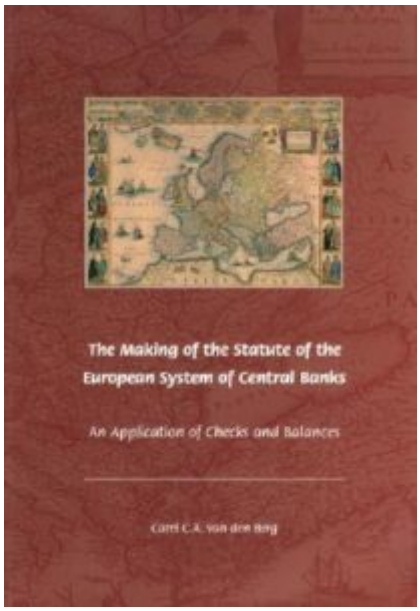
The Making Of The Statute Of The European System Of Central Banks ~ Chapter 2: Integration Theory, Federalism And Checks And Balances



Integration and transfer of power

Economic and political integration has been studied by a number of European authors. These studies related to the desirability for *economic* integration (a.o. Tinbergen)[i] and to ways to achieve *political* integration, on a worldwide scale or a regional scale (Mitrany, Haas).[ii] And there were 'practioners' (Monnet and Schuman). As to the academic writers occupied with questions relating to political integration, they were especially concerned with the issue of the optimal form of international organizations – intergovernmental or supranational. The proponents of supranational forms have won, be it of course dependent on the areas to be covered. Specific attention for the institutional aspects of integration (e.g. which powers to transfer, which decision-making procedures) is usually reserved for writers specialized in law, especially those specialized in European law (Lenaerts, Kapteyn and VerLoren van Themaat and more typically Dutch scholars like Barents and Brinkhorst)[iii] or American constitutionalism (Vile, Boon).[iv] But usually their emphasis is describing and explaining how the institutions actually work (and possibly recommending improvements) rather than putting down an overall framework for the institutional arrangement of those institutions – probably also because many institutions are seen as *sui generis* or otherwise historically determined. Below we will touch upon relevant elements of the work of those who have written in this area and this will lead us to a description of the concept of checks and balances, which will enable us to develop a framework to assess the role of checks and balances in the framework of the

European central bank.

Above we have mentioned Tinbergen. In his book *International Economic Integration* (1965) Tinbergen argues that a central agent is primarily needed where one government may adversely or favourably affect the interests of other nations. However, he does not deal with the institutional aspects of this agent. Other writers were more focused on the issue of political integration. In *Beyond the Nation-State* (1968) Ernst Haas deals with the questions such as 'what kind of international organization is required in order to maximize a process of international integration' (defined as a process of growing mutual deference and institutional mingling[v]). To answer this question Haas turns to study the dynamics of *intergovernmental* types of organizations. Intergovernmental organizations, which can only act on behalf of their members and within a limited technical mandate on behalf of themselves, had been recommended by Mitrany, the founder of the functionalist school, as a way to propagate international integration. According to Haas, intergovernmental organizations are only successful, as long as there is mutual trust between the participants, for the delegates remain representatives of their respective governments. Haas applies this approach to the International Labor Organization (ILO), which confirms him in his view that a process of international integration will only have a chance of succeeding when the central organizations are supranational, as opposed to international, in character – the crucial difference being that the supranational organ would be autonomous, having independent rather than intergovernmental powers within its own domain and would have the capacity and desire (or better: a natural propensity) to expand its activity into adjacent sectors.[vi]

Seen from our perspective, it is important to realize that Haas' neo-functionalism is a theory concerned with the *dynamics* of regional integration.[vii] The supranational ESCB might be seen as part of such integration, but the neo-functionalist theory does not provide a framework for assessing the design of the ESCB. More in general, the so-called 'Monnet method' for achieving European integration, i.e. making small steps at a time, exemplified by the establishment of the European Coal and Steel Community in 1951, could be seen as an example of both the functionalist and the neo-functionalist method. However, there are important ideological differences, as the founder of the functionalist method Mitrany was opposed to the project of European regional integration, because he feared European nationalism would replace 'national' nationalism. The European

debate between ‘economists’ and ‘monetarists’ can also be put in this perspective. The ‘monetarists’ wanted to give priority to integration in the monetary sphere. Once achieved, monetary integration was expected to ‘spill over’ and force integration in other domains. According to the ‘economists’ monetary integration had to follow economic and political integration, as money was seen as an attribute of sovereignty, and introducing a single currency was likened to member states giving each other a blank cheque.[viii]

