within the framework of the Treaties, however, critics continue to reject the CJEU's legal reasoning, maintaining that by adopting the OMT programme, and, presumably, the PSPP, 'the ECB also left its home turf of monetary policy' and effectuated a shift from regulatory to redistributive policy as the OMT 're-distributes financial risk among the ECB shareholders without their involvement: if the programme is activated, it automatically creates financial obligations for the remaining eurozone members'.[59] Many commentators regard these developments as falling foul of the restrictions on mutualising debt obligations and monetary financing within the Treaties. Kreuder-Sonnen summarises a recurrent complaint that the European Council created the European Financial Stability Facility (EFSF) and the European Stability Mechanism (ESM) 'outside the European legal order', undermining 'the material constitution of the Monetary Union by circumventing the no bail-out clause in Article 125(1) TFEU'.[60] Similarly, the OMT programme put in place by the ECB in September 2012 was dubbed the 'out-of-mandate transactions' programme by critical commentators, and was presented as 'a seizure of competences by executive self-empowerment that stretch the limits of the bank's mandate'.[61]

C. The Eurozone in crisis: a discussion of competing accounts

A significant proportion of recent legal scholarship on the changes post-crisis to the EU's monetary constitution is preoccupied with a shift to emergency politics, be it through overreach expressed through forms of fiscal conditionality and the troika, or through the unorthodox monetary policies of the ECB.[62] Stark rehearses a prevalent understanding that an independent central bank is best-suited to carry out the regulatory task of maintaining price stability, and that delegation to non-majoritarian institutions enhances 'the secondary (ie, non-participatory) values of constitutional democracy, such as the suppression of factions and the facilitation of deliberation'.[63] This construction only works, he argues, 'as long as the bank's activities are covered by the initial

[55]EU Parliament Briefing Note (n 52) 6.

[56]Ibid.

[57]Case C-370/12 *Pringle v Ireland* (2012) CJEU–053.

[58]Case C-62/14 *Gauweiler and Others v Deutscher Bundestag* (2015) CJEU.

[59]Kreuder-Sonnen (n 13) 77.

[60]Ibid., 74–5.

[61]J Stark, 'The ECB's OMTs (Out-of-Mandate Transactions)' (2012) 26 The International Economy 4, 52–53.

[62]C Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts' 35 (2015) *Oxford Journal of Legal Studies* 325–53; C Kreuder-Sonnen, 'Beyond Integration Theory: The (Anti-)Constitutional Dimension of European Crisis Governance' 54 (2016) Journal of Common Market Studies 1350–66; M Ruffert, 'The European Debt Crisis and European Union Law' 48 (2011) Common Market Law Review 1777; B Ryvkin, 'Saving the Euro: Tensions with European Treaty Law in the European Union's Efforts to Protect the Common Currency' 45 (2012) Cornell International Law Journal 227; A Baraggia, 'Conditionality Measures within the Euro Area Crisis: A Challenge to the Democratic Principle?' 4 (2017; 2015) Cambridge International Law Journal 268–88.

[63]Ibid.

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delegation contract and, in fact, remain regulatory, not distributive'.[64] Others note that the idea that money and monetary policy must be insulated from the political process is a recent, anti-democratic reversal of the longer-standing position pursuant to which central banks 'were first lender of last resort for the state and only later became lender of last resort for private banks.'[65] The shift towards making the ECB 'lender of last resort' (LOLR) only to the private sector, as opposed to states, represented a substantial shift away from the stabilising role that central banks played during the era of the gold standard and embedded liberalism. As Frerichs underlines, 'From a Polanyian point of view, the "protective" institution of central banking has thus switched sides – it increases the commodification of money, currency, credit, and debt rather than contains it.[66] (I will return to the significance of this concept of the 'commodification' of money in Section 2.)

Another body of scholarship on the EU's monetary constitution casts the debate somewhat differently and focuses more on its structural and material implications for the diverse political economics of the eurozone. The lack of a solid and uniform fiscal authority behind the ECB is seen as a structural flaw in the EU's monetary order by critics, who underline that the result of these arrangements is that EU Member States 'issue debt in a currency that they do not control in terms of central banking (they are not able to "print" euros or any other type of currency, at least not for a considerably long period of time).'[67]. This means that governments will not always have the necessary liquidity to pay off bondholders, as happened during the sovereign debt crisis. The consequence of this structure, according to Sotiropoulous et al, is that financial stability 'can be thus safeguarded only through fiscal discipline',[68] which has had disproportionate impacts on the economies in Southern Europe. A similar diagnosis is reached by De Grauwe in his analysis of the 'design flaws' of the EMU.[69] For many heterodox economists and critical legal scholars, some of the legalistic discussions over the ECB's actions pay insufficient attention to two key dimensions of the EU's monetary constitution, namely, how the creation of a single currency impacted on dynamics in the underlying economies of core and periphery states in the eurozone, as well as on process of financialisation. Streeck draws on the 'varieties of capitalism' literature to highlight the significant differences between the political economies of Southern European and those of Northern European Members States. Generally speaking, he argues, Southern states in the eurozone are demand-driven economies that have relied on high levels of government spending, and in which, prior to the introduction of the euro, inflation made it easier to borrow as it eroded the value of public sector debt over time. Pre-euro, devaluations of the currency were used to compensate for the loss in international competitiveness that resulted from the high labour costs that were a part of this settlement that made it possible to harmonise the interests between workers and employers.[70] Northern economies are different: 'their growth came from exports, so they were inflation averse'; they were less dependent on devaluations to support competitiveness, and they were wary of both debt and inflation, and influenced by the votes of savers, who preferred a 'stability culture'.[71] Growing pressures from speculative capital pressured governments to try to emulate the stability culture achieved by Germany in the years leading up to the introduction of

[64]Ibid.

[65]E Stockhammer, 'Neoliberal Growth Models, Monetary Union and the Euro Crisis. A Post-Keynesian Perspective' 21 (2016) New Political Economy 365–79, 373.

[66]S Frerichs, 'Prologue Money Matters: The Heads and Tails of Conflicts-Law Constitutionalism' in Glinski and Joerges, (n 13), 16 citing G Majone, 'Rethinking European Integration After the Debt Crisis', *UCL European Institute* Working Paper No 3/2012, 14.

[67]DP Sotiropoulos, J Milios, S Lapatsioras, *A Political Economy of Contemporary Capitalism and Its Crisis* (Routledge Taylor & Francis 2013), 204.

[68]Ibid.

[69]De Grauwe (n 11).

[70]Streeck (n 5) 172–4.

[71]Stark (n 61), 173.

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the EMU.[72] Hence, in spite of some forecasted disadvantages, governments in Southern Europe accepted the fiscal conditionality requirements imposed to join the ERM, and the constitutional settlement of the euro reflected the conditions for economic success in export-oriented, strong-currency countries like Germany.

It is now commonly acknowledged that Germany benefits substantially from an exchange rate that is lower than it would be were its valuation on global forex markets not also impacted by the inclusion of the performance of Southern economies.[73] On the other hand, though Germany, the Netherlands, Austria, and Finland are now seen to be the primary beneficiaries of the single currency, this has only been the case since 2008, when the full consequences of the EMU for Southern economies became apparent.[74] When the single currency was first introduced, Germany was still the 'sick man of Europe', mainly reflecting the dramatic cost of reunification.[75] By enforcing wage moderation and increasing labour market flexibility, Germany forced down its unit labour costs, resulting in a reduction in unemployment and a 'stellar export performance' that was assisted by its artificially low exchange rate.[76] Countries in the South experienced the opposite effect as the impacts of the single currency took hold: an influx of credit flowing in from Germany and other 'core' countries occurred as the borrowing of Southern states was facilitated by a low nominal common interest rate in the eurozone, and by the perception of market actors that the risks of default of those governments were shared by the eurozone as a whole.[77] The large current account imbalances created during the first decade of the single currency became increasingly unsustainable. Deprived of the possibility to devalue their currencies, and subjected to the discipline of an ECB pursuing price stability as an overall goal, when the global financial crisis began to unfurl, weaker and consequently more indebted peripheral eurozone countries were required to pursue painful internal devaluation processes including fiscal adjustments, leading to shrinkages in per capita incomes and high unemployment levels.[78]

Joerges and Falke argue there is a mismatch between how EU Law conceives of monetary governance and the material conditions that are required for a monetary unition to be successful. As they write, 'the legal constitution of EU Monetary Union "Europeanised" ordoliberal-monetarist conceptions; law, however, could not hope ever to substitute for the necessary historical evolution of the equally Europeanised social preconditions for successful monetary operation'.[79] Their account suggests that the formal understanding of money that underpins

[72]As Papalexatou notes, drawing on Rodrick, the climate of financial liberalisation meant that '[t]ight monetary policies, low taxation, flexible labour legislation, product market deregulation and a limited and small state' were all seen as 'indispensable for the attraction of trade and capital inflows'. This made governments with weaker currencies more determined than ever to join EA, as a means of containing the power of international currency speculators . . . There was a widely held view that governments wanted to emulate Germany's stability culture . . . ' Chrysoula Papalexatou, 'Essays on the Euro and Inequality'. Thesis submitted to the European Institute of the London School of Economics for the degree of Doctor of Philosophy, London, and October 2018, 16, drawing on Rodrik (Dani Rodrik, 'Feasible Globalizations' (2002) NBER Working Paper, 9129; D Rodrik, *The Globalization Paradox: Democracy and the Future of the World Economy* (W.W. Norton 2011).

[73]According to Morgan Stanley in 2013, at an exchange rate of 1.36 to the dollar, the euro was undervalued by 13 percent for German and over-valued by 12–24 for Italy and Greece' Streeck (n 5) 176, footnote 27.

[74]S Micossi, 'Balance-of-Payments Adjustment in the Eurozone' (12 February 2016) <https://voxeu.org/article/balance-payments-adjustment-eurozone> accessed 5 February 2022.

[75]Ibid.

[76]R Dornbusch, 'Euro Fantasies' 75 (1996) Foreign Affairs 110–24.

[77]As De Grauwe emphasises in his discussion of the design flaws of the euro, the employment of a common nominal interest rate was too high for countries experiencing inflows of capital: 'the booming Southern European countries (including Ireland) experienced systematically higher inflation rates and increases in unit labour costs than in the rest of the Eurozone. These booms led to large current account deficits in the South and surpluses in the North. It is important to stress here that the booms in the South allowed the Northern European countries to accumulate large current account surpluses. These were financed by credit that the Northern European countries granted to the South.' De Grauwe (n 11), 11.

[78]Otero-Iglesias (n 31) 350.

[79]C Joerges and J Falke, 'The Social Embeddedness of Transnational Markets: Introducing and Structuring the Project' in C Joerges and J Falke (eds), *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets* (Bloomsbury 2011) 1–15, 9.

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the legal frameworks of the Euro is in tension with how the euro operates in the context of diverse political economies. Streeck offers a similar diagnosis. 'Monetary systems designed for different social dispensations can co-exist' he finds, 'so long as states retain sovereignty and can compensate for fluctuations in competitiveness', which is fundamentally missing in the eurozone.[80] An integrated monetary regime for such disparate economies as the supply based North and the demand based South is likely to be unsustainable, he finds.[81] Although they agree that common interest rates laid the groundwork for the explosion of (private and public) domestic borrowing that led to the sovereign debt crisis, Sotiropoulos et al cast the question of diverging interests within the eurozone differently. From their perspective, accounts such as Streeck's, which cast the issue as a 'tug of war between the North and the South' over the management of the single currency,[82] err in putting the emphasis on the institutional malfunctioning of the single currency in the context of the 'classical dependency schema' of 'core' and 'peripheral' economies, and are mistaken in suggesting that the euro 'serves the national economic interests of the most competitive countries of the "center"'.[83] For these scholars, this analysis 'declares the priority of the international factor over the internal dynamics of the class struggle', casting the problem 'in terms of the capitalism of the "centre", and underweighting the matter of the power structures of the "periphery".'[84] The analysis of Sotiropoulis et al, which exposes the large gains made by some sectors of society in Southern European in the years leading up to the crisis and after it, reveals that, above all, when it comes to consideration of the role of the ECB with respect to inequality, attention must be trained not only on intra-country dynamics, but on how the EU's monetary constitution configures the interests of different social classes, and how it relates to the accumulation of capital, above all, financial capital.[85]

2. Debating the nature of money: orthodoxy, heterodoxy and new legal approaches

The underlying structural tensions in the monetary architecture of the EU are now widely acknowledged. Much of the legal literature on the actions of the ECB and the future of constitutionalism in the eurozone moves directly to focus on the legal dimensions of this debate – questions of proportionality, the nature of democracy, and constitutional balance – without expressly focusing on what conception of money underpins EU's recent monetary policies and the broader monetary practices of the EU. As the forthcoming analysis will seek to demonstrate, how money is conceptualised – as a commodity, or as a relation of creditors and debtors, or as a governance practice, or as a combination of all three – has profound implications for future thinking on how the single currency should be managed, particularly when it comes to the link between monetary policy and inequality. I will now discuss how different conceptions of the nature of money are being mobilised in the debate about the future of monetary governance in the EU.

A. Why understanding the nature of money matters for developments in the Eurozone

In broad terms, it is possible to distinguish two diverging diagnoses and sets of solutions to some of the issues afflicting the management of the single currency that are based on different conceptions of the nature of money. As dicussed above, the legal architecure governing money in the eurozone is strongly influenced by Monetarist macroeconomic theory, and it takes as its point

[80]Streeck (n 5) 174.

