Legal Issues Regarding The Representation Of The Euro Area In The International Monetary Fund (IMF)

Maria Meng-Papantoni*

Table of Contents

I. Scope

Although about 20 years have passed since the introduction of the euro as a global currency in transactions around the world, the issue of its representation in international *fora* and, in particular, the International Monetary Fund (IMF) has still not been resolved. The euro is a currency used by 19 EU Member States, i.e. Member States that meet the criteria for participation in the Economic and Monetary Union (EMU). Entry into the EMU is normally[1] achieved upon fulfilment of the 'convergence criteria' (set out in Art. 121(1) of the Treaty establishing the European Community (TEC), now Art. 140(1) of the Treaty on the Functioning of the European Union (TFEU)). The EMU operates on the basis of rules that require a greater degree of integration (deepening) among participating Member States. Since the introduction of the euro around the world, two proposals for a Council decision have been submitted by the European Commission (hereinafter the 'Commission') aiming at the euro's

* Dr. Maria Meng-Papantoni is Professor at the Panteion University – Athens. This article is based on the text of the presentation delivered at *Europa-Institut Saarbrücken* at the Conference *in memoriam* of Prof. Dr. Werner Meng held on 20/04/2018. The author wishes to express her gratitude to the Organising Committee of the Conference.

1 Besides Denmark, which opted out of participation in the EMU, Sweden decided in a 2003 referendum not to adopt the euro, and any future decision to join the EMU is subject to public approval by a referendum. The question whether the United Kingdom would opt to join the EMU has been settled by the UK decision to exit the EU at the June 2016 referendum.

unified representation in the IMF.[2] The topic of the euro's external representation in the IMF is inextricably linked with the issue of whether it is better achieved through the European Union (EU) or the EMU. However, neither the EU nor the EMU is a state, so that representation in the IMF could arise from their membership thereof. However, the latest proposal of the Commission submitted in 2015 stipulates in Art. 2 that the ultimate objective is for the EMU to be represented at the IMF (see below, under Section II.1).

This study does not attempt to critically analyse the 2015 Commission proposal. It is rather aimed at presenting and analysing the legal issues relating to the institutional aspect from the Euro Area's unified representation in the IMF, which we argue once resolved would ensure solid representation of the Euro Area in the IMF.

II. THE INTERPLAY OF EMU AND IMF RULES

II. 1 EU external representation rules

The external representation of the Euro Area is based on Arts 219 and 138 TFEU.

According to the first paragraph of Art. 219 TFEU, the Council has the power to conclude formal agreements with third countries in respect of the exchange rate system of the euro with the currencies of these countries.

The second paragraph of Art. 219 TFEU stipulates that the Council can also formulate general orientations for exchange rate policy in relation to one or more currencies of third states.[3]

Under Art. 138, paragraphs 1 and 2 TFEU, the Council has the power to '…adopt a decision establishing common positions on matters of particular interest for economic and monetary union within the competent international financial institutions…' The Council may also'…adopt appropriate measures to ensure unified representation within the international financial institutions…'.

Evidently, the Council acts in line with the said Articles of the Treaty upon a proposal by the Commission and in consultation with the European Central Bank (ECB) and the European Parliament, as stipulated by the Treaty.

The role of the ECB regarding the external representation of the Euro Area is based on Arts 6 and 23 of Protocol (No 4) on the Statute of the European System of Central Banks (ESCB) and of the ECB. According to Art. 6 of the above Protocol, the ECB and the National Central Banks (NCBs) may, without prejudice to Art. 138 TFEU,

2 In 1998, the Commission presented a proposal for a Council Decision 'on the Representation and Position Taking of the Community at International Level in the context of Economic and Monetary Union' (COM(1998) 637 final), which was never adopted by the Council. The second attempt to this effect was in 2015, with a new proposal by the Commission for a Council Decision laying down measures in view of progressively establishing unified representation of the Euro Area in the International Monetary Fund (hereinafter '*2015 Commission proposal*'), COM(2015) 603 final.

3 In the absence of agreements or general orientation, the ECB takes overall responsibility for conducting the exchange rate policy of the euro (Art. 127, para. 2 TFEU).

participate in international monetary institutions. According to Art. 23 of the above Protocol, the ECB and NCBs may also establish relations with international financial institutions.

It should also be noted that according to Art. 219, para. 4 TFEU, Member States may, without prejudice to EU competence as regards the economic and monetary union, negotiate in international organisations and conclude international agreements.

The provisions of the Treaty in respect of external representation in respect of the economic and monetary union set out the division of powers regarding economic and monetary union in the Union:

The ECB and the ESCB are responsible for monetary policy (Art. 127, paras 1 and 2 TFEU, Art. 3.1 of the Protocol (No 4) on the Statute of the ESCB and of the ECB).

The ECB and the Council have power over exchange rate policy (Arts 127, para. 2 and 219 TFEU).

Member States are responsible for economic, fiscal and labour policy, which are considered a 'matter of common concern' (Art. 121 para. 1 TFEU).[4]

All these policies fall within the sphere of IMF activities. The International Monetary Fund is an intergovernmental organisation, which at present comprises 189 members.[5] According to Art. 1 of the IMF Articles of Agreement,[6] the purposes of the International Monetary Fund are:

11(i) To promote international monetary cooperation through a permanent institution which provides the machinery for consultation and collaboration on international monetary problems.

(ii) To facilitate the expansion and balanced growth of inter-national trade, and to contribute thereby to the promotion and maintenance of high levels of employment and real income and to the development of the productive resources of all members as primary objectives of economic policy.

(iii) To promote exchange stability, to maintain orderly exchange arrangements among members, and to avoid competitive exchange depreciation.

(iv) To assist in the establishment of a multilateral system of payments in respect of current transactions between members and in the elimination of foreign exchange restrictions which hamper the growth of world trade.