Another post-war school on integration was the Social Communications School, founded by Karl Deutsch in the early fifties.[ix] Deutsch perceived integration at the international level as a process of strengthening the cohesion of transnational groups (with the same socio-economic characteristics and the same problems or values). Increased cooperation among these groups would lead to an increasing mutual dependence among political actors, thus promoting a process of integration among them. However, as late as 1967 Deutsch concluded that in Europe the forces to increase the independence of the nation-states were stronger than the forces strengthening the cohesion of transnational groups.[x]

The relaunch of the Community, with the Single European Act (1986) and subsequently the Maastricht and Amsterdam Treaties, has given rise to studies trying to explain the driving forces behind this form of supranational integration. See for an overview Cram (2001).[xi] In this process governmental preferences are accorded an important role. According to some these preferences are endogenized, i.e. the participation in lighter forms of integration, like the EEC and the EMS, alter the perceptions held by the national elites of their own interests and lead to the development of shared identity and norms. Others, e.g. Wolf (1997), applied the existing theories to explain the establishment of EMU. Wolf found that both Intergovern-mentalism and Neo-Functionalism had explanatory value when applied to EMU.[xii] Finally some authors hold the view that no single theory can explain EU governance at all levels of analysis.[xiii] More recent research follows and promotes an eclectic approach, i.e. borrowing concepts of different strands of integration theories in order to understand the process (or better said: certain episodes) of European integration. One example, the theory of multilevel governance, deserves special mentioning, because an attempt has been made to describe the ECB in terms of this theory.[xiv] This particular integration theory acknowledges the continued importance of individual states and intergovernmental bargains, but also recognizes the shifts in

decisional authority away from individual member-state control towards institutions at the (in this case) European level. However, we find the attempt does not convince, as the influence of national interests in the ECB is artificially exaggerated in order to introduce a 'multi-level'. To be more precise, both the influence of the national executive elites and the eurogroup (Ecofin-12) is exaggerated and the NCB governors are – misleadingly – seen as representing an 'intergovernmental voice to ECB deliberations'.

There are also authors who assess the actual European institutional structure, or details thereof, in terms of legitimacy and accountability.[xv] They look for possible improvements in these areas, but do not provide criteria for an optimal design of a supranational organization with distinctive federal characteristics. More recently, the issue of optimal institutional rules for federations has received some attention from the economic profession as well. An interesting example is the study of Alesina, Angeloni and Etro[xvi] on the organization of federations in which the members decide together on the provision of public goods. The authors find among others that federal mandates in which both the state and federal levels are involved in providing public goods are typically superior to complete centralization and are politically feasible. Furthermore, they find a qualified majority voting rule in a centralized system can be a useful device to correct a bias towards 'excessive' union level activism. However, this study seems less applicable in the sense that the authors allow for differences in the provision of public goods due to local differences. In the central bank system the input may be different (i.e. local circumstances and preferences may differ), but the outcome is one (and the same) interest rate. Of course, in other areas, like payment systems, local differences are allowed to exist.

Supranationality implies transfer of sovereign power to a higher level of government. Based on the literature studied I distinguish four degrees of power transfer:
– Reversible power sharing
– Reversible power sharing subject to the settlement of conflicts by procedures of arbitration
– Non-reversible but non-absolute power transfer
– Absolute power transfer.

The first form is close to intergovernmentalism; an example is the transfer of power, while allowing for an opt-out or the possibility to invoke the requirement

of unanimity for a certain decision. The second form would introduce the possibility for a majority of the members to put a unilateral decision of one member to opt-out or to invoke the unanimity requirement before an arbitration committee, which takes a binding decision. The third form is one which does not allow to block a current decision, but allows for influencing the outcome of similar decisions in the future. An example is the right of a government to appoint new members of the Supreme Court or of the central bank's executive board, possibly with a political thinking more in line with that of the appointing government. The last form of power transfer would on the face of it seem to be the most permanent of the forms, but in the end this is most likely not to be true, because it is not adaptable. That is to say, it is too rigid a form to be able to adapt to changes in the environment. In this respect we quote from the study by Elazar and Greilsammer: 'It is commonly said that the U.S. Constitution has survived until now, because it is a fundamental charter and is far from being a narrow legalistic code. The strength of the Constitution – unlike the French Constitutions, for example – has been its ability to adapt itself to changing circumstances.' It would seem that the ESCB is an example of non-reversible but non-absolute transfer of power (type 3).