[81]Ibid.

[82]Streeck (n 5) 177.

[83]Sotiropoulos et al (n 67), 186.

[84]Ibid., 187.

[85]Stockhammer reaches a similar conclusion, arguing that 'neoliberalism has given rise to an unstable finance-dominated accumulation regime' that, combined with the strictures of the EU's monetary constitution, favours 'downward flexible wages (or "internal devaluation") as the preferred adjustment mechanism'. Stockhammer (n 65), 365–6.

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of departure neoclassical perspectives on the the nature of money that cast money as a private resource. Feichtner's work on the euro (discussed at footnote 9 and below) has already provided a thorough illustration of how the narrow, neoclassical economic perspective on the nature of money has been fused with constitutional thinking on the appropriate functions of government to elevate monetary stability to the level of constitutional principle within the EU. In recent years, however, the 'pragmatic' approach to monetary policy adopted by the ECB has re-opened a debate about solutions to the inequities that result from the operations of single currency and its administration. One diagnosis critiques the current design of the monetary constitution but places great faith in technical solutions that further advance the role of financial markets within the eurozone. Influential economist, Paul Krugman, analyses the distributional consequences of the single currency across the eurozone Member States using Optimum Currency Area (OCA) theory[86] – a theory that relies on neoclassical elements of thinking about money that focus on the role of money in economic exchange.[87] The solutions that are proffered based on this conception of how money works in the EU include the 'creation of a banking union; making the ECB a genuine lender of last resort; and lifting the inflation target of the European Central Bank (ECB) to bring about a more symmetric adjustment between surplus and deficit countries.'[88] This view would likely favour the use of more activist monetary policy by the ECB to tackle inflation and the move to create a European Capital Markets Union (ECMU). Another diagnosis, advanced by Miguel Otero-Iglesias in a direct reply to Krugman, draws on a chartalist understanding of money that emphasises the role of authority and credit relations - a perspective that sees the lack of a fiscal union at the European level as fatal to the project of a single currency. For Otero-Iglesias, Krugman's technical solutions, which are formulated, in line with neoclassical analysis, in recognition of the differences in the 'real' economies of Member States, 'are necessary but not sufficient to make the euro a sustainable currency'.[89] He underlines that all of Krugman's solutions 'require in the long term the creation of a centralised political authority with the right to issue joint and several liabilities, but also with the capacity to raise joint revenues through taxation'.[90] In his view, 'under the Chartalist logic of money EMU will remain a fragile edifice as long as the eurozone does not create a centralized and legitimate political authority able to sustain it through the development of legitimate taxation at the European level'.[91] 'Money is an act of sovereignty', he underlines, and 'sovereignty is fragmented in Europe and as long as it remains so the future of the euro will be questioned'.[92]

As this brief discussion suggests, competing views of the nature of money are being mobilised in debates about the possibilities for moving beyond the current status quo in the EU. For Otero-Iglesias, by following the neoclassical paradigm of focusing mainly on the real economy, Krugman's approach ignores the important political economy questions of creditor–debtor

[86]'An optimal currency area (OCA) is one in which member countries largely share shocks in common, so that policies that are generally appropriate in one country are also appropriate for other member countries. Alternatively, an OCA can be viewed as an area in which labour and capital are sufficiently mobile so as to quickly offset any localised shocks. If these conditions hold, the loss of monetary policy independence will not greatly limit macroeconomic adjustment'. AS Englander and T Egebo, 'Adjustment under Fixed Exchange Rates: Application to the European monetary Union' 20 (Spring 1993) OECD Economic Studies <https://www.oecd.org/eu/33947924.pdf> accessed 6 February 2022. Many economists, including Krugman (cited below) and Höpner and Lutter (n 11) argue that the eurozone is too diverse to function as an OCA.

[87]OCA theory, along with its potential implications for the single market, was first elaborated by Robert A. Mundell in a 1961 paper for The American Economic Review. RA Mundell, 'A Theory of Optimum Currency Areas' 51 (1961) The American Economic Review 657–65.

[88]P Krugman, 'Revenge of the Optimum Currency Area'. Paper presented at the NBER Macroeconomics Annual Conference, Cambridge, MA, 20–21 April 2012 <http://krugman.blogs.nytimes.com/2012/06/24/revenge-of-the-optimum-currency-area/> accessed 6 February 2022.

[89]Otero-Iglesias (n 31), 351.

[90]Ibid.

[91]Ibid., 350.

[92]Ibid.

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relations. For heterodox thinkers like Otero-Iglesias, the behaviour of money in the 'real' economy is significantly impacted by political determinations of how creditor–debtor relations are configured by governments. On the other hand, Krugman would likely respond that focussing excessively on the creditor–debtor relation arguably underweighs how those relationships may be shaped by the differential political economies of countries with regard to 'real' factors of production and trade, which, while being made up of creditor-debtor relations, cannot be reduced only to this dimension. I will now turn to consider debates between different groups of economists on this central issue, before moving to introduce the recent interventions of legal scholars into this debate. Ultimately, my aim will be to demonstrate that while the ECB's use of unorthodox monetary policy has helped to demonstrate that money is, in fact, a governance project, and that money does not follow specific economic 'laws' but performs, as Desan and Feichtner both argue, in accordance with a specific monetary design for the administration of credit, there is a need to consider how the legal constitution of money also conditions a political-economic reality in which money *is* made to behave like a commodity. Addressing this situation, I will argue, requires us to take a different approach to understanding the nature of money to that inhering in dominant neoclassical and chartalist perspectives, or even in ecent legal scholarship on money. Money may be an act of sovereignty, as Otero-Iglesias argues, but this does not mean that sovereigns are able to control money through monetary policy and fiscal channels. Indeed, as my analysis will demonstrate, it is precisely due to the 'legal' nature of money that this ambition is likely to be frustrated. Before I set out this argument, though, it is first necessary to examine competing theories of money in more detail.

B. Orthodox and heterodox perspectives on money

The writings of Krugman and Otero-Iglesias reflect a long-standing debate between 'orthodox' and 'heterodox' economists about the nature of money.[93] For the orthodox camp, which is influenced by neoclassical economic theory, money is likened to a universal commodity that arose in private markets to improve barter. Exemplifying this tradition, William Stanley Jevons, one of the pioneers of neoclassical theory writing in the 18th century, explained how the acceptance and circulation of a 'chosen commodity' that serves as 'a common denominator or common measure of value' allowed for an easy comparison of the values of all other goods, and thereby overcame the problem of the 'double coincidence' of wants.[94] As a mere medium to facilitate exchange, money in neoclassical conceptions is neutral, hence, as Ingham underlines, quoting Schumpeter, money can be discarded in the analysis of the fundamental features of the economic process, indeed, 'it must be discarded just as a veil must be drawn aside if we are to see the face behind it'.[95] For this reason, neoclassical economists tend to understand the essence of moneyness as being in its exchangeability, and to equate the validity of money with its economic value, which is thought to be determined endogenously and influenced by the operations of the 'real' economy. (Hence Krugman's focus on the 'underlying' economy in his OCA-inspired approach).

The under-theorisation of money in neoclassical economics contrasts with the work of other heterodox economists and sociologists who have devoted considerable energies to trying to relate the tensions between the different functions that money needs to play in capitalism. For example, both Keynes and Weber developed theories based on typologies of different types of money – 'commodity money', 'fiat/limited money' and 'administered/managed money' – that acknowledge the tensions between different monetary functions.[96] The neoclassical conception of money is also

[93] Ibid., 350.

[94] WS Jevons, *Money and the Mechanism of Exchange* (Cosimo Economics Classics 2005 [1898]) 17.

[95] Ingham (n 28) 17 citing Schumpeter (J Schumpeter, *A History of Economic Analysis* (Routledge 1994 [1954]) 277).

[96] JM Keynes, *A Treatise on Money: Volume 1* (Macmillan 1930) 7–9; M Weber, *Economy and Society: An Outline of Interpretive Sociology* (University of California Press 1978) 166–78.

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explicitly challenged by what are variously called the 'claim' or nominalist' theorisations of money, which posits that the nature of money lies not in its role in exchange, but in its capacity to measure abstract value as the 'money of account'.[97] As Otero-Iglesias recounts, for these schools, 'which can be traced back to Plato, Schumpeter, and Keynes, and counts among its adherents most historians, sociologists and anthropologists who have studied money',[98] orthodox economic theory has failed to explain how the unit of account function is generated. Neoclassical perspectives assume that through continuous 'higgling' rational utility-maximising individuals are able to 'transform the myriad bilateral exchange ratios between all the different commodities, based on individual preferences, into a single price for any uniform good'.[99] However, as Ingham underlines, it is difficult to see how a money of account could emerge from myriad bilateral barter exchange ratios based upon subjective preferences, as 'one hundred goods could possibly yield 4,950 exchange rates'.[100] For many heterodox thinkers, 'the very idea of money, which is to say, of abstract accounting for value, is logically anterior and historically prior to market exchange'.[101] Chartalists and theorists who have a 'state' centric theory of money, like Knapp,[102] are persuaded that money is, in terms of its historical evolution and functioning, more accurately understood as a public credit medium that derives its authority from the state. Chartalist scholarship mobilises historical analyses to support this understanding of the nature of money, arguing that monies in different times and places consistently emerge 'a means for accounting for and settling debts, the most important of which are tax debts'.[103] In his recent endorsement of the chartalist approach, Otero-Iglesias argues that the dominant economic focus on neutral money as a symbolic medium of exchange for the market 'diverts attention from the fact that money consists in the social network of credit and debt of the capitalist economy'.[104] He charges Krugman's OCA theory as having limited explanatory capacity 'because it emanates from the commodity-exchange (generally referred to as the 'metallist') theory of money, which overlooks the necessity of a sovereign authority to underpin any given monetary space'.[105] A chartalist approach is a more helpful theoretical device to grasp the fundamental weaknesses of EMU', he contends.

Chartalist and nominalist theories of money stress that what the state accepts as payment in taxes, or what it ordains as legal tender, is decisive in determining what counts as money within a given economy, even if this money is not created in the first instance by the state. On this understanding, the processes by which commercial banks create and distribute credit does not negate the fundamentally public character of money as it is still the sovereign unit of account that is being accepted as payment for discharging debts and in payment for taxes. These approaches also offer a useful means to distinguish between money and near-money equivalents. For example, with regard to the ongoing debate over whether bitcoin is money or not, under a chartalist lens, bitcoin is not money unless bitcoin will be accepted in payment for taxes or else is explicitly designated as legal tender in a particular jurisdiction.[106] Nevertheless, strong Chartalism also encounters challenges in terms of its explanatory power. Chartalism was criticised by Austrian economists Menger[107] and von Mises[108] for failing to settle the question of how money gets an economic value.

[97]Ingham (n 28).
[98]Otero-Iglesias (n 31), 352.
[99]Ingham (n 28), 17.
[100]Ibid.
[101]Ibid., 25 emphasis added.
[102]GF Knapp, *The State Theory of Money* (Agustus M. Kelly 1973 [1924]).
[103]Otero-Iglesias (n 31), 352.
[104]Ibid., 358–9.
[105]Ibid., 350.
[106]See Passinsky for a fascinating discussion of whether bitcoin is money. A Passinsky, 'Should Bitcoin be Classified as Money?' 6 (2020–1) Journal of Social Ontology 281–92.
[107]K Menger, 'On the Origins of Money' 2 (1892) Economic Journal 239–55.
[108]L von Mises, *The Theory of Money and Credit* (tr. H. E. Bateson, Jonathan Cape 1934 [1912]).

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These approaches are only able to establish that money is a valid means of payment, which is not the same as explaining money's purchasing power with respect to a universe of commodities – a characteristic that, for many economists, is a fundamental criterion for moneyness.[109] While heterodox theorists like Otero-Iglesias are persuasive in their arguments that money as an institution is 'logically anterior and historically prior to market exchange' – a position that leads to a focus on money as credit, and a stance also adopted by legal scholars – the starting point of money as an 'abstract' unit of account is problematic. Strong Chartalism cannot explain how money comes to be redeemable for the payment of goods in specific ratios, as it doesn't explain how the unit has a substantive economic value. While a pound in weight and a meter in length can be objectively measured in the material world, a euro as a unit of account only has meaning if it is measured by reference to the social world: what is the meaning of 1 euro in abstract terms? Its economic value is only realised in the context of economic and social relations. Indeed, it is often highlighted that the precursor to the euro was a unit of account, the ECU, but this unit has no significance until it was used to measure the relative value of Member State currencies against one another through the use of a weighted ratio of existing rates of exchange. Credit theorists of money, perhaps most notably Keynes,[110] and neo-chartalist scholars, such as Innes[111] and Wray,[112] share the convictions of chartalists concerning the origins of money as being a unit of account and a public credit medium, but they offer more advanced analyses of the interactions between public credit and production and trade in the political economy. As I discuss below in Section 3 on advancing legal theories of money, in contrast to Monetarist perspectives that regard money as a stock that can be manipulated by the exogenous interventions of central banks, and in a departure from strong Chartalism, which stresses the control of the state over the money supply, many credit theorists and neo-chartalists argue that capitalist-bank credit money is produced through a more complex (and endogenous) process tethered to financing capitalist production. The consequence, as recognised by these scholars, is that central banks and governments cannot determine the value of legal tender in terms of its purchasing power. As I will go on to argue, this suggests that legal theories of money need to be extended to encompass the study of the legal entitlements through which *demand* for capitalist credit money is effectuated.