(v) To give confidence to members by making the general resources of the Fund temporarily available to them under adequate safeguards, thus providing them with

4 Competence for economic policy still lies with Member States, even after the measures taken in respect of European Economic Governance in the aftermath of the 2010 financial crisis; see: CJEU, case C-370/12, *Pringle v. Ireland*, ECLI:EU:C:2012:756, paras 69-70, 73; CJEU, joined cases C-8/15 P, 10/15 P, *Ledra Advertising Ltd and Others v European Commission and European Central Bank (ECB)*, ECLI:EU:C:2016:701, para. 53.

5 For more details on IMF Member Quotas and Voting Power, and the IMF Board of Governors, see IMF website at: http://www.imf.org/external/np/sec/memdir/members.aspx (30/07/2018).

6 See Articles of Agreement of the International Monetary Fund, as amended and effective on 26 January 2016 by the modifications approved by the Board of Governors in Resolution No. 66-2, adopted on 15 December 2010, available on the IMF website at: http://www.imf.org/external/pubs/ft/aa/index.htm (30/07/2018).

opportunity to correct maladjustments in their balance of payments without resorting to measures destructive of national or international prosperity'.

(vi) In accordance with the above, to shorten the duration and lessen the degree of disequilibrium in the international balances of payments of members.

Thus, the evident question is who should represent the EMU in the IMF. However evident this question may be, the answer has not been fully addressed yet; as a result, it remains a target for the Union.

In my view, the current situation regarding the EU division of powers and EU Member State membership in the IMF[7] is a classic case of shared competence[8] for the reasons set out below.

EU institutions have exclusive powers over monetary policy (the ECB) and exchange rate policy (the ECB and the Council) (Art. 219, para. 3 TFEU). Member States retain their sovereign powers over economic and fiscal policies (Art. 119, para. 1 and Art. 121, para. 1 TFEU). Therefore, although Member States do not have the power to fulfil their IMF obligations autonomously in areas for which their powers have been transferred to the EU, they are still under an obligation to do so under general public international law (and are also liable for any violations thereof).

This is a typical situation that is subject to the provisions of Art. 351 TFEU since it concerns treaties (e.g. between the IMF and EU Member States) that predate the EU Treaties. According to the abovementioned Article, the *pacta sunt servanda* principle prevails. If, therefore, international treaties concluded are not in line with Union law, the Member States shall take every measure to eliminate any incompatibilities and adopt a common position.

Further to Arts 4, para. 3 TEU and 351 TFEU, EU jurisprudence underlines the internal consequences of the transfer of powers by the Member States to the EU:

Member States have the duty to act in solidarity as trustees for the Union, guided by EU (former Economic European Community – EEC) bodies (*ERTA* decision);[9]

There is a duty to mutual coordination between the Member States and the EU if they are both members of a treaty or international organisation ('mixed agreement in case of shared powers', in accordance with the European Court of Justice (CJEU), Opinion 2/91);[10]

There is a duty to act in favour of giving the most far-reaching status of participation or membership to the EU in international regimes if the powers of the Union are at stake (*Kramer* judgment).[11]

7 See below under III.
8 Ibid.
9 CJEU, case 22-70, *Commission v. Council (ERTA)*, ECLI:EU:C:1971:32; the Court's *ERTA* doctrine has been continued in the Court's CJEU, Opinion 1/13 of 14 October 2014 pursuant to Art. 218(11) TFEU, ECLI:EU:C:2014:2303.
10 See CJEU, Opinion of 14 December 1991 pursuant to the second subparagraph of Art. 228(1) of the EEC Treaty, ECLI:EU:C:1993:106. See also *International Labour Organization*, Convention of the concerning safety in the use of chemicals at work (Convention N° 170).
11 CJEU, joined cases 3, 4 and 6/76, *Cornelius Kramer and others*, ECLI:EU:C:1976:114.

Given the abovementioned Treaty framework for the external representation in respect of the EMU as well as relevant EU jurisprudence, the possible solutions concerning the Union's membership in the IMF have been[12] the following. If consensus is reached with the IMF on the conclusion of a mixed agreement between the EU and the IMF, a qualified majority of all IMF members is required (Art. XXVIII(a) IMF Articles of Agreement).[13] Otherwise, EU Member States shall represent the EU under the coordination and upon the instructions of the institutions holding the relevant power:

i. partly by the ECB (Arts 3, para. 1(c) and 127, para. 2 TFEU),

ii. partly by the Council together with the ECB[14] (Arts 127, para. 2 and 219 TFEU).[15]

And the EU institutions will have observer status in the IMF.

The European Council in 1998[16] was in favour of double representation, i.e. shared by the ECB and the Council President or the Council Vice-President if the Council President is not from a Euro Area Member Country.

The compromise within the EU[17] on the abovementioned options was formulated in the Conclusions of the Presidency of the European Council of December 1998,[18] which stresses that the adoption of the euro signals a major event for the international monetary system. As a result thereof, the Community must fully play its role in international monetary and economic policy issues in the IMF. To this end, the Conclusions of the Presidency of the European Council endorsed the Report to the European Council on the state of preparation for Stage 3 of the EMU, in particular with

12 Since the introduction of the Euro.

13 According to Art. XXVIII(*a*) IMF Articles of Agreement, '... *When three-fifths of the members, having eighty-five percent of the total voting power, have accepted the proposed amendment, the Fund shall certify the fact by a formal communication addressed to all members*'. On this, see also below, under III.

14 And the *European Commission*, pursuant to Art. 302 EC Treaty: '*It shall be for the Commission to ensure the maintenance of all appropriate relations with the organs of the United Nations and of its specialised agencies. The Commission shall also maintain such relations as are appropriate with all international organisations*'.

15 On the question whether exchange rate policy is included in the meaning of monetary policy, see *Smits*, The European Constitution and EMU: an appraisal, Common Market Law Review 2005, p. 455; *Louis*, Monetary policy and Central Banking in the Constitution, in: European Central Bank, Legal aspects of the European System of Central Banks, Liber Amicorum Paolo Zamboni Garavelli, 2005, pp. 29 f.; *Lastra*, International financial and monetary law, 2015, ch. 9.18-9.26.

16 See *Presidency Conclusions*, Vienna European Council, 11/12/1998 and 12/12/1998, https://www.consilium.europa.eu/media/21092/vienna-european-council-presidency-conclusions.pdf (30/07/2018).