Federalism

This brings us to the concept of federalism. There is no universal definition which captures every aspect, so we turn to a description. We borrow a description from Elazar and Greilsammer, which captures a number of aspects relevant for our study:[xvii]

'In strictly governmental terms, federalism is a form of political organization which unites separate polities within an overarching political system, enabling all to maintain their fundamental political integrity, and distributing power among general and constituent governments so that they all share in the system's decision-making and executing processes. …. [F]ederalism has to do first and foremost with a *relationship* among entities – and then with the structure which embodies that relationship and provides the means for sustaining it.'

This description expresses that federalism is more than transferring power to a higher level, but it is also more than just power *sharing* – the American system can best be described in terms of 'powers that co-exist'. There is no hierarchy between the States and the Federal Government, the only difference being that the power of the Federal Government extends to a larger area than that of an

individual state.[xviii] Behind this is the strong American allergy for too large concentrations of power. In practice, it is difficult to define what is exclusively in the federal sphere of competence, or in the state sphere, or in the local sphere. Inherent to such a system, in which the division of power is not very precise nor detailed, is the need to have checks and counterchecks, which guarantee one own's rights and which limit the powers of the others. This brings us to the question of 'checks and balances'.

Checks and balances

The phrase 'checks and balances' is most known for its use as a description of the American system of government. The essential feature is that the departments (branches) of government are not just separate from each other (i.e. having their own functional jurisdiction and the absence of personal unions)[xix], but also exert limited control over each other, to the extent necessary for preventing departments (branches) from assuming authority in areas for which other branches are responsible. This philosophy was based on the experience that especially the legislature if left to itself could expand its powers in the field of the executive and in extreme cases even taking on judicial powers. Such an extreme case had been the Long Parliament, which governed England for a period of twenty years (1640-1660) following the Civil War by appointing a host of committees dealing with all the affairs of state, confiscating property, summoning people before them, and dealing with them in a summary fashion. A similar, though less extreme development took place in the early years of the United States (1776-1787), when the States established constitutions based on the concept of the separation of powers, but where in fact the State legislatures soon meddled in every type of government business, including those normally reserved to the judiciary. This explains why the Constitution of the United States of 1787 is based on a combination of the ideas of the separation of powers and checks and balances.[xx]

Checks and balances presuppose one is able to distinguish several functional powers,[xxi] which can be separated without creating deadlock. These checks can take different forms. Examples (taken from the American Constitution) are: the president has a veto power over Congressional legislation (though he can be overruled),[xxii] Congress has the power of impeachment,[xxiii] the president nominates (e.g. Judges of the Supreme Court, Ambassadors, important officials) but needs the assent of the Senate,[xxiv] the Supreme Court may invalidate

legislation.[xxv] Some define the bicameral character of Congress, consisting of a House of Representatives and a Senate, as another (internal) check and balance, as both chambers have to agree with legislation.

In the framework of the European Communities, the functional separation of powers is less clear: e.g. the Commission is both legislator and executive, the Council of Ministers has legislative power, but its members are, back home, part of the executive branch. On the other hand, the European system is characterized by many control mechanisms: Community legislation requires input or approval from two (sometimes three) 'branches' (the Commission, the Council of Ministers, the European Parliament – sometimes advice, sometimes approval), the appointment of the Commission members by the Heads of State is subject by the European Parliament,[xxvi] the Commission can be dismissed by the European Parliament, the legality of decisions by the Council of Ministers is subject to review by the Court of Justice.[xxvii]

Separation of powers does not only exist between the branches, but also within branches. Again, this is the case in the United States, where I refer especially to the establishment by Congress of independent regulatory commissions, like the Interstate Commerce Commission (1887) and the Securities and Exchange Commission (1934).[xxviii] The increased role of government in modern society and the increased complexity of this role in general have led to a reduced role of the legislative branch and – in the European context – an increased role of the government as regulator, while the implementation (i.e. decisions to be taken in individual cases) is also in the hands of the government (civil service). This could create two temptations: first, the temptation to change regulation ad hoc, at short notice and in an opportunistic way, with the argument that he who sets the rules, can at least also change them; second, and in fact going one step further, the temptation to dispense with regulation altogether. This could lead to arbitrariness, abuse of regulatory power for political reasons and unequal treatment and could constitute in itself a very valid reason to set these regulatory tasks at a distance of the Minister by creating *independent* bodies for applying the rules to individual cases.[xxix] The case of a central bank is related to this, in the sense that a government could, under circumstances, be tempted to intervene in central bank's monetary policy decision-making. However, this would affect the credibility of the central bank's monetary policy, and therefore its effectiveness. Thus, there are good reasons to grant the central bank independence, i.e.