In order to highlight the critical question of how money comes to have an economic value, it is worth reflecting, albeit briefly, on how other disciplines have approached the nature of money. Philosophers turn to recognitional conceptions to understand money, pursuant to which 'something is money if and only if it is recognized, accepted, or declared to be money (where 'acceptance' refers to a certain mental state as opposed to an act of accepting something as payment)'.[113] This framing accommodates aspects of both orthodox functionalism, where the focus is on what money *does*, and chartalist formalism, where the focus is on what money *is*: 'One view is that you are recognizing that the function of the thing is to be a medium of exchange (whether or not it fulfils this function); another view is that you are recognizing that the holder of the thing has certain rights, for instance, the right to repay public or private debts with it.'[114] However, recognitional approaches stress that neither functionalist approaches or more formalist accounts are adequate on their own in terms of explaining the nature of money in the social world. Passinsky offers an important discussion on this issue, and I now quote from her at length:

[109]As Ingham acknowledges, 'there is no consistent distinctively heterodox answer to how money gets it value'; the question of what money 'is' is clearer: it is a measure of abstract value; consists in claim or credit; backed up by state or authority; not neutral in economic processes'. Ingham (n 28), 56.

[110]Keynes (n 96).

[111]AM Innes, 'What Is Money?' (1913) Banking Law Journal 377–408; AM Innes, 'The Credit Theory of Money' (1914) Banking Law Journal 151–68.

[112]Wray (n 21); see also CLR Wray, *Credit and State Theories of Money: The Contributions of A. Mitchell Innes* (Edward Elgar 2004).

[113]Passinsky (n 106), 286.

[114]Ibid.

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> Neither conception is entirely adequate on its own. Consider banknotes in Germany during the period of hyperinflation following the First World War. These banknotes were eventually so devalued that people used them as wallpaper. At that point, the banknotes no longer fulfilled the characteristic functions of money, but they were still recognised as money by the German government.[12] There is some clear sense in which these banknotes were still money – or so it seems to me. The functionalist conception, though, cannot account for this. Since the devalued banknotes no longer fulfilled the characteristic functions of money, they were no longer money according to this conception. Imagine now a society in which people regularly accept seashells in exchange for other goods. These people use seashells in the way that we use dollar bills. But suppose that unlike us, they do not have a concept of money – so they do not conceive of the seashells as money. Again, it seems to me that there is some clear sense in which these seashells are money in this society.[115]

Passinky's analysis speaks to the two sides of monetary constitutions: the interaction between government actions that bestow recognition on a particular token, and the requirement – also widely acknowledged in sociological writing on money and the role of trust – for users of money to have faith in the value of the unit, and to continue, through their economic interactions, to bestow value into the unit designated as legal tender by the authorities. As I will now demonstrate, Passinky's analysis highlights an important tendency in legal scholarship on money, which focuses predominantly on supply-side questions of how credit is administered when there is another side to the legal constitution of money, which concerns how a broad spectrum of laws that are shaping entitlements in the 'real' economy configure demand for money and condition the endogenous creation of credit in line with patterns of production and exchange, both within and beyond the eurozone. Passinsky's analysis and her discussion of how to answer to the question of how bitcoin and other virtual currencies should be classified for legal and regulatory purposes also opens up a further discussion about the legal nature of money. As opposed to discovering a single constellation of laws that regulate the creditor–debtor relationships and thereby create and 'constitute' sovereign credit money, Passinsky points to a situation in which different forms of money are created and validated through distinct legal regimes in accordance with diverse judgements about the particular values that are promoted by the legal recognition of money. As she writes:

> it may very well turn out that the relevant values are best promoted by classifying bitcoin and other virtual currencies as money or currency in some contexts, but as something other than money or currency in other contexts. For example, it may turn out that these values are best promoted by classifying bitcoin as money in the context of money laundering statutes, but as property in the context of tax regulation.[116]

Her analysis would further imply that perhaps 'moneyness' is never an absolute but only a relative quality, and that different constituencies and individuals experience money differently, depending on how their legal entitlements are configured. So what do other legal scholars have to say about the relationship between money, the state, and the legal order? I now move to examine in more depth recent work that has pioneered a 'constitutional' approach to the study of money.

C. *Legal and constitutional theories of money*

Legal scholars writing about money have sought to answer the question of the legal nature of money in different ways. Some begin by seeking to explain what money 'is' in legal terms by

[115] Ibid., 287.
[116] Ibid., 289.

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studying the impacts of the multiple definitions given to aspects of money under different bodies of law.[117] For the purposes of this article, I am interested in those legal theories – notably the 'constitutional' approaches of Desan and Feichtner, and the work of legal scholars working on finance – that seek to understand the role of the state and law in creating money and making it operational in the political economy.[118] The writings of this group of scholars demonstrates that in spite of the prominent role played by private banks in administering access to credit, when the role of states in licensing private banks and establishing the infrastructure to produce private credit money is appreciated, 'states appear to exercise almost complete control over the legal, fiscal, and even physical machinery necessary to create money and ensure its widespread use amongst its citizenry'.[119] Legal scholarship on money to date has focused significantly on both challenging the accounts of neoclassical perspectives on the relationship between money and value, and on tracing the complex and changing operations of money in different periods of history, in the case of Desan, as well as under different governance frameworks, such as those for the euro,[120] and governance frameworks that shape the operations of global finance.[121]

Desan's constitutional approach is attentive to the intersecting interests of governments and capital, as well as to the mutually reinforcing roles of public and private law in enabling money to circulate, and to enable market exchange and wider processes of valorisation.[122] Legal theories thus break the impasse of strong Chartalism, considerably nuancing accounts of the monolithic 'state' in some state and chartalist writing on money. In one important example, Desan shows how, in the 18th century, the English government determined to share its authority over money creation with commercial banks: 'Erecting an architecture that privileged one bank's notes, it ordained them "money" and compensated the investors who issued them' installing 'a new theory at the heart of the political economy – the theory that individuals pursuing profits produced money.[123] The character of money as credit matters, Desan underlines, because 'credit money enters circulation selectively'; 'it is an advance (a credit) made to some people relative to others. Thus money, inherent to the way it is constructed as credit, comes into use as a resource that some participants acquire first'[124] – 'it is spent or loaned to certain hands.'[125] Against the presentation of economists who would see 'free' markets as democratic, Desan shows that not all citizens are all equal in the price mechanism – some are more favoured than others, and they are favoured by the state. Desan's conception of money is similar to that of the post-Keynesian school of heterodox economic theory, which holds that 'while money is created, in the modern economy, by private banks, its origins lie with the state and sovereign authority. The state is not only the largest borrower, but it also uses legal and coercive powers to establish its currency'.[126]

By revealing the fundamentally public nature of money making, and by underscoring how the capacities of financial institutions in the economy to issue credit and administer money are furnished by the state, legal theorists suggest that governments can choose to manage money

[117]Rahmatian elaborates a theory of money that argues that money is best understood in legal terms as 'dematerialised property'. A Rahmatian, *Credit and Creed: A Critical Legal Theory of Money* (Routledge 2020).

[118]It would be very interesting to offer a comparative analysis of how these different scholars understand money, however, a full investigation into these diverse approaches ationalizing money is beyond the scope of this article.

[119]D Awrey, 'Brother, Can You Spare a Dollar: Designing an Effective Framework for Foreign Currency Liquidity Assistance' 3 (2017) Columbia Business Law Review 934, 939.

[120]Feichtner (n 9).

[121]Hockett and Omarova describe the contemporary financial system as a public-private partnership characterised by the public accommodation and monetisation of private liabilities. Hockett and Omarova (n 17).

[122]I follow Goldoni in his definition of valorisation as 'the organisation of social relations as a way to increase value'. Marco Goldoni, 'The Constitutional Law of Euro Value'. Paper presented at 'Constitutions of Value Conference, Wuezberg, Germany, 2020.

[123]Desan (n 15), 14.

[124]Ibid., 15.

[125]Ibid., 5.

[126]Stockhammer (n 65), 367.

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differently.[127] While not all legal theorists of money necessarily endorse Modern Monetary Theory,[128] some of these arguments dovetail with those of scholars arguing that governments can take control of their fully-fiat currencies and can move away from the restrictive 'ordoliberal iron cage'[129] that is seen to influence current approaches to monetary policy and government spending in the EU (and in other countries around the world). There is a move by this community of scholars to try to 'democratise' money, and to make money a tool to address economic and social inequalities by rethinking and reforming monetary designs at the level of the state, as well as at the EU level. The fact that central banks don't just modulate the money supply but are also *allocating* a public resource, government-backed credit, has been rendered visible in both the global financial crisis and the coronavirus pandemic as governments have engaged in monetary financing to distribute funds to banks and to purchase 'toxic' assets to stabilise the financial system. In the US, proposals have been advanced that ordinary people should also be allowed to open deposit accounts directly at the Fed, and that the Fed should take steps to tackle climate change.[130] As central banks are already engaging in monetary financing and are funneling credit to particular constituencies, it is reasoned, a debate need to be had about which constituencies should benefit from this process, and on what basis. Indeed, as the recent speech of ECB president, Isabel Schnabel would attest, there is some evidence that this is precisely the approach that the ECB has begun to take.[131] While the role of monetary policy in addressing inequality is discussed, the most developed aspect of the ECB's new policy agenda concerns the use of monetary policy to address climate change.[132]

There is a tendency in much legal writing on money to prioritise a focus on creditor–debtor relationships to the neglect of another dimension of the monetary constitution: the role of diverse legal regimes and the state in prescribing for the treatment of money – even fiat money – as a commodity. The writings of Polanyi,[133] Keynes,[134] Marx,[135] and Weber,[136] and, more recently,

[127]Omarova has developed an innovative proposal to overhaul the Fed's entire balance sheet so that it can operate as what she calls the 'People's Ledger': 'the ultimate public platform for both modulating and allocating the flow of sovereign credit and money in the US national economy. S Omarova, 'The People's Ledger: How to Democratize Money and Finance the Economy' (2020) Cornell Legal Studies Research Paper Series No. 20-45.

[128](n 21).

[129]M Ryner, 'Europe's Ordoliberal Iron Cage: Critical Political Economy, the Euro Area Crisis and Its Management' 22 (2015) Journal of European Public Policy 275–94, 278.

[130]B Eichengreen, 'Central Banks Aren't What They Used to be – And the Better for It' (*The Guardian*, 10 February 2021).

[131]Schnabel (n 19).

[132]As the ECB's Strategic Review confirmed in July 2021, the Governing Council of the ECB will take a number of steps to build climate considerations into future monetary policy, including engaging in macroeconomic modelling of the impacts of climate change, enhancing environmental disclosures as a requirement for eligibility for differentiated treatment for collateral and asset purchases, and taking into account climate change risks in its due diligence procedures for corporate sector asset purchases. ECB, 'ECB Presents Action Plan to Include Climate Change Considerations in Its Monetary Policy Strategy' *Press Release*, 8 July 2021 <~https://www.ecb.europa.eu/press/pr/date/2021/html/ecb.pr210708_1~f104919225.en.html> accessed 7 June 2022. Significantly, as Steinbach and other scholars working on the green turn in monetary policy at the ECB underline, there is a shift away from the ECB's former stance on market neutrality, which had meant that the ECB had 'purchased securities in proportion to their market capitalization without accounting for whether an activity occurs in 'green' or 'brown' sectors'. A Steinbach, 'The Greening of the Economic and Monetary Union' 59 (2022) Common Market Law Review 329–62, 332–4. Climate-driven reform involves revising the benchmark allocations for asset purchasing programmes by mandating disclosure of climate-related risks in the assets, which could lead to the exclusion of certain bonds that conflict with EU decarbonisation objectives. Ibid. See also Y Fischer, 'Global Warming: Does the ECB Mandate Legally Authorize a "Green Monetary Policy"?' in B van den Boezem, C Jansen and B Schuijling (eds), *Sustainability and Financial Markets* (Kluwer 2019) 163–98.

[133]K Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (2nd edn., Beacon Press 2001).

[134]Keynes (n 92).

[135]K Marx, *Marx's Grundrisse*, selected and edited by D. McLellan (Macmillan 1980).

[136]Weber (n 92).