17 See *Bergthaler*, The relationship between International Monetary Fund law and European Union law: influence, impact, effect, and interaction, in: Wessel/Blockmans (eds.), Between autonomy and dependence – The EU legal order under the influence of international organisations, pp. 172 f.

18 See above (fn. 16), and Annex 1 – Resolution of the European Council on Economic Policy Coordination in Stage 3 of EMU and on Treaty Arts 109 and 109b to the Presidency Conclusions in Luxembourg, 12/12/1997 and 13/12/1997, http://www.europarl.europa.eu/summits/lux1_en.htm (30/07/2018).

regard to the external representation of the EU.[19] This Report points out that: 1) the ECB[20] will have observer status at the IMF Board as far as issues of monetary policy are concerned, 2) as regards other EMU issues, the views of the EMU will be presented at the IMF Board by the relevant member of the Executive Director's office of the Member State holding the Eurogroup Presidency assisted by a representative of the Commission, and 3) the coherence and effectiveness of EU representation are conditional upon its ability to speak with one voice on issues of particular relevance to the EMU.[21] This approach of the European Council has traces of a 'pragmatic solution'[22] prone to 'pragmatic arrangements' which 'facilitate the conduct of IMF surveillance under Art. IV[23] and the presentation of EU positions in the IMF'.[24]

The reaction of the IMF to EU decisions is deemed to be flexible as it is adjusted to the specificities of the division of powers between the EU institutions. Given that the EU/EMU is not a state,[25] the IMF has therefore accorded observer status to the ECB and to the Commission in the IMF bodies dealing with matters related to their powers. In December 1998, observer status was accorded to the ECB at selected IMF Executive Board meetings[26] and the International Monetary and Financial Committee (IMFC).[27] The Commission and the Council are represented in the IMFC. The practice is that when the EU Member State holding the Presidency of the Council is not rep-

19 Ibid.
20 See, therefore, *Horng*, The ECB's membership in the IMF: legal approaches to constitutional challenges, European Law Journal 2005, pp. 802-822.
21 See above (fn. 16).
22 See *Louis*, L'Union européenne et sa monnaie. Collection: Commentaire J. Mégret : politiques économiques et sociales, Editions de l'Université de Bruxelles, 2009, p. 289.
23 See Art. IV, Section 3b, IMF Articles of Agreement: '(*b*) In order to fulfill its functions under (*a*), the Fund shall exercise firm surveillance over the exchange rate policies of members, and shall adopt specific principles for the guidance of all members with respect to those policies. Each member shall provide the Fund with the information necessary for such surveillance, and, when requested by the Fund, shall consult with it on the member's exchange rate policies'.
24 See *Steinki*, Competencies of the European Community on International Monetary Fund matters: an overview of the key legal issues, in: IMF, Current developments in monetary and financial law, Vol. 2 2003, pp. 109-147.
25 On the criteria for IMF membership, see *Gold*, International Monetary Fund, in: Bernhardt (ed.), Encyclopedia of Public International Law, Vol. II, 1995, p. 1271.
26 See IMF Decision No. 12925-(03/1), 27 December 2002, as amended by Decision Nos 13414 (05/01), 23 December 2004, 13612-(05/108), 22 December 2005, and 14517-(10/1), 5 January 2010.
27 Its decisive role in the decision-making of IMF managerial bodies is highly praised. Its aims are to provide ministerial guidance to the IMF Executive Board, to advice and report to the IMF Board of Governors on issues regarding management and adaptation of the international monetary and financial system, including sudden disturbances that might threaten the international monetary system, and on proposals to amend the IMF's Articles of Agreement.

resented in the IMFC, the constituency[28] representing that Member State ensures the presence of the EU Council Presidency.[29]

The voting power in the IMF organs remains, therefore, exclusively with the EU Member States.

The 2015 Commission proposal expects a gradual strengthening of the external representation. During a transitional period, it foresees a troika representation, shared between the ECB, the President of the Eurogroup and the Commission in the IMFC and observer status for the Euro Area as well as a representative of the Commission in the IMF Executive Board. All questions relating to constituency arrangements are to be 'fully coordinated and agreed in advance', and 'consistent with the objective of increasing coherence'. Euro Area Member States are to 'closely coordinate and agree on common positions on all matters of Euro Area relevance for the IMF Executive Board and Board of Governors meetings and shall use common statements on those issues'. It also foresees that at the last stage of this transitional period, which should not last until later than 2025, the Euro Area will have a unified representation within the IMF guaranteed by the President of the Eurogroup in the Board of Governors, in the IMFC and by the Executive Director of a Euro Area constituency in the Executive Board; the goal will be the formation of one or several constituencies comprising only Euro Area Member States.

II. 2 The Euro Area's limited coherence in the IMF

The participation and representation of EMU Member States in IMF decision-making bodies presupposes that they are subject to the rules of operation thereof. The decision-making bodies of the IMF are: the Board of Governors (Art. XII, Section 2 IMF Articles of Agreement), the Executive Board (Art. XII, Section 3, IMF Articles of Agreement) and the Managing Director (Art. XII, Section 4 IMF Articles of Agreement).[30]

The Executive Board of the IMF runs the day-to-day business of the Fund and takes decisions on every issue delegated to it by the Board of Governors (under Art. XII, Section 2(b) and 3(a) IMF Articles of Agreement, and Section 15 of the IMF's By-Laws),[31] since this supreme body of the IMF does not operate in continuous session (Art. XII Section 2(c) IMF Articles of Agreement). The Executive Board comprises 24 Executive Directors (Art. XII, Section 3(b) IMF Articles of Agreement) representing 189 countries. Eight of the Executive Directors represent one country each (USA,

28 See below under II.B.

29 See *Glöcker/Truchlewski*, From polyphony to harmony? The external representation of EMU, in: Lieb et al. (eds.), The European Union in International fora – Lessons for the Union's external representation after Lisbon, Schriftenreihe des Arbeitskreises Europäische Integration e.V., Band 72, p. 119; above (fn. 16, 18).