independence from the executive and the legislator. In the case of the ECB the independence is directed to the European governmental branches. Another threat to the effectiveness of the ESCB could come not so much from a direct instruction (or political pressure), but from uncontrolled fiscal behaviour. Monetary Union makes free rider behaviour more likely, as neither ballooning current account deficits nor exchange rate pressures can exert discipline anymore once the national currency has been replaced by a single currency.[xxx]

Indeed, a major threat to price stability (the ESCB's primary objective) could come from derailed *national* budgetary positions (which are more relevant than the small budget of the European Commission), for which reason the 3 per cent of GDP limit for national government deficits can be seen as an important check, *in casu* on the behaviour of national governments. This risk emanating from the fiscal side was already clearly described by the Delors Committee,[xxxi] and this led to the rule for a limit on the deficit and the debt. Failing budgetary policies together with high unemployment will make the ECB vulnerable: inflation which is too high in some countries (eating away purchasing power) and too low in other countries (deflationary) will lead to attacks on its monetary policy and, in the end, on its independence. This is why the ECB has every reason to be openly critical on any deviations from agreed budgetary rules, which rules are part of its constitutional checks and balances. We will make some critical remarks on the economic part of EMU in chapter 12, seen from the perspective of checks and balances.

The ESCB, being set up as a federally designed system of central banks, is, however, also characterized by the relationship between its constituent elements. More specifically, a natural partnership, but also tension, could arise between the ECB and the national central banks (NCBs), both in the operational area as well as in the highest decision-making body, the Governing Council, in which are represented the members of the Executive Board and the presidents of the NCBs – a tension the drafters of the ESCB Statute were well aware of. In the end a form has been found which gives the upper hand neither to the centre nor to the periphery. Also here the concept of checks and counterchecks applies.

Checks and balances can be framed with different time horizons. For instance, the examples of checks and balances in the American Constitution listed above can be divided into two groups: checks which work immediately (e.g. veto, assent) and checks which work over time (appointments). Checks that work over time

probably take away tensions which would otherwise be fought out in a different way, possibly leading to a break-up of the system. In other words, the presence of such checks and balances adds a desired flexibility to the system. It means the system or – within its mandate – a regulatory body can adjust over time to external circumstances, though at the same time it introduces certain continuity over time.

A definition of '*a system of checks and balances*' which covers both external and (in case of a federally designed organization also) internal aspects could thus be formulated as follows:
"a rule-governed system for two or more public bodies with rules which prevent the concentration of too much power in one public body (or a part of that public body), basically by separation of functions, [xxxii] but combined with rules which *protect* each public body's power, which allow for *influence* by and over the other public bodies, which *stimulate co-operation* among these public bodies and which *prevent the dominance* of personal interest over public interest, among others through public control mechanisms." [xxxiii]

On top of this, these rules of the game should allow for some *intertemporal flexibility* (to prevent the need to overhaul the framework, which could put several valuable characteristics of the institution at risk). Intertemporal flexibility will serve the longevity of the system, because it allows for different degrees of power concentration, which could serve possible changing circumstances. [xxxiv] This element is especially relevant for the relation of the ESCB vis-à-vis the political authorities.

Normative aspects
This definition will help us identify checks and balances in the ESCB Statute. Together they form a system, the sustainability of which would depend on a certain degree of flexibility. However, the system should also be acceptable from a normative point of view. As a starting point for formulating elements of a possible normative framework we will take the fact that the organizations we study are part of modern Western society, which can be characterized as a liberal democratic society based on the rule of law. This implies that some *basic notions* apply, like the liberal notion that infringements by the State into the rights of citizens should be as limited as possible, the democratic notion that any law, regulation or decision based thereupon should have a democratic basis (i.e. should be based on a decision by general representative (elected) bodies), that

'government' should be accountable to the 'democratic complex'[xxxv] and that concentration of large powers should be prevented both in one branch/public body and/or in one part of a public body (separation of powers doctrine). The notion of the rule of law refers to the concept of due process and the fact that public administration should be subject to judicial control. Apart from this, general notions should apply like the notion that public administration should be effective and efficient (no squandering of public money). These notions have been derived from Zijlstra (1996, pp. 43-51, 232-233 and 480-481). Cushman (1941, pp. 11-13 and 759) likewise emphasizes the notions of democracy, responsibility (i.e. vis-à-vis the three governmental branches), separation of powers, efficiency and effectiveness.