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of Beggs,[137] and Lapavitsas[138] offer theories of the nature of money that recognise the complexities of its production and circulation in capitalist political economies. To give one example of these hybrid approaches, as discussed by Frerichs, Polanyi defines 'actual money', in its uncommodified state, as 'a token of purchasing power which … comes into being through the mechanism of banking or state finance', but 'his interest is in how money is "commodified", that is, left to the logic of the market, while the state loses its monetary authority'.[139] Polanyi's analysis of the rise and fall of the market economy in the long 19th century in which '[b]elief in the gold standard was the faith of the age'[140] demonstrates how states 'regulated money by trying to institute a self-regulatory mechanism through gold legislation and strictures on the national central banks diminishing their role in smoothing out monetary imbalances in earlier epochs'.[141] As Desan and others have shown, money is a governance project involving both public and private law, but one of the effects of particular public legal dispensations is that, while it may formally 'be' public credit, money can be treated in law as a commodity and made to perform in accordance with a commodity logic.[142] The Classical Gold Standard is the archetypal example of the attempt to forge a commodity-standard money through international cooperation, domestic legislation, and institutional practice, but Graeber highlights the significance of much earlier developments in the commodification of money. He argues that the beginnings of capitalism were not only fermented by the delegation of power to produce money to private banks, which is central in Desan's account, but also by the legalisation of interest-bearing loans: 'the commodification of money properly understood.'[143] The lift of the ban on usury allowed the 'economy of credit' of the Middle Ages to turn into an 'economy of interest', as we still know it today.[144]

The focus of legal scholars on the public dimensions of money place creditor–debtor relationships in the foreground of the analysis, and results in a focus on the supply side of money. A consequence of this approach is that it leads to the underweighting of the other side of the monetary constitution: how laws and regulations that lead to the treatment of money as a commodity now substantially shape developments in the 'real' economy, which impacts in turn upon how the sovereign regulates access to credit. Although the breakdown of the Bretton Woods system of fixed exchange rates and the move away from a US dollar backed by gold is commonly described as a shift towards a world of 'fully-fiat' currencies, meaning that, at least in theory, governments lost the constraint of having to back reserves with supplies of gold, these developments were catalysed by practices in financial institutions that were implicitly authorised by nation states and that destabilised the post-war settlement by subverting restrictions on capital controls; practices that led to the development of a global forex market in which the fully-fiat currencies of many leading economies are priced and traded for their exchange values, and in which credit money is created and distributed by private banks for a price. As Kreitner underlines, while the formal culture of gold politics and gold legislation was abandoned with the move to fixed-exchange rates under Bretton Woods, since the 1970s, a requirement for participation in a global economy characterised by capital controls has been adherence to a set of internationally-negotiated regulations that effectively re-instate a market-based mechanism for regulation of credit production that treats money not as a fully-fiat medium that can be utilised

[137]Beggs (n 146).

[138]C Lapavitsas and N Aguila, 'Modern Monetary Theory on Money, Sovereignty, and Policy: A Marxist Critique with Reference to the Eurozone and Greece' 46 (2020) The Japanese Political Economy Journal 300–26.

[139]Frerichs (n 66) 7.

[140]Ibid.

[141]Ibid.

[142]I elaborate on this terminology below.

[143]D Graeber, *Debt: The First 5,000 Years* (Melville House 2011) 332.

[144]Graeber, Ibid., cited in Frerichs (n 66) 9.

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by governments at will, but rationalises it as a scarce commodity.[145] Kreitner's analysis supports the position of Beggs, who, in a recent rejection of Chartalism, underlines that while states are clearly involved in the reproduction of money, the sense in which money is a 'creature of the state' is limited.[146] The role of the state in establishing and maintaining the unit of account is 'only a part of the relations through which money is reproduced', he argues.[147] By explicating constraints on states that are endemic within capitalist political economy, Beggs reaches an important conclusion: 'To the extent that authorities are not indifferent to the results of markets' disposal, managing money requires that they orient their rules and actions strategically within that context. In this sense, money makes the state even as the state makes money.'[148] The question that Beggs' analysis leaves unanswered is a question that has preoccupied many generations of legal scholars, which is the extent to which markets, or, put differently, the constraints endemic within capitalist political economy, can meaningfully be understood as being a product of legal relations, or whether legal scholars perhaps over-estimate the productive power of the law in the formation of social relations and institutional dynamics.[149] If markets, or relations of production and exchange, are understood as being constituted by law, then the state is also 'making' the monetary power that then operates to constrain it. Indeed, this is what I will seek to argue.

I will now move on to advance legal thinking on the nature of money by addressing two neglected dimensions of money's operations in the global political economy: first, the question of how money comes to have an economic value and the extent to which the regulation of credit impacts on price formation, and, second, the transnational legal operations of contemporary credit monies and their operations as currency in international exchange and global finance.

3. Advancing legal theories of money: considerations of value and transnational law

There are a number of aspects of the operations of money in contemporary political economies that have been hard to reconcile with an understanding that money is credit that is managed by the state according to a set of political priorities. One important set of issues relate to the fact that money is now being created not only by commercial banks but through money markets. As Gabor and others have stressed, the legal nature of this money is different to that of the money distributed though commercial banks backstopped by central banks: money in these markets is created through the posting of collateral, it is contractual in nature, and sovereign bonds form the basis of the market.[150] A significant body of scholarship on the operations of 'shadow' money has complicated the role played by institutions such as the ECB in this context. I will discuss some of this

[145] As Kreitner argues, 'In sum, the regime of managed flexibility is something of a mirror-image to the gold standard regime of a century ago. The new regime rests on structured cooperation in formal or semiformal international frameworks. Negotiation in these frameworks is ongoing, and often yields norms that are nonbinding in theory, but binding in practice. Lawmaking relies intensively on high-level expertise, and is geared toward having a direct impact on money-creating agents (banks) in the various states toward which it is directed. The regulation is of low visibility but high impact, and is mediated by central bankers more often than politicians. These differences notwithstanding, the resulting norm of capital mobility and the usual reliance on market mechanisms to smooth adjustment processes are similar to the results under the gold standard.' R Kreitner, 'The Jurisprudence of Global Money' 11 (2010) Theoretical Enquiries in Law 117, 202.

[146] M Beggs, 'The State as a Creature of Money' 22 (2017) New Political Economy 5.

[147] Ibid., 464.

[148] Ibid., 470.

[149] K Pistor's 2019 book, *The Code of Capital*, foregrounds the performative power of law in the operations of capitalism. K Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press 2019). Her account has been challenged by scholars who suggest that law is only one social relation among others that it influential in shaping capitalism. See Marco Goldoni in M Goldoni et al (2021) 'Symposium on Katharina Pistor's The Code of Capital: How the Law Creates Wealth and Inequality' 30 (2021) Social & Legal Studies 291–326.

[150] D Gabor, 'The (Impossible) Repo Trinity: The Political Economy of Repo Markets' 23 (2016) Review of International Political Economy 5; P Mehrling, *The New Lombard Street, How the Fed Became the Dealer of Last Resort* (Princeton University Press 2011).

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literature in the following examination of what I term the 'transnational' character of contemporary monetary constitutions. First, however, I return to a longstanding debate among heterodox economists over the question of how money comes to have an economic value, and I argue that consideration of this question builds the case for an expanded focus by legal theorists of money on how a broader set of laws and legal entitlements are necessary to make money functional in a capitalist political economy.

A. Bringing back value: the other side of money's legal constitution

Thus far, legal theorists of money have either adopted an account of the relationship between money and economic value (that is, its purchasing power against a universe of commodities) that comes close to a chartalist position that stresses the role of government in determining the substantive value of money, or they have side-stepped the question of how money comes to have an economic value in a given point in time. Chartalist approaches stress that money is fundamentally a token that is accepted as payment for tax. Indeed, such was the emphasis that some neo-Chartalists like Innes placed on the role of the state in creating and regulating money's value that he argued at the height of the Gold Standard that there was no such thing as a 'metallic' standard of money.[151] In a sense, Innes was right, since there was nothing natural or 'self-regulating' about the gold standard, which emerged out of specific agreements between states and legislative measures to implement the standard domestically – states that were grappling with the controversies and distributional dilemmas of 'gold politics' at home.[152] Nevertheless, as the work of Beggs make clear, chartalist approaches are not able to explain how the production of credit influences processes of price formation and value distributions in the wider economy. 'The mint prints the bills, but not the price lists',[153] Beggs underlines, arguing that the state can insure the formal validity of a type of money through legislation, but 'this formal power implies nothing as to the substantive validity of money; that is, the rate at which it will be accepted in exchange for commodities'.[154] For Beggs, chartalist approaches, and the legal theories that appear to follow them in stressing the role of the state in authorising the assignation of credit money by commercial banks in accordance with a conception of creditworthiness, are confusing the matter of the substantive value of money with its validity. As Ingham – a sociologist and political economist – underlines, money needs an authority to exist, it is an expression of sovereignty, but 'the substantive value of money is another question'.[155]

Legal theorists of money have been primarily concerned to challenge neoclassical perspectives on value, as the work of Desan does to great effect.[156] That being the case, legal theorists have thus far evaded a fraught debate among a wider community of scholars writing about money that specifically considers the relationship between supply-side, or monetarist, theories of money that stress that activist monetary policy should be the preferred mechanism to influence the relationship between the substantive value of money and 'price lists', and the more demand-oriented theories of Keynes and post-Keynesians, who place greater emphasis on the role of governments in using fiscal measures and other legal tools to influence quantities of money in the economy and the value of money relative to price lists. The most persuasive theories of money are those that grapple with the complex and hybrid role of governments in this process, and to be fully convincing legal approaches must also address this dimension of the debate. One important strand of scholarship on the Theory of the Money Circuit argues that the relationship of money to prices and economic growth must be understood in accordance with 'the *actual structure* of relationships

[151]Innes (n 102) cited in Ingham (n 28), 45. AM Innes, 'What Is Money?' (1913) Banking Law Journal 377–408.
[152]Kreitner (n 145).
[153]Beggs (n 146), 470.
[154]Ibid.
[155]Ingham (n 28), 48.
[156]Desan (n 22).

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that constitute the capitalist monetary circuit'.[157] Theorists in this tradition, notably Graziani and Parguex and Seccareccia, argue that attention needs to be paid to how relationships between banks and firms, firms and workers, and banks and banks are configured, and to how these configurations influence the relative purchasing power of money and the volume of money in circulation.[158] Legal scholars have begun to develop accounts of the relationships between these different institutional constellations. However, they have focused predominantly on elaborating the relationship of states to banks, as well as banks to financial markets. Questions of how the configuration of labour plays into these dynamics have not yet featured prominently in work by legal theorists, though some, notably Goldoni, are moving in this direction.[159] As Ingham underlines, the state 'not only establishes the valuableness of money by its declaration or what it will accept in payment of taxation; it also determines its substantive value by influencing what must be done in the economy in order to earn the income to pay the tax'.[160] Desan mobilises the concept of 'credit-worthiness' to develop an account of ways in which the state configures the demand for money and distributes it within a given society. However, the focus is primarily on the role of banks, when a more Keynesian, demand-oriented understanding of how credit is created would posit that a further set of legal questions are relevant, such as which legal regimes enable some actors to generate effective demand for credit and which legal regimes permit particular actors to be regarded as creditworthy by money lenders in the first place. A focus on the *demand* for credit suggests that law enters the picture earlier, and that legal theories of money should also consider questions such as the extent to which property ownership and the legal structures governing collateral are necessary to produce credit; who is able to monetise property in order to receive rents and other income streams, there by eschewing the need to take out interest-bearing loans; and also how wage relations are configured by the state – or by the EU – and its laws.

While Neoclassical accounts of money 'blackbox' the unit of account in models of how the economy works,[161] the debate over the relationship between money, prices, and directions in growth has primarily taken place between different schools of heterodox economists, all of whom argue that money is much more than a 'neutral veil' over economic relations, and all of whom also *agree* that the origins of money lie with the states and how it configures banking, but many of whom *disagree* on the impact that volumes of state money have on the price level over the long term. In short, while monetarists subscribe to a quantity theory of money that stresses that the volume of money circulating has a significant impact on the price level, meaning that too much money causes inflation and diminishes the purchasing power of money, Keynesians, and, more recently, post-Keynesians, argue that bank notes are issued in response to demand for the facilitation of production and trade, which means that there can never be excessive credit as long as demand reflects a need for money to finance capitalist production.[162] These post-Keynesian arguments have led to a substantial body of work, MMT, that revises what are contended to be the outdated monetarist foundations of monetary policy. Monetarism is recast as a political agenda masquerading as a technical science of money that seeks to further neoliberal values of a strong-but-small state; as a political programme that has the effect of substantial strengthening the position of private actors and financial institutions relative to other constituencies. As discussed earlier, until recently, the monetary constitution of the EU strictly prohibited monetary financing

[157] Ingham (n 28), 54.

[158] A Graziani, *The Monetary Theory Production* (Cambridge University Press 1990); A Parguez and M Seccareccia, *The Credit Theory of Money: The Monetary Circuit Approach* (Routledge 2002).

[159] Goldoni (n 122).

[160] Ingham (n 28), 84.

[161] In order to remain true to its animating theory of where value originates, Desan suggests, neoclassical economics cannot look too closely into the origins and operations of the money that it assumes will oil the wheels of exchange: 'Preserving the integrity of the comparative exercise and all that it promises invites, or perhaps requires, abstracting the definition of money, that is, blackboxing the unit of account'. Desan (n 22), 8.

[162] Ingham (n 28), 42.

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by the ECB for states while effectively authorising what can be regarded as a form of monetary financing for private finance by virtue of the ECB's role as the LOLR and 'market maker of last resort' (MMLR).[163] The EU's monetary constitution largely reflects a monetarist, supply-side conception of money that posits that it should be actors in the private economy supported by private banks, in the first instance, who grow the economy, subject to assistance in the form of 'technical' monetary policy implemented by independent central banks administering interest rates to manage price stability. This vision is the opposite of a more Keynesian approach that would posit that interventions into the regulation and management of labour markets or tax policies are more effective mechanisms to keep flows of money in line with the needs of capitalist monetary circuits.