30 See *Gianviti*, The International Monetary Fund and the International Monetary System. Decision-making in the International Monetary Fund, Current Developments in Monetary and Financial Law, 1999, pp. 33-67.

31 See By-laws rules and regulations of the International Monetary Fund (April 2016) at https://www.imf.org/external/pubs/ft/bl/pdf/by-laws.pdf (30/07/2018).

United Kingdom, Germany, France, Japan Russia, China and Saudi Arabia). The remaining 16 Executive Directors are elected by 'coalitions',[32] known as 'constituencies', each representing between 4 and 24 countries.

Two of the Euro Area Member States – Germany and France – each form single-state constituencies, elect their one Executive Director and occupy each a seat in the Executive Board. The remaining 17 Euro Area Member States[33] belong to 6 different mixed-state constituencies which are not only composed of EU/EMU Member States but also third countries.[34] Two of these constituencies[35] have only one EU Member State each (Ireland and Spain respectively) and some[36] are represented through constituencies with non-EU Executive Directors.

The composition of the IMF Executive Board presents the following problem for the external representation of the EMU in the IMF.[37] Executive Directors of single-state constituencies are generally accepted[38] to follow orders from their government.[39] Elected Executive Directors in mixed-state constituencies have to coordinate their views with other states within their constituency, although they are formally independent when they vote in the Executive Board.[40]

Regarding EMU influence on decision-making within constituencies, it should be pointed out that the EMU does not account for the majority in any of the IMF constituencies. In the two constituencies,[41] it could theoretically be argued that the EMU holds the majority together with 'EU Member States with a derogation' (Art. 139 para. 1 TFEU). But, given the difference in status between the EMU Member States and the EU Member States that are still not members of the EMU, we cannot argue that a European bloc exists. In the case of the largest IMF constituency, comprising

32 See *International Monetary Fund*, 'The IMF at a glance' (19 April 2018), https://www.imf.org/en/About/Factsheets/IMF-at-a-Glance (30/07/2018).
33 As well as the other eight Member States of the EU which are with a derogation; the United Kingdom forms a single-state constituency.
34 See *European Commission*, Completing Europe's Economic and Monetary Union, The external representation of the Euro, https://ec.europa.eu/commission/sites/beta-political/files/factsheet-external-representation_en.pdf (30/07/2018).
35 See *IMF Executive Directors and Voting Power* as at 30/07/2018, https://www.imf.org/external/np/sec/memdir/eds.aspx (30/07/2018).
36 Ibid.
37 Comp. *Bini-Smaghi*, A single EU seat in the International Monetary Fund?, in: Jørgensen (ed.), The European Union and International Organizations, 2009, p. 61.
38 Comp. *Leino*, On the duty of cooperation, consistency and influence in the external relations of the Eurozone: representation of EU and EU Member States in the International Monetary Fund, in: Bungenberg et al. (eds.), European Yearbook of International Economic Law 2017, p. 593.
39 It is pointed out, however, that the Executive Directors contravene to their fiduciary duty to the IMF if they act only following instructions received from their countries or constituencies; see: *Gianviti*, (fn. 30), p. 40.
40 Ibid.
41 One constituency comprises Denmark, Estonia, Finland, Iceland, Latvia, Lithuania, Norway and Sweden and the other constituency consists of Austria, Belarus, the Czech Republic, Hungary, Kosovo, the Slovak Republic, Slovenia and Turkey. See *IMF Executive Directors and Voting Power*, (fn. 35).

15 countries,[42] EU Member States hold a clear majority of seven votes, of which four are EMU member countries. Portugal, Ireland and Spain are completely marginalised in their respective constituencies. The criticality of the situation in the constituencies participated in by EU/EMU Member States can be safely concluded if we look at the membership of these constituencies.

Poland is a member of the constituency comprising Azerbaijan, Kazakhstan, the Kyrgyz Republic, Serbia, Switzerland, Tajikistan and Turkmenistan,[43] i.e. states that cannot be considered to form a community of interest. The same applies to Ireland,[44] which participates in the constituency comprising Antigua and Barbuda, the Bahamas, Barbados, Belize, Canada, Dominica, Grenada, Jamaica, St. Kitts and Nevis, St. Lucia, and St. Vincent and the Grenadines. The same also applies to the constituency composed of: Spain, Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Mexico and Venezuela.[45]

Greece, Italy and Portugal, are in a somewhat better position, as they form a constituency with Albania, Malta, and San Marino. The same applies to Estonia, Finland, Latvia, Lithuania, Denmark and Sweden, which form a constituency with Iceland and Norway.[46] *Mutandis mutandis* for the constituency which includes Austria.[47]

Also, as highlighted above, in the case of the largest constituency comprising, on the one hand, Belgium, Bulgaria, Croatia, Cyprus, Luxembourg, Netherlands, Romania and, on the other hand, Armenia, Bosnia and Herzegovina, Georgia, Israel, the former Yugoslav Republic of Macedonia, Moldova, Montenegro and Ukraine, this is not only distinguished as a result of the heterogeneity of its membership, but also the fact that the EU Member States participating therein may have a significant weight, but they are still not a decisive factor in the decision-making procedure in quantitative terms.

All in all, this short overview shows that the Euro Area, despite its certainly strong position, lacks consolidated representation (in formal terms) and major relevance in the IMF, which would arise from the aggregate number of the voting rights of its Member States as a whole. EU/EMU Member States are scattered in various constituencies, subject to different quotas and voting rights. Only Germany and France can rely on their special weight, whereas the remaining 17 Euro Area Member States must strike compromises within their respective constituencies, in which their role is only limited. It can easily be deduced, therefore, that as long as the interests among the members of the constituencies are different, their role will be declining.

42 This constituency is composed of: Armenia, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Georgia, Israel, Luxembourg, the former Yugoslav Republic of Macedonia, Moldova, Montenegro, the Netherlands, Romania, and Ukraine. See *IMF Executive Directors and Voting Power*, (fn. 35).