We translate these notions into the following list of *basic norms*, with which a system of checks and balances of a federal central bank system should comply:

– The regulatory powers of the central bank system should be circumscribed.
– It should be accountable to the 'democratic complex'. [xxxvi]
– There should be as little infringement as possible into the rights of citizens.
– The doctrine of separation of powers should apply.
– It should be efficient.
– It should be effective.
– The rule of law should apply.
– It should be democratically based.

A categorization of checks and balances
The separation of powers doctrine aims at preventing one branch or one part of the system from attaining too much power.[xxxvii] This doctrine is sometimes referred to by the notion of 'balance of power', which itself is a mixture of 'delineation of powers', 'independence', 'interdependence' and the 'need to cooperate'. Based on this we distinguish *prima facie* four categories of checks and balances:
– those which *protect* a body's independence and competences;[xxxviii]
– *controlling* (or blocking) mechanisms (which give a branch the power to prevent the build-up of uncontrolled power by one of the other branches);[xxxix]
– *consultation* mechanisms (either voluntary (i.e. at one's own initiative) or obligatory, i.e. when prior consultation is required);[xl]
– *accountability* mechanisms;

We add a fifth category to capture the notion of some desirable flexibility over time:
– some degree of *flexibility* over time.

In this study we use this categorization as a model for recognizing and evaluating checks and balances in federal structures. In the remainder of the study we apply this model at three levels:
– the checks and balances between the Treaty-based institutions in the area of monetary policy (i.e. between the ESCB and the public authorities)

– the checks and balances between the components of the federally structured European System of Central Banks (ECB, NCBs)

– the checks and balances between the members of the ECB's Governing Council (i.e. the Executive Board and the governors)

At the end of each cluster we group the checks and balances found according to these five categories. One would expect all categories to be represented, in a balanced way – where this is not the case, there have to be special reasons for it, or it might point to potential weaknesses in the design. The categorization should assist in finding deficiencies and imperfections, from which will follow suggestions for improvements. These suggestions will be presented in each cluster's final section.

While accountability as such is part of the normative framework, the accountability mechanisms themselves are part of the checks and balances. They help keeping powers in check in an indirect way. The accountable party is forced to be transparent,[xli] while the 'receiving' party is likewise limited by pre-defined accountability mechanisms, i.e. the legal framework lends the accountable party some institutional free ground. In the American Constitution there is less emphasis on ex post accountability, as the Constitution's checks and balances work mostly directly). For instance limits are set to a branch's powers over the other branches (e.g. the president cannot dissolve Congress, Congress cannot dismiss the president, but only impeach him/her). In the US in the end the executive and legislative branches are 'responsible' only to the electorate.[xlii] In the case of the Federal Reserve, however, accountability does play a role, i.e. in its relationship with Congress (which established the Fed) and with the Administration (which appoints the members of the Board of Governors). In all

cases public opinion matters, as the public constitutes the electorate.

There are not many studies taking a similar approach. Some studies look into the optimal allocation of power between accountable and non-accountable branches of government, e.g. Maskin and Tirole (2004). In their study they conclude that highly technical decisions, of which the feedback on the quality thereof is slow may be best allocated to appointed (unaccountable) officials (called 'judges') rather than to elected (re-electable) officials (called 'politicians'), though 'judges' should be given less discretion than 'politicians'. When important minority interests are at stake independent 'judges' could create a better outcome for society than majority rule. Eggertsson and Le Borgne (2003) also come close to some aspects of what we are doing. They study why, and under what circumstances, a politician gives up rent and delegates complex policy tasks to an independent agency, which crucially has a longer time-horizon. (We refer to the last pages of chapter 3 for a critical remark on their approach.)

Based on the above we conclude that an important condition for the durability of the ESCB is that the legal framework defining its external[xliii] and internal relations contains adequate checks and balances in all relevant aspects of its institutional set-up. In the final chapter of this study we will, inter alia, try to answer the following questions:
– Does the Statute, as one would expect from a federally designed central banking system, contain an adequate measure of checks and balances?
– Is it assured that none of the parties/actors involved can assume all power at the cost of the other?
– Does the system display an efficient degree of flexibility over time to adjust/adopt to changing circumstances?
– Does the system of checks and balances comply with the basic norms one would expect to hold for such system?

In describing the genesis of the articles we will also try to gauge the influence the central bank governors had on the formulation of the articles of the ESCB Statute.