Ingham argues that a monetarist focus on the money supply is misleading. He finds that money's value, its purchasing power, is 'also determined by long-run equilibrium between quantities of money and goods',[164] which, if cast in legal terms, suggests the need for a much broader conception of the laws that configure money in a capitalist economy: one that considers how laws and legal relations condition the 'capitalist money circuit'. Ingham acknowledges that changes 'in the balance of power between capital and labour, and between producers and consumers, affects the purchasing power of money', but he also states that 'arguably the pivotal struggle is between creditors and debtors'.[165] For Ingham and others, the fetish of independent central banking and the structures of the EU's monetary constitution clearly prioritise the interests of creditors over debtors as 'in the era of pure credit-money, the credibility resides in governments' and central banks' transparent maintenance of sound money practice', which is understood as requiring the positions of creditors are safeguarded by the minimisation of risk through default or the erosion of the value of the debt through inflation'.[166] His account demonstrates that the monetarist position that holds that fiscal measures by the public sector are 'politically or socially motivated and that they can increase national debt, fan inflationary tendencies and lead to a successive crowding-out of the private sector through public sector entities',[167] hides how its own account is political, and how it leads to the funnelling of credit to private actors, which also has a damaging array of macro-economic impacts; notably leading to an influx of irresponsible lending into private housing markets in advance of the global financial crisis, as well as into Southern economies in the lead up to the sovereign debt crisis. Nevertheless, while noting that the struggle between creditors and debtors is arguably more significant that the balance of power between capital and labour in determining the substantive value of money, in a substantial qualification to this position, Ingham recognises that money is not 'pure credit money' in the contemporary political economy; it has a commodity element. As he writes, 'in open capitalist economies under a floating exchange rate regime, the attempt to manipulate a currency's external exchange rate is a more prevalent means of altering the domestic purchasing power of money'.[168]

Ingham's innovation is to unite the 'real'-economy orientation of neoclassicals and Marxists with heterodox and sociological perspectives by arguing that 'the process of the production of money' through credit 'has an impact on estimations of its future value' in the real economy.[169] Although Ingham follows heterodox economists who stress the nature of money as credit and see money as a 'non-neutral 'force of production',[170] he is sympathetic to the argument that processes of credit creation are only 'relatively' independent of underlying dynamics of production and

[163]Mehrling (n 150).
[164]Ibid., 82.
[165]Ibid.
[166]Ibid., 82–4.
[167]EU Parliament Briefing Note (n 42), 3.
[168]Ingham (n 28), 83.
[169]Ibid.
[170]Ibid., 58 citing Minksy (H Minsky 'Money and Crisis in Schumpeter and Keynes' in H-J Wagener and J Drukker (eds), *The Economic Laws of Motion of Modern Society* (Cambridge University Press 1986), 112–22.

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trade, which means that 'the value of money is affected by its status as a commodity, and, consequently, it can largely be explained in terms of supply and demand'.[171] Like Polanyi, he is interested in how public credit is 'commodified' and 'left to the logic of the market, while the state loses its monetary authority'.[172] On Ingham's reading, the way in which credit is organised and distributed by banks backed by the state *significantly conditions the investment decisions and actions of actors in the 'real' economy* – an argument that is similar to the approach taken by Desan. Ingham follows the heterodox perspective that sees 'Prices, rates of interest and so on' as independent forces in the economy, and not merely as symbols of the actual substructure of the 'real' economy'.[173] Legal scholars have also argued that the way that governments and central banks configure such socially-constructed 'systemically significant prices',[174] and the way that those price signals are interpreted by actors that are 'cognitively embedded' in particular ways of thinking about their significance,[175] leads market actors as social agents to impact on the circuits of value production and to influence the 'real' economy. Hence the production of credit and monetary policy are 'forces' of production that are not separate from the 'real' economy. As I will go on to discuss, however, the heterodox perspective tends to cast these tools as tools of the State, when an analysis of development in contemporary finance would recognise that interest rates, exchanges rates, commodity prices, and debt valuations are to a significant extent shaped by the practices of financial institutions developing private contracts that challenge forms of monetary regulation by governments and central banks.

The implications of Ingham's analysis on the hybrid nature of what I will denote 'commodity-fiat money' are manifold.[176] First, his arguments significantly disrupt the monetarist fixation on the importance of the supply of money that has substantially shaped the EU's monetary constitution. Monetarists understand money as a stock; as a supply that state and monetary authorities can regulate with to particular ends and effects, manipulating the supply of credit through interest rates that shape how private banks loan money, which ultimately impacts on the price level. For Ingham and others, money is also produced through a demand-side configuration and is loaned by banks 'in the *normal* course of financing capitalist production'.[177] This means that the total stock of money is also a result of demands that are legally constructed and vindicated as credit-worthy, and that thereby pull capitalist credit money into existence. A more hybrid approach suggests that money is much more than a creature of the state; it is a creature made through a confluence of different legal regimes, public and private, that displays a commodity logic and is responsive to patterns of production and exchange. In legal terms, a more expansive approach to the nature of the 'monetary constitution' would recognise that money is not just produced and distributed through those state-backed legal structures regulating banks and the banking system, but also through legal structures that constitute demand for money in the economy. Analysis of monetary constitutions should extend to how tax liabilities are structured, how wages are configured through minimum wages and employment laws, how labour mobility and supply-chain factors shape production and exchange, and, going back to the root, as it were, how property rights are interpreted and enforced.[178] On a strong reading of this account,

[171] Ibid., 83.

[172] Frerichs (n 66), 7.

[173] Ibid., 57.

[174] R Hockett and S Omarova, 'Systemically Significant Prices' 2 (2016) Journal of Financial Regulation 1–20.

[175] E Chiapello, 'Accounting at the Heart of the Performativity of Economics' 10 (2008) Economic Sociology: The European Electronic Newsletter 12–5; D MacKenzie, 'An Engine, Not a Camera: How Financial Models Markets (MIT Press 2008); M Callon, 'Elaborating the Notion of Performativity' 5 (2009) Le libellio d'AEGIS 18–29; F Muniesa, *The Provoked Economy: Economic Reality and the Performative Turn* (Routledge 2014).

[176] See n 181 below for a discussion of this terminology.

[177] Ingham (n 28), 53.

[178] As Legal Realists Hale and Cohen demonstrated, wage and employment relations are an outcome of bargaining powers distributed between different social classes in which control over land and resources plays a substantial part. RL Hale,

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governments and central banks have 'little or no choice' to provide the reserves of state money needed to accommodate any level of endogenous demand for money'.[179] Money should be understood to be created not only at the behest of the state through the creation of credit, but as a response to a demand by actors who are legally able to command state money in return for the provision of services (wages) or trade in goods and services, or from other ways of generating income, including rents and investments.[180] Significantly, as I will now go on to discuss, money is also flowing in and out of the economy based on its balance of payments in trade and investment from the international political economy, and it is impacted by the generation of forms of collateral-based credit outside of any single state's 'monetary jurisdiction'.

B. Remaking the state? The transnational dimension of monetary constitutions

I have just argued that in addition to a focus on how credit creation is legally configured, consideration of monetary constitutions must extend to the laws and legal structures that impact on the endogenous demand for money in capitalist circuits of production and exchange. Viewed through an expanded legal theory of money that would place greater emphasis on how the relative capacities of different market actors to command credit money in the political economy are shaped by law, current debates in the eurozone about the relationship between monetary policy and price stability, and about the potential role of the ECB in addressing design flaws that prejudice the interests of 'peripheral' countries have a further dimension. The capabilities of monetary authorities to alter the design of money are significantly shaped by the functions that money is required to play within capitalism, and, significantly, within financialised capitalism. I have also suggested that while money is widely understood as credit-fiat money in much recent scholarship, closer scrutiny of the legal frameworks and governance paradigms through which money operates reveals that credit-fiat monies can be commodified and made to function in accordance with a 'commodity logic'.[181]

I will now build on this analysis to address what I argue is another limitation of current legal scholarship on money, which is its tendency to underweight the international operations of money as currency, and to overlook the fact that many of the legal regimes that operationalise money in the global political economy are 'transnational' in character. By offering a (necessarily) selective analysis of some of the transnational dimensions of contemporary monetary constitutions, including the significance of exchange rate regimes, shadow banking, and derivatives markets, I will develop my argument that in order to address design faults in the eurozone, greater attention must be paid not only to the public dimensions of ostensibly private money-creation, but to the legal capacities that *the collective of political authorities* in the global political economy is conferring on financial actors with regard to insulating their wealth from redistributive policies.

'Coercion and Distribution in a Supposedly Non-Coercive State' 38 (1923) Political Science Quarterly 470–94; MR Cohen, 'Property and Sovereignty' 13 (1927) Cornell Law Quarterly 13.

[179]Ingham (n 28), 53.

[180]My analysis here will correctly lead to the complaint that I am arguing that legal theories of money must accommodate the legal structure of the whole economy, but, after all, the most sophisticated accounts of the nature of money, such as those of Keynes or Minsky, did consider money as a creature of a much more complex capitalist political economy.

[181]I employ the term 'commodified' money to describe the processes by which money comes to become a value-producing asset, through the creation of interest, and also how it can be traded based on its value in market exchange. When I say that money can be subject to laws and institutional norms that mean that it behaves in accordance with a 'commodity logic', I refer to the fact that the production and circulation of credit money is intimately related to the production and trade of commodities in exchange, which highlights the endogenous creation of credit money in service of these processes within capitalism. Thus the current international monetary system is not fully fiat; rather it is hybrid: central banks are engaged in the production of commodity-fiat money.

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Exchange rate regimes

Analysis of the domestic and regional operations of different monies in contemporary economies has to be understood against the broader background of the international monetary system. The interrelationships between different monetary orders have been mediated through a changing configuration of international agreements, domestic laws, and institutional frameworks. It is common to diagnose three key shifts: from the 'metallist' era of the classical gold standard, through to the first system of negotiated 'pegged' exchange rates and hybrid fiat monies (backed by the US dollar and underpinned by gold) and supranational monetary governance under Bretton Woods, on to the current system of capital market liberalisation, 'managed floating', and the removal of a commodity anchor. Eichengreen and Sussman argue that the new system involved the transition to a fully-fiat monetary system, noting that 'The collapse of Bretton Woods loosened the exchange rate constraint and cut the last remaining link to commodity money. It removed the traditional anchor for monetary and fiscal policies'.[182] Nevertheless, formal removal of a gold standard was replaced by a more nebulous governance structure that is also highly restrictive in terms of its effects.[183] Money is still rationalised as a scare resource, and governments are still ensconced within a monetary culture that takes its influence from monetarist monetary theories that prohibit states from actively steering their economies through robust fiscal policies.

All sovereign credit monies display a commodity logic in the international economy however, the nature of their commodification is variegated. The currencies of many high-income countries are now priced and traded as commodities by financial institutions in the enormous global forex market. These are the countries that have sufficient 'financial depth' to manage the exchange rate instability that is now 'an accepted part of global finance'.[184] Other low-income countries with 'weak' currencies, and particularly those highly dependent on commodity exports for revenue, are not able to afford to 'float' their currencies. Whereas advanced economies are able to borrow from international capital markets in their own currencies, emerging economies with weaker and more volatile currencies are unable to do, meaning that their debts are denominated in advanced country currencies.[185] For a country in this position, allowing its currency to float leaves it vulnerable to financial crises and debt default; thus, in order to maintain access to foreign capital, most emerging economies sacrifice monetary policy independence in favour of a 'hard peg' to one of the core-country currencies, or the use of a currency board. Relatedly, many countries cannot pursue domestic policy objectives through monetary policy as maintaining their exchange rates, purchasing imports, and servicing debt requires them to accumulate large reserves of foreign currencies, which is very expensive.[186] Critical development economists stress that the capacity of states to govern money depends on broader structural constraints inhering in the historically conditioned relations of production and exchange in the global economy.[187]

Even for countries whose currencies 'float' and whose central banks borrow in their own currency a situation that means that they can better manage their exchange rates through purchasing and selling their currencies and those of other countries -are subject to practices of currency pricing that treat their sovereign units as commodities. Economists who supported the transition to floating exchange rates argued that the values of national currencies would be determined 'in the same way as any financial asset prices', through the informational efficiency

[182]B Eichengreen and N Sussman, 'The International Monetary System in the (Very) Long Run' IMF Working Paper (2000) <https://www.imf.org/en/Publications/WP/Issues/2016/12/30/The-International-Monetary-System-in-the-Very-Long-Run-3466> accessed 15 February 2022, 36.

[183]Kreitner (n 141).

[184]D Bryan and M Rafferty, 'Financial Derivatives: The New Gold?' 10 (2006) Competition & Change 267.

[185]M Bordo and M Flandreau, 'Core, Periphery, Exchange Rate Regimes, and Globalization' in M Bordo et al (eds) *Globalization in Historical Perspective* (2003) 462.

[186]D Rodrik, 'The Social Cost of Foreign Exchange Reserves' NBER Paper (2006). <http://www.nber.org/papers/w11952> 9.

[187]B Bonizzi et al, 'Monetary Sovereignty is a Spectrum: MMT and Developing Countries' 89 (2019) Real-World Economics Review 46.

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of financial markets, that will ensure that currency prices, over the long run, reflect 'fundamental values'.[188] There are different theories concerning the nature of the 'fundamental value' that currency prices are supposed to reflect. In the particular arena of foreign exchange, the debate centres around 'purchasing power parity', a theory that holds that the monetary value of a good in one country when converted into the currency of another should be equal, meaning that persisting differences in nominal exchange rates reflect relative national costs of production.[189] Theories of fundamental value in financial markets are an extension of neoclassical value theory, which posits that financial assets will be valued according to inter-subjective valuations of their 'utility', which, considering the function or usefulness of a financial asset, translates to its 'income-generating capacity'.[190] Asset prices and exchange rates do not, in fact, behave as these theories suggest they should: movements in financial markets diverge considerably from projections of what the 'correct' values of assets should be.[191] However, arguments that financial markets can correctly price assets, including currencies, have underpinned the development of financial instruments that enable geographically dispersed but legally and electronically networked communities of investors to rank the performance of different economies, and to divert flows of capital in response to relevant 'information', such as forecasts of economic performance and changing interest rates. While there is no external commodity anchor to fix the value of money in the post-BW system, national currencies are supposed to be priced in conformity with the nation's success in commodity production and trade, or in line with the capacity of its financial environment to deliver yield to investors. In the current system in which the values of many currencies are significantly shaped by market forces ('managed' floating), capital account liberalisation is regarded as 'signaling a country's commitment to good economic policies' as, in a country with an open capital account, 'a perceived deterioration in its policy environment could be punished by domestic and foreign investors, who could suddenly take capital out of the country'.[192] Thus, in significant respects, money continues to follow a commodity logic in the current global political economy, even without a formal metal anchor in gold.