43 See *IMF Executive Directors and Voting Power*, (fn. 35).

44 Ibid.

45 Ibid.

46 Ibid.

47 See above (fn. 41).

For the coordination between the Executive Directors from EMU countries, there are two bodies:[48] the EU Sub-Committee on IMF-Related Issues (SCIMF) based in Brussels and the EU Representatives to the IMF (EURIMF) based in Washington DC.

Both the Commission and the ECB are represented in the SCIMF in Europe and the EURIMF in Washington and, accordingly, their views are considered during the coordination process.

The SCIMF consists of two representatives from each Member State and the EU institutions – two representatives from the Commission Directorate-General for Economic and Financial Affairs (DG ECFIN) and two representatives from the ECB. SCIMF has a membership broader than Euro Area members alone; it meets eight to ten times per year, and its decision-making is based on reaching consensus.[49] Agreements made at the SCIMF are communicated to the Economic and Financial Committee for endorsement and then sent to the European Executive Directors at the IMF for the EURIMF or the IMF Executive Board meetings.[50]

The EURIMF – with a view to maximising coordination in Executive Board proceedings – is composed of representatives from all EU Member States. It comprises EU Executive Directors and other EU IMF representatives, an observer from the ECB and the Commission delegation in Washington. This group constitutes an important supplement to the SCIMF because it is able to meet frequently, which is essential given the fact the Executive Board meets generally three times a week (Art. XII, Section 3(g) IMF Articles of Agreement); its decisions are based on consensus.[51] Due to its large size, there is a 'mini-EURIMF' composed only of EU Executive Directors and their alternates which meet on an ad-hoc basis.[52]

48 See *Eurodad*, European Coordination at the World Bank and International Monetary Fund: A question of harmony?, 2006, http://www.eurodad.org/uploadedfiles/whats_new/reports/eurodad%20euifigovernance.pdf (30/07/2018).

49 Ibid., pp. 11 f.

50 See *Leino*, (fn. 38), p. 581.

51 See *Eurodad*, (fn. 48), p. 9.

52 Ibid.

Experience demonstrates,[53] however, that there are limits to the degree to which the EU/EMU Member States are able to forge common positions in the IMF. Executive Directors are not formally bound to comply with the contents of the agreements made at SCIMF.[54] These limits are most evident when discussions take place regarding surveillance of – or the provision of financial assistance to – countries outside the EU, where the differing geopolitical priorities of EU Member States may surface.[55] Although these issues may not be considered directly linked to the Euro Area and currently in the absence of EU legislation on the matter,[56] the lack of coordination of Euro Area Executive Directors and the Member States shows once again the impossibility of the 'Europeans to speak with one voice'.[57] It is important, however, to highlight that consensus, which is the standard practice in the IMF bodies,[58] mitigates problems of coordination.

The difficulty of addressing the lack of a consolidated Euro Area representation in the IMF was pointed out very early on and may also be explained by the differentiated integration of the EMU.[59] In more detail, the lack of a consolidated Euro Area rep-

53 See *Bini-Smaghi*, (fn. 37), pp. 68 f.; *Hagan*, 10 Years of the Euro: A Perspective from the IMF from 29/01/2009), https://www.imf.org/en/News/Articles/2015/09/28/04/53/sp012909 (30/07/2018); *Council of the European Union*, EU statements in multilateral organisations – General Arrangements, 15901/11, 22 October 2011, para. 3; *Louis*, The Euro Area and multilateral financial institutions and bodies, in: Govaere/Lannon/van Elsuwege/Adam (eds.), The European Union in the world. Essays in honor of Marc Maresceau, 2013, p. 193; *Leino*, (fn. 38), p. 582; *European Commission*, Communication from the Commission to the European Parliament, the Council and the European Central Bank, A roadmap for moving towards a more consistent external representation of the Euro Area in international fora, COM(2015) 602 final, p. 6; *European Parliament, DG for Internal policies*, Policy Department A: Economic and scientific policy, External representation of the Euro Area, Study, May 2012, pp. 36 f.; *European Economic and Social Committee*, ECO/392 Euro Area external representation, Opinion on the Communication from the Commission to the European Parliament, the Council and the European Central Bank – A roadmap for moving towards a more consistent external representation of the Euro Area in international fora, COM(2015) 602 final and on the Proposal for a Council decision laying down measures in view of progressively establishing unified representation of the Euro Area in the International Monetary Fund, COM(2015) 603 final – 2015/0250 (NLE) of 17/03/2016, para. 3.7.

54 See *European Parliament*, External representation of the Euro Area, IP/A/ECON/FWC/2010_19, May 2012, p. 36; *Eurodad*, (fn. 48), p. 12.

55 See *European Commission*, (fn. 53), p. 6.

56 See therefore Art. 4 of the 2015 Commission Proposal: Euro Area Member States are to 'closely coordinate and agree on common positions on all matters of Euro Area relevance for the IMF Executive Board and Board of Governors meetings and shall use common statements on those issues'. In the long term, the scope of coordination expands beyond matters that are of Euro Area relevance to 'all positions to be taken, orally or through written statements, within IMF organs', which 'shall be fully coordinated in advance' in the relevant EU bodies.

57 See *Bini-Smaghi*, A single EU seat in the IMF, JCMS 2004, pp. 229-248; *Smits*, (fn. 15), pp. 425, 455.

58 See *van Houtven*, Governance of the IMF. Decision making, institutional oversight, transparency, and accountability, IMF Washington D.C., 2002, Pamphlet series, No 53, at https://www.imf.org/external/pubs/ft/pam/pam53/pam53.pdf, (30/07/2018), pp. 25-31.

59 See *Dutheil de la Rochère*, EMU: constitutional aspects and external representation, Yearbook of European Law, Vol. 19 1999, p. 445.

resentation in the IMF may be explained by the fundamental differences between Euro Area Member States and 'Member States with a derogation' (Art. 139 para. 1 TFEU) – not only in terms of monetary policy, but also in terms of economic policy – against the background of differentiated integration of the EMU.[60] But, in accordance with the 2015 Commission proposal, and the issue on the EMU's consolidated representation in the IMF is raised, it is advisable to analyse institutional questions, which arise from the external representation of the EMU in the IMF.