Notes
[i] J. Tinbergen (1965), International Economic Integration.
[ii] D. Mitrany (1946), *A Working Peace System* (Royal Institute of Int'l Affairs); E. Haas (1958), *The Uniting of Europe: Political, Social and Economic Forces*, 1950-1957; and E. Haas (1968), *Beyond the Nation-State – Functionalism and*

International Organization. See also Elazar and Greilsammer (1986), 'Federal Democracy: The U.S.A. and Europe Compared – A Political Science Perspective', in: *Integration Through Law*, Volume 1 (ed. by Cappelletti a.o.), containing inter alia an overview of theoretical approaches to European integration in the period after World War II (pp. 79-85).

[iii] K. Lenaerts (1991), 'Some Reflections on the Separation of Powers in the European Community', *C.M.L. Rev*. 11; K. Lenaerts (1998), 'Federalism: Essential Concepts in Evolution – the Case of the European Union', *Fordham International Law Review*, Vol. 21; P.J.G. Kapteyn and P. VerLoren van Themaat (1998*), Introduction to the Law of the European Communities*; R. Barents and L.J. Brinkhorst (1994), *Grondlijnen van het Europees Recht.*

[iv] M.J.C. Vile (1967), *Constitutionalism and the Separation of Powers*; P.J. Boon (2001), *Amerikaans staatsrecht*.

[v] Haas (1968), p. vii.

[vi] Haas also referred to other commentators on the functioning of international organizations, among whom Gunnar Myrdal, former Executive Secretary of the United Nations Economic Commission for Europe. Myrdal ventilated sobering remarks on international intergovernmental bureaucracies. They may be occasionally successful, but in such organizations voting does not resolve conflicts of a substantive nature, only procedural issues, and they do not arise above a minimum common denominator of interests. (Haas (1968), p. 98 and 119.)

[vii] Another difference with the functionalist school of thought, apart from the emphasis on supranational organizations, is that the neo-functionalists rejected the functionalists' rigid distinction between socio-economic (labelled non-controversial) and political functions. The functionalist school had advocated integration in the non-controversial or 'technical' sectors through the creation of a myriad of international agencies performing collective welfare tasks, with extensive powers in their own limited spheres. This would prepare the mind of the peoples for future cooperation at the political level. The neo-functionalists considered the socio-economic and political spheres as a continuum. According to Haas once the process of the shift in popular attention from national to supranational government has started on instigation of the national governments, it will become more or less automatic, because of technical spill-overs (cooperation in one sector would spill over into cooperation in other sectors). (This was criticized by Stanley Hoffmann (1966), who distinguished between issues of 'low politics' and 'high politics', over which national governments would want to maintain tight control.) However, Haas also argued that there was no

'dependable, cumulative process of precedent formation leading to ever more community-oriented organizational behaviour, unless the task assigned to the institutions is *inherently expansive*, thus capable of *overcoming the built-in autonomy of functional contexts* and of surviving changes in the policy aims of member states.' (Quoted in L. Cram (2001), in J. Richardson (ed.) (2001), *European Union*, p. 59 – emphasis by Cram). This expansive element is a tenet of the European Community, see the first recital of the Treaty of Rome establishing the EEC (1957): 'Determined to lay the foundations of an ever closer union among the peoples of Europe'. Note that the emphasis is on uniting peoples, and not states.

[viii] See André Szász (1999), *The Road to Monetary Union*, p. 9-10.

[ix] Deutsch and Haas are seen as the founders of (post-war) integration theory.

[x] Elazar and Greilsammer (1986), pp. 83-84.

[xi] L. Cram (2001), 'Integration theory and the study of the European policy process: towards a synthesis of approaches', in J. Richardson (ed.) (2001), *European Union – Power and policy-making*.

[xii] Intergovernmentalism, as defined by Wolf, explains integration through a process of converging interests and preferences, while (neo)functionalism explains integration through functional spill-over, 'forcing' ever more integration. Wolf points out that liberal (intentional) intergovernmentalism views the EC as an instrument of national governments; in their view the EC is 'kein eigenständiger Akteur' (is not one of the negotiating parties), but its institutions improve the 'Kooperationsbedingungen' (conditions for cooperation), for example they can improve the commitment credibility of the Member States by assuming certain functions. (Wolf (1997), *Integrationstheorien im Vergleich – Funktionalistische und intergouvernementalistische Erklärung für die Europäische Wirtschafts- und Währungsunion im Vertrag von Maastricht*, pp. 14, 62 and 273-274.

[xiii] View held by Peterson (1995), mentioned in Cram (2001), p. 65.

[xiv] P. Loedel (2002), 'Multilevel Governance and the Independence of the ECB', in A. Verdun (2002), *The Euro – European Integration Theory and Economic and Monetary Union*.