In contrast to both neoclassical accounts that stress money's neutrality in 'real' economic processes, and some heterodox (including chartalist and legal) approaches that emphasise the hierarchical position of sovereign money in a credit-money system, consideration of the role of money international exchange highlights the importance of the commodification of sovereign credit-monies. The price that is put on a sovereign's money relative to another (its rate of exchange) has substantial impacts on the country's economic performance, as well as on economic inequality. The exchange rate has been described as the most important price in the economy due to its knock-on impacts on production, trade, debt financing, and capital portfolio compositions.[193]As analysts at UNCTAD underline, 'the effects of misaligned currency on prices are similar to those of an export subsidy and import tax. The literature on the topic provides a great amount of evidence on how responsive trade flows are to changes in relative prices consequent to movements in exchange rates'.[194] In an important qualification to the credit-centric perspectives of both many heterodox and legal theorists of money, flipping the focus to look at money in its roles as international currency demonstrates that money enters the domestic

[188]Bryan and Rafferty (n 184), 267.

[189]Ibid., 270.

[190]Ibid.

[191]S Claessens and MA Kose, 'Asset Prices and Macroeconomic Outcomes' (2017) *World Bank Policy Research Working Paper* 8259, 12–4.

[192]MA Kose and E Prasad, *'Capital Accounts: Liberalize or Not?'* IMF Finance and Development (24 February 2020) <https://www.imf.org/external/pubs/ft/fandd/basics/capital.htm> accessed 18 February 2022.

[193]'Factors Influencing Exchange Rates' (Investopedia) <https://www.investopedia.com/trading/factors-influence-exchange-rates/> accessed 16 February 2022.

[194]A Nicita, 'Exchange Rates, International Trade and Trade Policies' Policy Issues in International Trade and Commodities Study Series No. 56 (Geneva: UNCTAD, 2013), 2.

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economy not only through domestic credit-creation, but also flows through the economy in response to patterns of international trade and investment, which are registered as international credits and debts in the 'balance of payments'. The effects of exchange rate movements 'impact directly on the monetary base'.[195] Significantly, the exchange values that are assigned to diverse currencies, and not only the willingness of a sovereign to take a unit back as tax, also impact on the volumes of money in circulation and its purchasing power (key components of price 'stability').

Current representations of the impact of monetary policy present central banks as playing a steering role in terms of regulating the money supply through the setting of interests rates for its 'base' unit. However, the image of governments on top of a hierarchy managing the sovereign's units in accordance with a political agenda contrasts with the descriptions of the practices of central banks, which cast them as furiously 'transacting' with the rest of the world in the attempt to stabilise imbalances and manage market perceptions of exchange rates, interest rates, and the value of sovereign debt.[196] In their 'attempts to organize alignment of monetary policy with the changing structures of finance', central banks have been drawn 'into a kind of 'ontological complicity' (Bourdieu, 1981) with the dynamics of financialised capitalism',[197] and increasingly act as 'monetary technocrats', trying to inject 'public-interest monetary contents into contracts' compete with private actors who react to that information and leverage high-frequency trading technologies and speculative trading strategies to offer their competing valuations and interpretations of policy signals.[198] This situation has been significantly exacerbated by the creation of private monies, which, as I will now illustrate, demonstrates that vast quantities of national and regional credit monies are being created outside of the jurisdiction of their monetary sovereigns, or, in the case of the euro, the domain of the ECB.

'Private' money: repos, sovereign debt, and money markets

Since the 1980s, the growth of market-based lending has displaced bank lending leading to a profound transformation in the world's financial systems into a set of 'interconnected, hierarchical balance sheets, increasingly subject to time-critical liquidity'.[199] Gabor, Tooze, and Mehrling are three prominent scholars who all underline that credit creation in market-based finance is structurally different to credit creation in bank-based finance.[200] It is also legally different. Bank-based finance centres around the creation of deposit liabilities to finance traditional loan assets, and these deposits acquire moneyness – understood here as being ready convertibility into cash at par – through a social contract with the state.[201] In collateral-based finance, together with their lawyers, 'shadow bankers' have developed legal structures that monetise credit and escape the constraints of state-backed money through the posting of collateral and the widespread use of 'repurchase agreements', or 'repo' contracts.[202] The basis for money creation in the money

[195] P Savona, A Maccario and C Oldani, 'On Monetary Analysis of Derivatives' 11 (2000) Open Economies Review S1 149–74, 159.

[196] U Bindseil, *Monetary Policy Implementation–Theory, Past and Present* (Oxford University Press 2004).

[197] T Walter and L Wansleben, 'How Central Bankers Learned to Love Financialization: The Fed, the Bank, and the Enlisting of Unfettered Markets in the Conduct of Monetary Policy' 18 (2020) Socio-Economic Review 625–53, 629 citing Bourdieu: P Bourdieu, 'Men and Machines' in KK Cetina and AV Cicourel, (eds) *Advances in Social Theory and Methodology: Toward an Integration of Micro- and Macro-Sociologies* (Routledge & Kegan Paul 1981) Chapter 11.

[198] M Faro de Castro, 'Monetary Impacts and Currency Wars: A Blind Spot in the Discourse about Transnational Legal Orders' 60 (2017) Revista Brasileira de Política Internacional 13.

[199] D Gabor, 'Critical Macro-Finance: A Theoretical Lens' 6 (2020) Finance and Society 45–55, 45.

[200] Mehrling (n 150); D Gabor and J Vestergaard, 'Towards a Theory of Shadow Money' INET Working Paper (2016) <https://www.ineteconomics.org/uploads/papers/Towards_Theory_Shadow_Money_GV_INET.pdf> accessed 20 February 2022; A Tooze, *Crashed: How a Decade of Financial Crises Changed the World* (Allen Lane 2018).

[201] Gabor (n 199); Gabor and Vestergaard, Ibid.

[202] In repo contracts, short-term loans are created through agreements to sell collateral assets (shares or bonds and to repurchase them at a later date for a specific price (which is effectively the interest on the loan). The value of the outstanding debt

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markets is through contractual transactions for the sale and purchase of securities (typically government bonds, but also company shares). As Gabor underlines, 'what renders repo liabilities 'money' is not their ability to settle debts (you cannot – yet – buy a burger with repos) but their ability to store value at par, that is, to credibly promise par convertibility between repo deposits and state-backed money through collateral valuation'.[203] Thus, these monetary relationships are not constructed in the first instance on the backing of a central bank and through the regulated banking sector, but on 'liquid securities collateral' that is valued by the market.[204]

Whereas formerly, and in accordance with chartalist perspectives, it was credible to argue that it was the state's power to make and enforce tax laws that renders its money the most acceptable form of debt within the 'hierarchy' of monies,[205] now, at least in the short term, it is the ability of the state to convince market actors that it will not default on the debts that function as collateral for the creation of credit in private markets that underpins the creation of money. Shadow-banking remains subject to backing by the sovereign, but, as Mehling and Gabor counter, 'The credibility of public debt depends, in many cases, on the assessment of private financial institutions'.[206] While the ECB is prohibited from engaging directly in monetary financing, other central banks can print money in the event of a liquidity crisis. However, their actions are evaluated by a network of financial institutions that have the power to influence the value of their debt, and, hence, their future ability of the government to borrow from private banks. Instead of sitting atop a hierarchy of claims regulating access to its base unit, in order to maintain the stability of a system that constantly demands more and more liquidity, central banks, including the ECB, have been forced to backstop the system. 'By promising to safeguard the market liquidity of securities and putting a floor on their price, MMLR derisks collateral into safe assets, preserving the monetary power that collateral confers on repos'. Credit creation through these 'private' shadow banks, which encompasses 'credit creation through securities markets, collateral-based money, and derivative markets',[207] does not immediately or directly lead to the creation of more state-money (base money), but flows of financial investment into a diverse range of assets nonetheless have an impact on prices in the 'real' economy, impacting on capitalist monetary circuits, and undermining the monetarist position that it is interest rates that control the supply of base money. These forms of private credit creation enable financial investors to invest in a wide range of assets: company shares; more sovereign debt; currencies; commodities; property etc, with corresponding impacts for the further demand of sovereign credit money (created through commercial banks) in response to a changing financial climate. Moreover, if the value of the underlying collateral assets falls, a liquidity crisis can set in due to fire sales in collateral in response to falling prices,[208] which impacts supply and demand for state money, potentially leading to a contraction in the money supply as banks call back their loans and take money out of circulation.

Stockhammer notes that 'In the case of Spain and Italy, debt levels were clearly sustainable at the interest levels prior to the crisis. After the financial crisis, interest spreads on southern

between the parties depends on the market valuation of the collateral, and if the collateral valuation falls, this can create liquidity events as large numbers of parties begin to sell collateral assets at the same time, leading to a further collapse of the price and triggering more liquidity events. Whereas in bank-based finance, banks can smooth over this liquidity crisis, as Sissoko explains, the same does not apply with repo-based market finance: 'The modern markets system is, however, characterized by repo-based leverage that generates an environment where liquidity events are accompanied by forced selling, the expectation of forced selling, and repo borrowers who realize losses. In short, as many have observed, repo contracts are inherently procyclical and can easily play a key role in transforming a simple price decline into a liquidity event, losses, and bankruptcies.' C Sissoko, 'Repurchase Agreements and the (de) Construction of Financial Markets' 48 (2019) Economy and Society 315–41, 16.

[203]Gabor (n 199), 51.

[204]Ibid.

[205]S Bell, 'The Role of the State and the Hierarchy of Money' 25 (2001) Cambridge Journal of Economics 149–63.

[206]Stockhammer (n 65), 373.

[207]Gabor (n 199), 46.

[208]See Sissoko (n 202) for a full discussion.

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European countries increased sharply; essentially the banks started speculating against the governments that had rescued them'.[209] In other words, while private credit creation within shadow banking system depends intimately on the safe asset class of sovereign bonds, it also creates opportunities for financial market actors to determine the creditworthiness of sovereigns through rankings and interest rate spreads on their debt. Sovereign bonds become a safe asset class because central banks commit to do 'whatever it takes'[210] to support the private-credit system, committing themselves to backstopping it in order to avoid a downgrade of their sovereign debt and financial collapse. States are no longer controlling the money supply through interest rates, as monetarists would expect; rather, to stave off crisis, they are having to deliver volumes of state money on demand in response to the rhythms set by the financial sector. As Leaman underlines, where banks and other financial institutions indulge in the creation of hyper-leveraged finance backed by securities, the central bank is no longer able to control directly the volume of base money as it cannot refuse to back these loans, if requested.[211]

To rehearse the argument of Ingham, money creation by the state is only relatively autonomous from the need to respond to the dominant mode of production capitalist political economy. As many scholars have underlined, the current mode of production is 'financialised', reflecting a 'proliferation of regulations, governance frameworks and formal rules that have reconfigured capitalist modes of ownership and exchange, as well as structures of information and liquidity within markets',[212] leading to new pathways whereby central banks are required to supply liquidity and create money in response to the demands of finance. The role of the state has become increasingly reactive, as opposed to authoritative, in terms of controlling the supply of money within its territory. Another significant development that challenges to the presentation of money as a creature of state made law is that the forms of credit-money generated by markets are generated outside of the sovereign's jurisdiction in what Murau et al term the 'off-shore US dollar system'.[213] The 'Eurodollar market', as Awrey underlines, is an 'incredibly important yet relatively obscure corner of the financial system' in which bank deposits and a broader range of financial instruments are issued by banks domiciled in one jurisdiction in a range of different national currencies.[214] In these markets, 'not only is the vast majority of credit money created by private institutions, but the core of the system is formed of credit money created *outside of any single state's 'monetary jurisdiction'*.[215] In contrast to the considerable emphasis that many legal scholars place on the role of the state in the operations of money, Awrey posits that 'The unfettered ability of financial institutions to create these short-term foreign currency liabilities with little more than the stroke of a bookkeeper's pen-or a few keys-effectively severs the cord between states and money creation'.[216]

Due to the fact that financial institutions issuing these forms of credit are not backstopped by the emergency lending assistance facilities of central banks, the parties to the transactions and loans rely, in the first instance, on an array of 'contractual mechanisms such as variation margin, closeout netting, and novation requirements designed to protect the contracting parties against changes in counterparty credit and market risks'.[217] Again, it is this market valuation of collateral,

[209] Ibid.

[210] Awrey (n 119), 937.

[211] J Leaman, 'The Size that Fits No-One. European Monetarism Reconsidered' (2012), 241 in E Chiti, AJ Menéndez and PG Teixeira (eds), The European Rescue of the European Union, in The European Rescue of the European Union?: The Existential Crisis of the European Political Project 395. Reconstituting Democracy in Europe Report No. 19, ARENA Report No. 3/12.

[212] Walter and Wansleben, (n 190), 626.

[213] S Murau et al, 'The Evolution of the Offshore US-Dollar System: Past, Present and Four Possible Futures' 16 (2020) Journal of Institutional Economics 1–17, 32.