III. Legal issues of institutional nature arising from the Euro Area external representation in the IMF

The unified representation of the EMU in the IMF may be achieved either through the EMU obtaining IMF membership (by substituting the EMU Member States or in addition to them)[61] or if the EMU obtains the possibility to express a common position in all IMF organs.[62]

The IMF membership issue in general and how the EMU can become a member of the IMF are matters that are dealt with in Art. II para. 2 IMF Articles of Agreement:

'*Membership shall be open to other countries at such times and in accordance with such terms as may be prescribed by the Board of Governors. These terms, including the terms for subscriptions, shall be based on principles consistent with those applied to other countries that are already members.*'

Here, arises the contentious issue of how is it possible for the EMU to acquire IMF membership status when it is not a state? Why are monetary unions not accepted as IMF members? Being a Bretton Woods institution of the post-war period, IMF membership is based on the principle of countries[63] as the constituent element (Art. II of IMF Articles of Agreement). All the EU Member States are Member States of the IMF. Accordingly, the EMU Member States are Member Countries of the IMF. IMF considers that only monetary unions that become states are eligible for IMF membership.[64] EMU is not the only example of a monetary union. The solution applied to the EMU and IMF applies also to the West African and Central African Economic and Monetary Union and the Members of the Central Bank of West African States, al-

60 See *Leino/Salminen*, A multi-level playing-field for economic policy-making: does EU economic governance have impact?, in: Beukers et al. (eds.), Constitutional change through euro-crisis law, 2017, pp. 69 f.

61 Creating an analogous structure pattern of representation of the EU in the WTO (See *Pollack*, The engines of European integration. Delegation, Agency, and Agenda Setting in the EU, 2003, pp. 268-299).

62 See contra *Leino*, (fn. 38), pp. 589 ff.

63 See *Gold*, Membership and Non-membership in the International Monetary Fund, IMF Washington D.C., 1974, pp. 41-52; *Meng*, Internationaler Währungsfonds und Weltbank als Gläubiger: Vormundschaft über souveräne Staaten, in: Institut für Rechtswissenschaften der Polnischen Akademie der Wissenschaften (ed.), Status der Abgeordneten, Internationale Kredite, Achtes Kolloquium der Öffentlichrechtler aus der Bundesrepublik Deutschland und Polen, 1992, pp. 114-172.

64 Comp. IMF Factsheet, March 1999, https://www.imf.org/external/np/exr/facts/emu.htm (30/07/2018).

though their currency doesn't play a role equivalent to that of the euro in the international monetary system. The Euro is part of the basket of the Special Drawing Rights (SDRs),[65] the international reserve asset, created by the IMF in 1969 to supplement the Member Countries' official reserve assets.[66]

Legal authors[67] stress, therefore, that the EMU should be considered as pertaining all the elements needed by the IMF Articles of Agreement – a single currency, independent monetary and exchange rate policy, the ECB and guaranteed capital and payments freedom between the EU Member States and third countries – for it be recognised as a country. It is, therefore, possible that the EMU being formally not a state, it could not be an IMF member, without prior amendment of the IMF Articles of Agreement.

Furthermore, the issue of EMU membership in the IMF relates to the Member States of the EMU; so far as they are obliged to require membership for the EMU.

Member States are bound by EU law[68] to require membership for the EU/EMU in the IMF and if they do not comply the Commission could defer to the CJEU (Art. 258 TFEU).

The consolidated representation of the EMU in the IMF relates to the issue of competence[69] for the conclusion of an international agreement with the IMF. According to recent jurisprudence, the ERTA effect doctrine (Art. 3 para. 2 TFEU) plays a role. The affectation formula of Art. 3, para. 2 TFEU, according to which the Union shall have exclusive competence for the conclusion of an international agreement when

65 Each of the current 189 members of the IMF is allotted votes according to the size of the members' subscription to the IMF. This 'capital subscription' or 'quota' is an amount of financial resources that each member contributes to the IMF. Quotas are since 1969 (See *Gold*, Legal and Institutional aspects of the Monetary System: Selected essays, IMF Washington D.C., 1979, pp. 165-169 on the new remedies created by the provisions of IMF Articles of Agreement dealing with SDRs, after they were created in 1969) denominated in SDRs, which is an international reserve asset used by the IMF for accounting purposes. The value of the SDR is based on a basket of five currencies – the U.S. dollar, the euro, the Chinese renminbi, the Japanese yen, and the British pound sterling.

66 See *Lastra*, (fn. 15), ch. 13.54-13.62.

67 See *Smits*, in: von der Groeben/Schwarzen/Hatje, Art. 138, Rn. 46; *Zilioli/Selmayr*, The external representation of the Euro Area: Legal aspects, Common Market Law Review 1999, p. 339.

68 See above under II.1; See contra *Leino*, (fn. 38), pp. 586ff.

69 The issue of the division of competences between the Union and the Member States continues to be at the heart of EU external relations. The Union's internal and external action is limited by the principle of conferral. EU jurisprudence shaped the doctrine of implied powers and recognised the Union's external competence may not only arise from an express attribution by the Treaty, but may equally flow implicitly from its provisions. The Court considered (CJEU, Opinion 1/76, *Draft Agreement establishing a European laying-up fund for inland waterway vessels*, ECLI:EU:C:1977:63, p. 741, para. 3) that whenever EU law provisions entail internal competence for the Union institutions 'for the purpose of attaining a specific objective, the Union has authority to enter into the international commitments necessary for the attainment of the objective even in the absence of an express provision concerning the matter'. Moreover, in case of fulfilment of the criteria of the 'affectation of the internal rules of the Union', the EU external competence is to be exclusive (CJEU, case 22/70, *Commission v. Council*, ECLI:EU:C:1971:32, para. 17).

its conclusion may affect common rules or alter their scope, received an extensive interpretation in Opinion 3/15[70] and Opinion 2/15.[71] The case-law rendered by the Court of Justice highlights the difference between the existence of EU competence and the nature of competence, between compulsory and facultative mixity for the conclusion of an international agreement. Given that the international agreement between the EU and the IMF will contain both clauses where there will be no Union competence involved and clauses falling under exclusive Union competence, there will be no choice for the EU legislature as to the nature of the agreement, which will need to be mixed.