[xv] E.g. Everson (1995), 'Independent Agencies: Hierarchy Beaters?', *European Law Journal*, Vol. 1; Cappelletti a.o. (ed.) (1986), *Integration Through Law*, Vol. 1; but see also Kapteyn and VerLoren van Themaat (1998), Chapter IX.3, sections E and F and Epilogue, section 4 (as regards EMU topics).

[xvi] Alesina, Angeloni and Etro (2001), 'Institutional Rules for Federations', *NBER Working Paper* 8646.

[xvii] Elazar and Greilsammer (1986), p. 90.
[xviii] Uniformity in interpretation and application of federal law is assured through the appellate jurisdiction of the Supreme Court. See K. Lenaerts (1990), 'Constitutionalism and the Many Faces of Federalism', *The American Journal of Comparative Law*, Vol. 38, p. 252-262, and Boon (2001), chapter 5.3, also for a comparison with the European Court of Justice.
[xix] This is the so-called concept of the separation of powers, which aims at preventing a too large concentration of governmental power in one hand. (See S.E. Zijlstra (1996), *Zelfstandige Bestuursorganen in een Democratische Rechtsstaat*, p, 152.) One could say the motto of this concept is: 'division of power by separation of functions'.
[xx] Vile (1967), p. 43, 143 and 145-147.
[xxi] The most famous distinction is the Trias Politica, developed by Montesquieu (1689-1755). Montesquieu did not want to rely upon a concept of negative checks to the exercise of power, i.e. checks dependent upon the mere existence of potentially antagonistic agencies, charged with different functions of government – he went further, and advocated placing positive checks by placing powers of control over the other branches in the hands of each of them. In his writings the judiciary was not given powers of control over the other branches. At the same time, the judiciary's independence in trying individual cases was to be absolute, i.e. not subject to control by the other branches, directly nor indirectly. (Vile (1967), p. 87ff.)
[xxii] Constitution of the United States, Art. I, section 7, paragraph 2. The president does not have a line item veto. A line item veto is considered unconstitutional by the Supreme Court (Clinton v. City of New York (1998))
[xxiii] Constitution of the United States, Art. I, section 2, par. 5; Art. I, section 3, par. 6 and 7; Art. II, section 4. The House impeaches, the Senate tries the impeachment. The impeachment procedure relates to the president, vice-president and all civil Officers of the United States, which includes federal judges (see Boon (2001), p. 103-104). It is a typical feature of the American system that the president (Administration) cannot be dismissed by Congress (indeed, impeachment has not to do with policy, but with 'treason, bribery or other high crimes and misdemeanours'); likewise the president cannot dissolve Congress and call for elections.
[xxiv] Constitution of the United States, Art. II, section 2, paragraph 2 ('by and with the Advice and Consent of the Senate').
[xxv] The Supreme Court has the power to assess the constitutionality of State

laws (Art. VI, section 2 Constitution) and of Federal laws (Marbury v. Madison (1803)). This deviates from Montesquieu (see above). In other words, the Court sees itself as guardian of the system of checks and balances. It should be noted however that the Court does not have the means to enforce its opinion (see Boon (2001), p. 118).

[xxvi] This is only the case after the Treaty of Nice of December 2000, which became effective in February 2003. Approval of the European Parliament is not required for the appointment by the Heads of State of the Judges of the Court of Justice.

[xxvii] Kapteyn and VerLoren van Themaat (1998), p. 187.

[xxviii] See R.E. Cushman (1941), *The Independent Regulatory Commissions*. Cushman also places the Federal Reserve Board on his list of independent agencies. These agencies may perform quasi-legislative and quasi-judicial and/or executive-type functions. Because they do not fit in one branch (or better said: in more than one) the independent commissions are sometimes likened to a 'fourth' branch. Because of the characteristics of the commissions (among which limited mandate and, essentially, respect for the due process of law doctrine) the legislative act of creating such agencies itself has never been judged by the Supreme Court as incompatible with the constitutional separation of powers doctrine, though the Supreme Court might rule negatively on individual decisions by these commissions. (The word 'regulatory' is a bit misleading, as what these commissions basically do is exercising control and discipline over private conduct.)

[xxix] Such bodies are called in Dutch *zelfstandige bestuursorganen* (ZBOs, autonomous public bodies), a difference being that in the Dutch case autonomous public bodies with national competence are as a rule created by the Minister, i.e. the executive branch with approval from the legislator, while in the US the independent regulatory commissions devolve from Congress, though the members of the federal commission are always appointed by the US President (Cushman (1941), p. 743). In the Dutch context the Commission-Scheltema concluded in 1993 that the use of ZBOs would improve the system of checks and balances in the Dutch system of public law, because it creates more distance between the rule-makers (in modern society many rules are made not by the legislator, but by the executive branch) and those who apply the rules to individual cases – mentioned in S. E. Zijlstra (1996), p. 157.