[214] Ibid.

[215] Monetary jurisdiction, Murau underlines, is a 'legal, not a geographical, category. It refers to the legal space in which a state's banking regulation applies and where, in turn, liquidity and solvency backstops are in place for banks. Ibid., 3.

[216] Awrey (n 119), 943.

[217] Ibid.

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which is an evaluation of the performance of an economy through its sovereign bonds, that creates this form of credit. In the case of Eurodollar instruments, which can be liabilities created in other currencies by domestic banks, or which can take the form of other financial instruments,[218] when the credit risks of the parties to these loans and transactions change owing to market movements for underlying collateral, parties are required by these contractual clauses to deliver at short notice *foreign* currencies, with corresponding impacts on the money supply of other states through both the quantity of foreign reserves available in the system and the impacts on the valuation of the currency created by fire-sales in assets.[219] As Murau et al underline, the more commodity and financial markets make use of a particular unit of account for the purposes of trade and investment, the more credit money denominated in that unit of account will be created offshore.[220]

As the global financial crisis illustrated, as a result of the network of liabilities in the Eurodollar markets it is the central banks of other countries that have to step in to backstop an insolvent institution in this market, as was demonstrated by the actions of the US Federal Reserve (Fed) during the financial crisis in which it extended over 500 billion US dollars to foreign banks under the auspices of temporary swap lines.[221] These swap lines were subsequently made permanent for a group of 14 countries, including the ECB, which was one of the two largest recipients of emergency USD liquidity during the financial crisis along with the Bank of Japan.[222] Non-euro area countries within the EU (Denmark, Bulgaria, Croatia, and, since April 2022, Poland) are dependent in turn upon swap lines granted by the ECB. Owing to the dominant role of the US dollar in Eurodollar transactions and international trade, the US Federal Reserve had to offer unlimited access to its public resource through a process of credit issuance by institutions located in other countries that it does not control or directly regulate (international bodies take on some of this functionality). Likewise, because over half of cross-border loans and international debt securities are denominated in US dollars, and 85 percent of all transactions in the forex market are denominated against the US dollar,[223] other monetary jurisdictions such as the ECB are highly vulnerable to changes in the value of the US dollar, and to exchange rate fluctuations, and their financial stability depends on the mechanisms of access to a currency (a sovereign credit money) that they do not produce or directly regulate. Hence, financial stability and the health of the monetary system in the EU depends not only on the ECB's power to create or regulate its own currency, the euro, but on central bank swap line contracts created between the ECB and the Fed that backstop the EU's monetary order.[224]

On one level, the development of swap lines does suggest a move away from an era in which money is governed as a 'scare' commodity, at least for some states, as the central banks swap lines have created a 'mechanism for elastic expansion and contraction of the global supply of world reserve currencies as needed'.[225] Yet the system of swap lines reinforces the inequalities faced by low-income and commodity dependent countries under the current international monetary system. Some states benefit from backstop with respect to their financial systems and others do not, and states who desperately need access to foreign currencies for other essential purposes,

[218]'The best-known Eurodollar market is the market for U.S. dollar denominated deposits held with foreign banks in countries like the United Kingdom. However, there are also significant Eurodollar markets for commercial paper, repo agreements, derivatives, and trade financing across a range of different countries and currencies' Ibid.

[219]As Awrey writes, 'Where financial institutions that rely heavily on the Eurodollar market as a source of financing also perform significant levels of credit, liquidity, and maturity transformation, these institutions will be susceptible to destabilizing runs by depositors and other short-term creditors. As we have seen, these runs can escalate into broader contractions in the money supply within the domestic financial system'. Ibid., 968.

[220]Murau et al (n 213).

[221]Awrey (n 119), 938.

[222]S Murau, F Pape and T Pforr, 'On Swap Lines, the FIMA Repo Facility and Special Drawing Rights' *Global Economic Governance Initiative*, GEGI Study, (2021) 7.

[223]Ibid.

[224]Ibid., 2.

[225]P Mehrling, 'Beyond Bancor', *Barnard College and INET* (2015) 1.

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such as to service debt and pay for exports, must pay high premiums for the privilege that has been granted to the central banks of other countries for free (for the goal of ensuring financial stability). When foreign banks in countries with weak currencies are scrambling to access liquidity to balance their reserves, they have to purchase foreign reserves of expensive currencies, such as the US dollar and the euro. Likewise, there are profound inequalities not only between countries, but between different social constituencies in accessing the Eurodollar markets. Whereas ordinarily people and smaller business are impacted by the fluctuation of exchange rates on their purchases, investments, and trading activities, large financial institutions and the creative forms of accounting that they introduce enable them to sidestep these fluctuations. This is because Eurodollar deposits and instruments that are created by central, commercial and shadow banks ' typically trade with each other at par, at a one-to-one rate', which 'conceals inherent differences between the different money forms, especially when we speak in the everyday language of 'the Dollar', 'the Euro', etc'.[226] In other words, this is an international monetary system in which different actors pay a different price for access to credit: while financial institutions can utilise contracts to create liabilities denominated in the currencies of different states with the stroke of a keyboard, other businesses and individuals access credit domestically according to criteria of creditworthiness, and their fortunes are impacted significantly by changes in the exchange rate that are conditioned by the flows of capital generated in the financial sector.

Monetarists would insist that while money *can* be produced endogenously by actors in the political economy, tools such as interest rates nonetheless allow central banks to steer the money supply. However, a closer look at the legal permissions granted to private actors under the current monetary system reveals that the systemically significant prices – such as like interest rates and exchange rates – that are positioned by monetarists as the tools to control the base money and, thereby to impact on inflation, are not only the tools of public actors, such as the ECB, or national central banks. As Sotirpoulos et al underline, 'The representations generated by the markets are not neutral; on the contrary, they define economic "fundamentals" in such a way that . . . [d] ifferent policy actions receive different valuations and bring about different debt dynamics',[227] meaning that 'Every alternative economic policy plan will immediately bring about a re-pricing of the balance sheet income flows thus changing the debt dynamics and restraining the alternatives of the governments'.[228] Indeed, as I will now demonstrate in the final section of this article, the development of a wide array of financial instruments grounded in contract law does not only enable the production of credit money outside of any single monetary jurisdiction; some of these instruments enable financial actors to eschew the impacts of monetary policies advanced by central banks, including the ECB, by recategorising their financial flows, and by influencing the financial and economic variables and indicators through which central banks are attempting to influence price stability and pursue other monetary objectives.

Bespoke transactions: financial derivatives and monetary policy

The elaboration of a range of financial products such as derivatives further amplify the effect of transnational flows of capital on domestic economies. Derivatives are financial contracts that enable parties to take a position in the market for a range of underlying assets and variables and to exchange cash flows based on their performance over time. Market participants can quantify the risks associated with different forms of volatility, and create contracts that turn them into tradable products through which 'market participants can (for a price) buy certainty in financial values.'[229] The use of derivatives to 'lock in' a particular exchange or interest rate is seen to be

[226]Murau et al (n 213), 5.
[227]Sotiropoulos et al (n 67).
[228]Ibid., 230.
[229]D Bryan, 'The Global Forex Market: An Interpretation of the Bank for International Settlements' Survey of Forex and Derivatives Market Activity' 22 (2007) Global Society 492.

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critical to the operations of a liberalised global economy. Yet, derivatives have other functions that are overlooked in literatures that focus on their role in 'hedging' risk. By providing a means to compare the value of (commensurate) different sorts of financial assets in highly liquid markets, Bryan and Rafferty argue, derivatives 'provide a measure of a value of capital against which all different forms of capital, including national currencies', can be benchmarked.[230] The result is that in a world without a commodity anchor in the form of the Gold Standard, derivatives 'act as a kind of anchor' for the value of currencies and other financial assets,[231] but, crucially, as an anchor in which the value of the currency reflects the interests of financial capital. State currencies are now 'an asset class, each with its own risk and return profile'.[232] Moreover, derivatives also fulfil specific economic functions that can influence the way that individual economic agents and financial markets to respond to monetary policy. Analysts at the Bank for International Settlements have noted that by allowing market actors to 'transform their financial exposures cheaply and quickly', and to 'modify their sensitivity to interest and exchange rate changes', derivatives allow them to shirk the effects of monetary policy.[233] Widespread use of derivatives can 'affect the speed and the extent of the transmission of monetary policy actions to the level of spending, and, in turn, inflation'.[234] Thus, if a state wants to use interest rate or exchange rate targeting to alter the value of its unit of account – the equivalent of debasing a silver coin, for example – the use of its 'authority to adjust the value of money when circumstances' so require'[235] does not necessarily affect the value of money used in contracts between private parties. Private parties nominate the economic value of the sovereign's coin in their contract.

Savona et al argue that derivatives 'have a monetary nature that has not yet been recognised by central banks and other international institutions'.[236] They find that derivatives, which create positions in markets for a range of different assets with a relatively small initial investment, act as a multiplier of the money supply: 'with a given amount of monetary base, the money multiplier is higher than without derivatives', meaning that 'the Keynesian preference for liquidity is influenced not by central bank behaviour on the interest rate but by derivatives markets'.[237] To sum up, they conclude, 'the free reserves of banks are partly substituted by the "synthetic reserves"' of derivatives markets,[238] also arguing that 'derivatives make it more difficult for a central bank to defend an interest-rate policy if the level is not perceived as optimal by the financial markets'.[239]

The role of law and the state in the context of shadow banking has been debated by a number of scholars. As Murau et al write, 'Private profit-driven financial institutions have used available regulatory spaces for financial innovations to create new forms of credit money outside of the regulated US banking system.'[240] The typical image that results is one of regulatory 'cat and mouse' in which the state and its regulators is consistently trying to keep up with the innovations of a well-resourced financial sector and its lawyers. However, this dynamic is perhaps better understood as a foreseeable outcome of a liberal legal system in which there is a strong assumption that matters of property and money are private in origin and nature, and that a class of private property owners is a necessary constitutional constraint on a potentially autocratic sovereign. Feichtner evinces a convincing account of the dialectic between economic ideas and liberal

[230]Bryan and Rafferty (n 184), 268.

[231]Ibid.

[232]Bryan (n 224), 504.

[233]'Macroeconomic and monetary policy issues raised by the growth of derivative markets' BIS Report (1994) <https://www.bis.org/publ/ecsc04.pdf>, 4.

[234]Ibid.

[235]Desan (n 15), 13.

[236]Savona et al (n 195), 149.

[237]Ibid., 156.

[238]Ibid.

[239]Ibid., 159.

[240]Murau et al (n 213), 6.

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legal constructs in her analysis of the governance structures of the euro.[241] To return to the insights of Passinsky discussed in Section 1, the governance structures that permit the operations of money markets are also choices that reflect particular values for legal regimes. Some actors are permitted to circumvent regulations on finance for particular ends, whilst other people might be criminalised for fraud for trying to carry out what in certain financial transactions is 'arbitrage'.

The capabilities of private actors in these markets are a consequence of licenses and permissions granted by states, either explicitly or implicitly, *but by states attempting to manage the fractious character of money in capitalist political economy*. By removing controls on the free movement of capital, states enabled private actors to move capital offshore and cemented the role of the forex market in carrying out currency valuations. Central bankers worked with financial institutions that were developing the Eurodollar market and permitted the activity to continue; regulatory carve-outs were created to enable the development of the over-the-counter derivatives market and to exempt the market from oversight by financial regulators. Other significant developments relate to the ubiquity conflict-of-laws provisions in areas of law including property, contract, and corporate law that 'have converged to a remarkable extent on the principle that the parties to a contract or the founding shareholders are free to choose the law by which they are governed',[242] and the creation of an international treaty through the Hague Conference on Private International Law that standardises conflict-of-law rules for financial assets.[243] Transactions require specific contracts and regulatory structures in order operate, and, consequently, require backing of the state, 'no matter how de-territorialised or digitized the transactions are',[244] however, the legal regimes that have enabled financial institutions to create financial assets denominated in other currencies have a 'transnational' character: national legal frameworks, above all contract law, are a point of departure through and around which non-state actors develop practices, norms, and regulations to regulate their transactions and, cumulatively, to govern particular markets.[245] Standardised contractual documentation without which the global derivatives market could not operate has been developed by a private industry association, the International Swaps and Derivatives Association (ISDA), and is referred to as a piece of 'private legislation'.[246] These instruments typically include state-contingent contractual mechanisms designed to enable derivatives counterparties to 'jump the queue' in bankruptcy proceedings and ensure that their legal claims will be converted into state money in the event of an insolvency.[247] Contracts in this context are used to prefigure crises, and to prioritise the interests of parties above other constituencies. As Pistor underlines, 'netting laws' assist financial actors in 'running for the exit' and removing their capital from a particular jurisdiction or market, a dynamic that poured oil on the fire during the global financial crisis.[248] In order to make their economies and sovereign bonds attractive to financial investors, the government must make credible commitments to honoring financial contracts even in conditions of crisis by tying its own hands, issuing debt under foreign legal systems, and subjecting itself to the rulings of independent adjudicators: investment arbitration tribunals, and the independent credit determination committees of ISDA.

[241]As she argues, under German Public Law's rationalisation of money, 'Money is regarded as belonging to the sphere of civil society; it is the medium through which civil society conducts its economic relations. Recognition of a political role of the state in the creation of money, beyond its role as neutral protector of money's value, might undermine the conceptualisation of civil society as a sphere separate from politics and the state'. Feichtner (n 9), 884.

[242]Pistor (n 149), 135.