EMU Member States may thus apply for membership in the event of an amendment to the IMF Articles of Agreement. The Articles of Agreement of the IMF were adopted at the United Nations Monetary and Financial Conference, Bretton Woods, New Hampshire, on 22 July 1945 and they constitute the constitutional charter of IMF. They have been amended seven times.[72] Proposals for amendment of the IMF Articles of Agreement may be introduced by IMF members (Art. XXVIII(a) IFM Articles of Agreement). The question is if EMU Member States request for the EMU itself to become a member if there is a chance for this request to be received positively by the other IMF members? What would be the incentives in this respect? We must first recognise the difficulty of this endeavour of EMU Member States proposing the membership of EMU in the IMF, given the necessary majority that needs to vote in favour. In order for new members to enter into the IMF, a qualified majority is not needed, but given the above analysis and on the basis of the nature of the EMU, such a majority will be required for the EMU to enter the IMF. An amendment of the IMF Articles of Agreement, which must be approved by the Board of Governors, becomes effective when it is ratified by three-fifths of the members, having 85 % of the total voting power (under Art. XXVIII(a) IFM Articles of Agreement). It is clear that membership of the IMF cannot be obtained without the consent of the US, which hold 16.52 % of the voting rights.[73]

The question of the EMU joining the IMF could be linked with opening the debate on the whole IMF quota issue, in which case the EU/EMU membership in the IMF might quite possibly have a more positive outcome. More specifically, EMU membership of the IMF might be linked with the issue of a review of the aggregate quota of EMU members in the IMF and eventually the number of seats that EMU Member States have at the IMF Executive Board.

The Member States of the EU jointly hold at present[74] 29.45 % of IMF quotas and 29.59 % of voting rights, although their share of global GDP stood at just 21.8 % in

70 See CJEU, Opinion 3/15, *Marrakesh Treaty*, ECLI:EU:C:2017:114.
71 See CJEU, Opinion 2/15, *Singapore Agreement*, ECLI:EU:C:2017:375.
72 See *IMF*, Articles of Agreement of the International Monetary Fund (April 2016), http://www.imf.org/External/Pubs/FT/AA/index.htm (30/07/2018).
73 See *IMF Executive Directors and Voting power*, (fn. 35).
74 Ibid.

2016 and has declined by around 10 % since 2006.[75] This needs to be borne in mind, as many countries (including the USA and Japan) consider that the Europeans – who currently hold 8[76] out of the 24 seats on the IMF Executive Board[77] – are clearly over-represented[78] in terms of the number of IMF Executive Director seats. The present number of quotas of IMF members is a product of the 2010 IMF Quotas and Governance reforms (approved by the Board of Governors in Resolution No 63-2, adopted on 28/04/2008 and effective since 03/03/2011). The 2010 IMF Quotas and Governance reforms included quota increases for all Member Countries and an amendment to the Articles of Agreement on the reform of the Executive Board. Under these reforms, advanced European countries committed to giving up two of their IMF Executive Director seats in favour of developing and emerging market countries.[79] In 2012, Belgium moved into the Netherlands' constituency and both now share one Executive Director seat;[80] further changes (resulting from the agreements between Poland and Switzerland as well as between the Nordic countries and the Baltic countries to share an Executive Director seat in their respective constituencies) did not appear to fully realise the commitment to reduce 'advanced European country representation' and they were subject to strong criticism.[81]

It must also be stressed that EMU membership of the IMF is quite uncertain for another objective reason: pursuant to Art. XIII, Section 1 IMF Articles of Agreement, the seat of the IMF is '*located in the territory of the member having the largest quota*'. Washington D.C. is where the IMF is seated because the USA holds at present

75 See *Eurostat*, The EU in the world, 2018 edition, https://ec.europa.eu/eurostat/documents/3217494/9066251/KS-EX-18-001-EN-N.pdf/64b85130-5de2-4c9b-aa5a-8881bf6ca59b (30/07/2018).

76 19 Euro Area Member Countries are represented on the IMF Executive Board via six different constituencies; among them, Germany and France each have a seat of their own. The seat of the United Kingdom in the IMF Executive Board is not factored in.

77 See *IMF Executive Directors and Voting Power*, (fn. 35).

78 *Pisani-Ferry/Sapir* as quoted in: *Smits*, International representation of Europe in the area of Economic and Monetary Union: legal issues and practices in the first ten years of the Euro, 2009, p. 18, available on the ECB's website, at: https://www.ecb.europa.eu/events/pdf/conferences/emu/RSmitsInternationalRepresentationOfEMUpaper.pdf (30/07/2018), argue that: 'the EU occupies 7 of the 24 seats on the IMF Board and essentially selects the Fund's Managing Director, who chairs the Board. It also holds more than 30 % of the IMF quotas and votes. By contrast, the US has only one seat on the Board and 17 % of the quotas and votes, whereas China and Japan together have two seats and 9 % of the quotas and votes'; Comp. *Bini-Smaghi*, (fn. 37), p. 63. See *Louis*, (fn. 53), p. 193; *Leino*, (fn. 38), p. 563.

79 For the seats held by EU Member States at the IMF Executive Board before the 2010 IMF Quotas and Governance reforms, see: The external representation of the EU and EMU, ECB Monthly Bulletin, May 2011, https://www.ecb.europa.eu/pub/pdf/other/art2_mb201105en_pp87-97en.pdf?e37ea7999b4fc337f7388dc685c8e85d (30/07/2018), p. 92.

80 See DNBulletin, IMF governance reform: open economies have a place at the table as at 17/10/2012, https://www.dnb.nl/en/news/news-and-archive/dnbulletin-2012/dnb279658.jsp# (30/07/2018).