[xxx] At the same time the central bank of the anchor country loses its capacity to discipline the fiscal authorities of its country, because in EMU monetary policy is

set for the euro area as a whole. A less disciplined fiscal authority might also imply less disciplined trade unions, because they might hope that a less disciplined government is more willing to correct for any negative employment effects of too high wage demands. This points to an increased need for fiscal rules in EMU, as compared to before EMU.

[xxxi] The Delors Report (section 30, third paragraph) defined unbalanced fiscal positions as a direct threat to price stability: 'In particular, uncoordinated and divergent national budgetary policies would undermine monetary stability and generate imbalances in the real and financial sectors of the Community.'

[xxxii] Usually a distinction is made between executive, legislative and judicial functions. A separate category are independent (regulatory) commissions/independent public agencies or organs established by or pursuant to public law and invested with any public authority. Such organs usually have a hybrid character (combining some regulatory and executive power). In these cases it is important to allow for enough distance between rule-making and the application of policy to individual cases.

[xxxiii] The checks and balances determine the rules of the game. These rules undoubtedly leave room for strategic behaviour of the parties involved. However, we do not look into this, as we look into the rules of the game themselves, which should ensure that powers do not become concentrated into the hands of one party.

[xxxiv] The importance of institutions being adaptable is also made by Douglass North, i.e. especially in complex environments characterized by non-efficient markets and incomplete information. Rigid institutional structures are not equated with success. (D. North (1994), Economic Performance Through Time, *AER* Vol. 84, Issue 3, p. 359-368.)

[xxxv] For a definition see S.E. Zijlstra (1996), p. 481.

[xxxvi] This relates to the issue of democratic control and presupposes sufficient transparency.

[xxxvii] This could hardly be better expressed than by quoting from *Federalist* paper no. 47 written by James Madison: "From these [historical] facts by which Montesquieu was guided it may clearly be inferred, that in saying 'There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates,' or 'if the power of judging be not separated from the legislative and executive powers,' he did not mean that these departments ought to have no *partial agency* in, or no *control,* over the acts of each other." Here Madison expressed the core of the American system of checks and balances,

i.e. not a simple separation of powers, but mechanisms to prevent the accumulation of too much power in one institution or one governmental branch. (‘*The Federalist*’ papers, which initially took the form of brilliantly written essays published in the New York press under the pseudonym of Publius over the period October 1787 – May 1788, were written by Hamilton, Madison and Jay with the aim to convince the people of the State of New York to vote in favor of the Constitution of the United States of America (‘We the People …’), which had been drafted during the Constitutional Convention held in Philadelphia in 1787 and which was meant to replace the earlier Articles of Confederation (1777); see Michael Kammen (1986), *The Origins of the American Constitution*, p. 125)

[xxxviii] This is a wide category covering inter alia the endowment of exclusive competences and mechanisms that shield from political pressure.

[xxxix] Examples are the right of the US president to veto budget proposals by Congress and the requirement of Senate consent for the presidential appointment of new members of, for example, the Supreme Court and the Board of Governors. Such mechanisms ensure that no power can fulfil its tasks in an efficient way without at least the assistance of one of the other powers, thus controlling the use which the first power makes of its authority – see Lenaerts (1991), p. 11.

[xl] A difference between consultation and accountability is that consultation takes place *ex ante* and accountability *ex post*.

[xli] Transparency is a means to an end, i.e to make accountability work.

[xlii] This is different in the European countries, where parliaments may force governments to step down, when a majority of parliament lost confidence in the government, and where governments may call for new elections. The ‘control’ function of US Congress as regards actions by the Executive takes the form of its right to approve the Administration’s appropriations (expenditures, taxes) and its right to be informed by the Administration’s Departments in the form of reports or hearings and its right of investigation. (Leibbrandt (1968), *Economen in dienst van politici*, dissertation Vrije Universiteit Amsterdam.) In fact, the States created a federal government with many internal checks and balances to prevent one branch from becoming dominant, with accountability not directed to them (the States), but directly to the people. But it should also be recalled that the States placed the federal government not over them, but next to them. See our paragraph on Federalism above.

[xliii] This relationship is usually framed in terms of the opposition between independence and accountability. However, we will take a much broader look.