[243]Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary.

[244]S Sassen, 'Embeddedness of Electronic Markets' in K Knorr-Cetina and A Preda, *The Sociology of Financial Markets* (Oxford University Press 2005), 33.

[245]P Zumbansen, 'The Law of Society: Governance Through Contract' 14 (2007) Indiana Journal of Global Legal Studies 2.

[246]Pistor (n 149), 146.

[247]Ibid., 147.

[248]Ibid., 150.

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4. Concluding reflections: legal theories of money and the crisis in the Eurozone

Legal scholarship on money has already challenged the influential neoclassical and monetarist conceptions of money that have shaped the EU's monetary order, demonstrating that in terms of its historical development and origins, money is best understood as a public credit medium that is distributed by authorities according to particular political agendas, as opposed to being a private commodity that obeys economic 'laws' in the real economy. Legal theorists who have taken a constitutional approach to the study of money recognise that current monetary designs are the products of an interaction between government actions, institutional designs, and the behaviour of private actors. Nevertheless, there is a strong focus on the role of the state in producing and regulating credit money in these accounts. In this article, I have argued that in addition to being concerned with how credit creation is legally configured, the study of monetary constitutions must extend to the laws and legal structures that impact on both the endogenous demand (and, thereby, creation) of money in capitalist circuits of production and exchange, and the laws that – in line with the shift to financialised capitalism – enable private actors to exert influence over economic policy in their valuations of currencies, sovereign debt, and interest rates. The legal capabilities granted to a range of actors to demand credit money, and to thereby influence both the economic value of the sovereign's unit at a given point in time, and to impact the relationship between money and price formation (which also influences inflation and price stability) are an understudied dimension of contemporary monetary constitutions, but they are an essential dimension of 'moneyness'. Significantly, many of the laws that enable both the production of sovereign credit money (Eurodollars), of near-money equivalents (securitised financial loans and transactions), and its valuation are transnational contracts that reconfigure capitalist relationships of ownership and generate new liquidity structures. The activities of private banks that have been rationalised and legitimised under a monetarist regime of monetary governance (in and beyond the EU) have led to forms of market-generated credit creation being normalised that have fundamentally altered the relationship of states to the money supply, creating a situation in which central banks such as the ECB are only able to enact policies by effectuating transactions in markets as monetary technocrats reacting to developments in global financial markets. What is more, the permissions granted to private actors to develop innovative financial derivative contracts enable them to recategorise their transactions and eschew the impacts of centralised monetary policy, consummating forms of market power grounded in a network of transnational contracts that significantly condition the policy options available to states. Recent work by Braun and Hübner demonstrates that the EU is leaning decisively towards developing technical solutions to fix what the 'structural capacity gap' that deprives the EU of using the fiscal and other macroeconomic policy instruments normally available to monetary sovereigns to stabilise the euro. The European Commission, supported by the ECB and by public development banks, sees Capital Markets Union as a means to harness private financial markets in order to achieve macroeconomic goals.[249] Braun and Hübner see this as a 'financial fix for a 'fiscal fault', intensifying an agenda of 'state-led financialization' that Sotopoulidis et al and many others regard as one of the causes of the crisis. Their work offers a compelling account of how the EU looks set to deepen the considerable challenges in managing financial capitalism by introducing 'more than thirty proposed measures to strengthen financial intermediation via capital markets – that is, the roles bond, equity, venture capital, and securitisation markets play in the financing of "real" economic activity'.[250] Meanwhile, the vision of a fully fiscal federation remains a 'show real' of

[249]B Braun and M Hübner, 'Fiscal Fault, Financial Fix? Capital Markets Union and the Quest for Macroeconomic Stabilization in the Euro Area' MPIfG Discussion Paper 17/21 (December 2017) <https://pure.mpg.de/rest/items/item_2518103_5/component/file_2518131/content> accessed 1 March 2022, 2.

[250]Ibid., 2.

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dreams to keep populace on board,[251] the EU is positioning market-based finance as a solution to the intractable problem of 'risk-sharing'.[252]

Scholars who are unconvinced that the efficiency of deep and liquid – albeit well-regulated – financial markets'[253] will solve the design flaws in the eurozone tend to be divided into two camps. One camp sees the solution as lying in the development and implementation of much more consciously redistributive monetary policy that could compensate those economies that suffer from the hard currency approach under the Treaties, and that would further use monetary policy as a means to consciously address social goals, such as divestment from fossil fuels and the facilitation of a 'green new deal' for Europe. Others contend that only a full fiscal union at the EU level, or, as an alternative, the return to national currencies, can address the profound imbalances of the common currency. The enhanced legal theory of money that I have sought to elaborate in this article problematises both of these responses.

With regard to the conscious deployment of monetary policy to funnel credit away from 'endogenously fragile' and yield-hungry finance towards more socially useful causes, such as green energy, there could be significant value in this approach, but it would require processes by which companies and banks demonstrate their green credentials to the ECB, which, as analysis of green bonds has suggested, require significant investments in due diligence and enforcement measures to be effective.[254] Moreover, this development depends on how the wider community of networked financial actors responds to the actions of the ECB. Policies that reduce the value of financial investments seem likely to be met with capital flight, which, under current arrangements, can take place almost instantaneously, though perhaps there would be advantages to doing business in the EU and costs to moving elsewhere that would mitigate this scenario. If MMT scholars are successful in persuading this networked community of investors that the printing of sovereign money will not necessarily result in inflation and erode the value of their investments, then more expansionary monetary policy could mitigate inequalities within the eurozone.[255] However, if that monetary policy is designed to address inequalities, then there is reason to think that it would impact on financial yields and reduce the value of investments, in which case, further measures to try to limit capital mobility are required, which would, if imposed only by the EU, risk leading to capital flight.

A broader constitutional reform to address inequality within the eurozone would be to design regulations that would put private citizens and public budgets on a more equal footing with the exorbitant privileges of the financial sector in the global economy – a form of levelling up, as opposed to levelling down. Omarova has offered a convincing proposal for how public infrastructures can be created at the national and international levels that would re-publicise finance in the US.[256] Implementing such a vision could effectuate the kind of transformation of financialised capitalism that would counter some of the current issues with the euro. Having said that, Omarova's proposals are confined to a single (albeit very large) economy with a fiscal sovereign backing the system, and questions remain regarding how such proposals would apply in a context

[251]Streeck (n 5).

[252]Braun and Hübner (n 247), 16.

[253]Ibid., 17.

[254]SK Park, 'Investors as Regulators: Green Bonds and the Governance Challenges of the Sustainable Finance Revolution' 54 (2018) Stanford Journal of International Law 1; I MacNeil and E Irene-Marié, 'From a Financial to an Entity Model of ESG' 23 (2022) European Business Organization Law Review 9–45.

[255]As Ingham underlines, there is no 'mechanical relationship between levels of state expenditure, revenue, and inflation/deflation as expressed in orthodox monetary theory', rather, these impacts are mediated through theoretical understanding of the hypothetical impact of fiscal and monetary policy on the portfolios and investments of banks and financial investors. Ingham (n 28), 84.

[256]Omarova (n 127).

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as diverse as the euro. Undoubtedly, implementing a re-publicisation of finance would require a profound reworking of the current Treaties, and it would require considerable acceptance of redistribute initiatives within the EU on the part of Member States. Furthermore, a monetary design that would significantly address inequalities might need to confer upon ordinary citizens the extraordinary privileges that financial institutions and actors are able to enjoy under the current system, such as enabling them to work in one jurisdiction, receive a salary in US dollars in an off-shore account, take out a swap with a bank that gives them a more advantageous rate on their savings etc. Perhaps simply exposing how far the legal privileges granted to banks, financial institutions, and other fictitious legal persons diverge from those of ordinary citizens in the EU could advance the legal theorists' goals of democratising money, and could lead to reconsideration of what is constitutionally significant in EU Law. By framing monetary designs in terms of political choices, value judgements, and competing interests, legal theorists of money and the expanded focus on what financial actors have been enabled to do through contractual structures could offer new insights into important debates about constitutional balance in the eurozone.[257] Returning to the insights of Passinsky, as opposed to a set of legal arrangements for the governance of money leading to one macro-conception of 'money', it may also be productive to further study how different legal regimes regulate aspects of money in accordance with particular values. Rahmatian's legal theory of money moves in this direction by analysing how different types of money relate to law.[258] It has not been possible in this article to compare the two quite different ways of theorising money pursued by Rahmatian as contrasted with Desan, Feichtner, and theorists of finance, such as Hockett and Omarova, but the question of how different types of money or near-money are categorised legally in private law is a question that could further enhance understanding of the operations of contemporary monetary designs on the macro level.

On the much-debated matter of a full fiscal union at EU level, this development would certainly seem to be the most promising measure to address the inequalities between Member States that are currently plaguing the eurozone. Legal analysis of money demonstrates that a fiscally empowered EU could seek to address inequalities and stabilise the eurozone, notably because such a shift would further empower the ECB to print money and engage in monetary financing to smooth the impacts of unstable flows of capital, creating less dependence on the swap lines of the US Fed, and amplifying the euro's international credentials. However, this position could exacerbate already substantial inequalities between 'fortress' Europe and countries with weaker currencies in the global economy. Practically speaking, there continues to be profound resistance to such a further assignation of monetary sovereignty to the EU level among many governments and constituencies within the EU, as the furore over the redistributive impacts of the PSPP further demonstrate. What is more, without changes to how the legal capacities of financial actors are configured with regard to the creation of private credit, the operations of derivative markets, and capital liberalisation, the EU would remain vulnerable to how its tax policies are perceived by a network of financial actors with considerable powers to realise their preferences for economic policy through pricing the euro in forex transactions, influencing the value of debt within the eurozone, and removing business (commercial and financial) abroad. On the other hand, at least under current developments in the global economy, moving forward with a fiscal union would seek to hold out more promise than a return to national currencies. Although this move would restore the fiscal function to European sovereign states so that they are better able to calibrate their political economies

[257]M Dawson and F de Witte, 'Constitutional Balance in the EU after the Euro-Crisis' 76 (2013) Modern Law Review 817–44.

[258]As he writes, 'Banknotes, coins, bank money, negotiable instruments, digital currencies, cryptocurrencies (Bitcoin, etc) are subject to specific and different rules as to the details but are all instances of a higher-ranking category, that of dematerialised property, of which money forms a sub-category. Rahmatian (n 117), 20–1.

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in conditions of international competitiveness, it overlooks the further intensification of the capabilities of financial capital in the decades since European nations clubbed together, in part, to try to insulate their currencies and sovereign debt valuations from the powers of finance. A move in this direction would reopen the problematic instability generated by exchange rates, which destabilised economies in Europe in spite of how then-fiscally sovereign European states chose to issue credit and conduct monetary policy.

In my attempt to further advance legal theories of money, I have sought to illustrate that the transnational laws that facilitate the financialised mode of capital accumulation to which the single currency was formulated as a response put into question the transmission mechanism of monetary policy (conducted by the ECB or national central banks), suggesting that all states have lost monetary sovereignty as a result of these developments. As opposed to fixating on how the single currency divides Member States, my analysis underlines a profound need to focus in greater detail on the privileges granted to private actors to create innovative contractual instruments that enable them to recategorise their financial transactions, and to direct flows of investment in response to developments in economic policy. For example, derivative transactions are argued by some theorists to function as money, but current laws do not require them to be registered as credits and debts on the balance sheets of large banks, which has led some economists to argue that monetary policy is currently conducted without accounting for these large volumes of 'missing global debt'.[259] Equally, while there has been intense discussion of the lack of a fiscal union at the EU level, less consideration is given to questions such as where EU Law stands with respect to permitting the operations of tax havens.[260] While restoring fiscal sovereignty to EU Member States could address some of the inequalities within the eurozone, perhaps a more significant intervention in the area of fiscal policy would be to ban – or at least not to whitewash[261] – tax havens. Ultimately, the question of how to reform the governance of money in the eurozone is a question of how to reform global finance, which in turn requires the reform of tendencies within capitalism that lead to dynamics of financialisation.[262] Indeed, at the end of this article, in addition to raising the question as to whether it makes sense to develop a unified legal theory of money, I am left doubting whether it makes sense to analyse money, or 'the euro', as something distinct from capitalism at all; the shape of current monetary orders are inextricably intertwined with broader economic processes and labour relations. As others have suggested with regard to the future governance of the eurozone, 'It's the political economy . . . !'.[263]

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[259] C Borio, R McCauley and P McGuire, 'FX Swaps and Forwards. Missing Global Debt?' (2017) Bank for International Settlements Quarterly Review 37–54.

[260] Oxfam has recently authored a report on this issue. OXFAM, 'Off the Hook: How the EU is about to whitewash the world's worst tax havens' Oxfam Briefing Note (March 2019) <https://oxfamilibrary.openrepository.com/bitstream/handle/10546/620625/bn-off-the-hook-eu-tax-havens-070319-en.pdf> accessed 12 February 2022.

[261] Ibid.

[262] There are some important initiatives underway to curb trends in financialisation, such as the recently agreed OECD's measures to institute a major reform of the international tax system, which seeks to address tax havens and to ensure that Multinational Enterprises (MNEs) will be subject to a minimum 15 per cent tax rate from 2023. Assessing the likely impact of such measures on the dynamics of the transnational legal constitution of money described in the article will be an important future research agenda. OECD, 'OECD/G20 Base Erosion and Profit Shifting Project Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy' (8 October 2021) <https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.htm> accessed 9 June 2022.

[263] Dani et al (n 41).

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