81 See International Monetary and Financial Committee of the IMF, Statement by Guido Mantega, Brazil's Minister of Finance as at 13/10/2012, p. 3, https://www.imf.org/External/AM/2012/imfc/statement/eng/bra.pdf (30/07/2018); *Lopez Escudero*, New perspectives on EU-IMF relations: a step to strengthen the EMU external governance, European Papers, 2016, p. 495, www.europeanpapers.eu (30/07/2018).

17.46 % of the IMF quotas and 16.52 % of the voting rights, thus being the IMF member with the largest quota.[82] We think that a request to join the IMF on the part of the EMU would raise the issue pertaining to the need to remove the USA's *de facto* rights and relocation of the IMF seat outside of the USA, and would not be successful without due regard being given to amending the above-mentioned Article of the IMF Articles of Agreement.

An additional disincentive with respect to not pursuing the membership of the EMU itself in the IMF or a consolidated external representation of the EMU in the IMF is due to the fact that there are Euro Area Member States that consider that they could come out as losers from a unified representation of the EU in the IMF.[83] It is underscored that 'while there has been ample time since the ratification of the Maastricht Treaty in 1993 to establish an efficient external representation, little action has been taken'.[84] The unified representation of the EU in the IMF would put an end to the existing over-representation of the EU at the IMF Executive Board. The EU Member States which have a seat of Executive Director or Alternate Executive Director[85] fear they might lose their political stature and the influence emanating from their seat in the Executive Board.[86]

In the EU, the problems relating to mixed constituencies have been seen as one of the key factors for Europe 'punching below its weight'[87] in the IMF; it is believed that a single EU constituency would enable EU Member States to have a strong impact on IMF policies.[88] Given that the Euro Area Countries are currently spread over various constituencies in the IMF, the Commission proposed in its 2015 Proposal that they form one or more constituencies composed exclusively of Euro Area Member States by 2025 (Art. 8, para. 3). The formation of constituencies is not formally stipulated in

82 See IMF Members' Quotas and Voting Power, as well as IMF Board of Governors (as at 30/07/2018), http://www.imf.org/external/np/sec/memdir/members.aspx (30/07/2018).

83 See *Brandner/Grech/Paterson*, Unifying EU representation at the IMF Executive Board. A voting and veto power analysis, Institute for Advanced Studies Vienna, 2009, at https://www.ihs.ac.at/publications/eco/es-245.pdf (30/07/2018).

84 See *Bini-Smaghi*, Powerless Europe: Why is the Euro Area still a political dwarf?, International Finance Vol. 9 No. 2 2006, pp. 261-279.

85 It must be pointed out that after the IMF 2010 Quotas and Governance reforms, all Executive Directors are now elected, even those representing single-seat countries such as Germany and France.

86 See *European Commission*, EMU@10: the evolution of economic governance in EMU, Economic Papers 328, June 2008, p. 146.

87 See *Wouters/van Kerckhoven/Ramopoulos*, The EU and the Euro Area in international economic governance: the case of the IMF, in: Kochenov/Amtenbrink (eds.), The European Union's shaping of the international legal order, 2014, p. 310; *McNamarra/Meunier*, Between national sovereignty and international power: what external voice for the euro?, International Affairs, 2002, pp. 849-868; for a current analysis on the distribution of voting power in the IMF Board of Governors, see *Leech*, Transparency and democracy in the governance of the IMF and reforms in progress: a voting power analysis, in: Sciso (ed.), Accountability, transparency and democracy in the functioning of Bretton Woods institutions, 2017, pp. 3-17; *Cafaro*, The missing voice of the euro. Legal, technical and political obstacles to the external representation of the Euro Area, Il Diritto dell'Unione Europea, 2011, p. 907.

88 See *Bini-Smaghi*, (fn. 57), p. 247.

the IMF Articles of Agreement. With the exception of the 5 IMF members – i.e. USA, United Kingdom, Germany, France and Japan – that formed their own constituency before 2010 IMF Quotas and Governance reforms, IMF constituencies were formed based on regional coherence, as well as a country's search for a more influential role within a constituency group.[89] In the past, formal rules (known as 'Decisions') have been adopted to safeguard a level-playing field between constituencies, but over time these rules have gradually lost effectiveness. Elected Executive Directors were originally supposed to have a minimum voting power of 19 % and a maximum voting power of 20 %.[90] By 1970, the margins had been altered to 6 % and 13 %.[91] The maximum percentage of votes to be wielded by an elected Executive Director was 9 % prior to the 2010 IMF Quotas and Governance reforms, but this rule has since been abolished. This would allow in principle all of the Euro Area Member States to form one or more homogeneous constituencies. Such a debate depends on consensus being reached with all other IMF members, in line with the IMF framework (Art. XXVIII(a), IMF Articles of Agreement).

IV. Conclusions

The seminal development of the creation of the EMU and the emergence of the euro as a European currency – which altered the composition of the IMF's Special Drawing Rights (SDR) basket, following the substitution by the euro of two major European currencies, the French franc and the German Deutschmark – did not signal any fundamental change. Despite the subsequent transfer of competences to the EU, the EU Member States remain members of the IMF lacking the competence to make decisions within the IMF's remit. Euro Area representation in the IMF is to this day based on 'pragmatic agreements' between the EU and the IMF, which have, however, shown their limits.

The consolidated representation of the euro, set out in the 2015 Commission proposal for a consolidated representation of the Euro Area in the IMF, raises issues that are primarily of an institutional nature. It is imperative that institutional issues are resolved, in order to normalise the present situation, which, on the one hand, deprives the EMU from being represented in the IMF by those bodies that are respectively competent and, on the other hand, prolongs the image of Europe's fragmented representation through several different constituencies at the Executive Board, which, albeit numerous, cannot promote the EMU's catalytic role vis-à-vis the total voting rights held by EMU Member States.

89 See *Martin/Woods*, Multiple-states constituencies in the IMF: an agency approach, in: Sixth Jacques Polak Annual Research Conference, IMF, p. 20, https://www.imf.org/external/np/res/seminars/2005/arc/pdf/mart.pdf (30/07/2018).

90 Ibid., p. 17.

91 Ibid., p. 18.