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# ASSESSING UPPER CHAMBERS' ROLE IN THE EU DECISION-MAKING PROCESS

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# ABSTRACT

*With the Lisbon Treaty, the National Parliaments are finally involved in the EU decision-making process and there are called to actively contribute to the good functioning of the Union. However, the EU proved again its blindness toward the national constitutional settings and it does not recognise the distinctive features of each parliamentary system. In this way, the Early warning system introduced a unicameral logic and each house acquired an autonomous power to participate in the EU. Those provisions seem to reinforce the role of upper houses and some scholars hypothesised a potential rise of the Senates in EU affairs. Starting from this prediction, the paper generally investigates the role of upper chambers in the EU both in the political dialogue and in EWS. The paper argues that the role of each upper house in the EU strongly depends on some national features and the domestic impact is expected to be intensely mediated by the idiosyncrasies of each Member States.*

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Keywords*: upper chambers, subsidiarity, national Parliaments, Lisbon Treaty, early warning system, political dialogue.*

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# 1. INTRODUCTION

The Treaty of Lisbon introduced important novelties aimed to improving the participation of National Parliaments (NPs) in the EU decision-making process. The most important is the introduction of the Early Warning System (EWS), which gives to NPs the power to express concerns on subsidiarity directly to the European institutions. Thus, NPs have acquired an individual power with respect the scrutiny of compliance of EU draft legislative acts with the principle of subsidiarity. However, the System does not take into account the peculiarities of each national constitutional setting but rather it establishes a mono cameral logic and each house has acquired - according to art. 6 Protocol (2) - autonomous powers to participate in the EU. In this respect, art. 7 (2) Protocol No. 2 TEU/TFEU states that "each National Parliament shall have two votes, shared out on the basis of the national Parliamentary system. In the case of a bicameral Parliamentary system, each of the two chambers shall have one vote". This equal distribution of votes has important legal consequences in the national constitutional systems (Kiiver 2012).

In bicameral systems, the two votes are thus assigned regardless of their internal distribution of competences and regardless of the formal role played by each chamber in the national decision-making process. In other words, according to the Treaty provisions, the votes cannot be liberally assigned in line with the national division of competences but rather, in bicameral system, the houses must have one vote each. In this way, the upper houses have seen their positions reinforced at the European level. In fact, contrary to the widespread national constitutional realities of bicameral systems which recognise to upper chambers fewer formal powers with respect to the lower ones - except Italy and Romania -, today, upper chambers have acquired an autonomous power to participate in the EU decision-making on equal footing with the lower ones. This provision does not only impact on the EU level but it also entails considerable repercussions in the national constitutional framework and, mainly, for the executive-legislative relationship.

Despite those important implications, the literature has so far largely neglected the role of upper houses and NPs have been regarded as unitary actor, without any distinction between monocameral and bicameral systems. The aim of this paper is thus to bring the attention on the issue and to emphasise their role in the EU parliamentary democracy. Since, "Senates which are more independent from the cabinet than lower chambers in fact offer a greater prospect that their opinion will not merely be a repetition of what the government thinks already, and they can thus potentially add further ideas to the discourse" (Kiiver 2012, 66).

Having set this premise, the paper has a twofold aim. On the one side, it explores the participation of upper chambers in the EU and, conversely to the hypothesis of the potential "rise of the Senates" (Kiiver 2012), it argues that the active participation of upper houses is expected to be intensely mediated by the idiosyncrasies of each Members States. Specifically, National Constitutions, parliamentary norms and procedures, national culture, party system and, obviously, country's attitude toward EU, are expected to influence and shape their involvement in EU affairs. On the other side, it investigates the impact of those provisions on the national constitutional settings.

In order to fulfill those aims, the paper mainly focuses on the participation of upper chambers in the EWS and in the political dialogue. The choice to focus on the number of opinions and reasoned opinions adopted by upper houses is twofold. First, their adoptions presuppose an internal debate on EU affairs, and in some cases, this is not limited to the competent select Committee but rather, they should be adopted by the plenary of the House. Second, the participation in the political dialogue and the EWS determined an internal process of adaptation both in structural and procedural terms, which implies an impact on the national parliamentary system.

## 2. THE LISBON TREATY AND THE EARLY WARNING SYSTEM

Since the inception of the European Integration process, the system has been strongly characterised by its executive nature with a complete parliamentary marginalisation in the EU decision-making process. With the entry into force of the Lisbon Treaty, the general expectation to enhance the legitimacy of EU institutions increased. For the first time in the history of the European construction, one of the main text of the EU non only mentions NPs, but rather formally 'involves [them] in the European legislative process'[1]. NPs are finally called to actively contribute to the good functioning of the Union (Art. 12 TEU) and the Treaty identifies the ways in which this should be assured. However, the Article 12 TEU does not contain an exhaustive list of all the new powers conferred to by the Treaty to the NPs. The article should be jointly read with the content of the two Protocols (Craig 2008), namely, on the role of national Parliaments in the EU (No.1) and on the control of the application of the principles of subsidiarity and proportionality (No.2).

[1] Conclusion of the Working Group I on the Principle of Sudbisiarity, CONV 286/02, 5 available at http://register.consilium.europa.eu/doc/srv?l=EN&t=PDF&gc=true&sc=false&f=CV%20286%202002%20INIT

The Protocol No. 1 on the role of national Parliaments in the European Union and the Protocol No. 2 on the application of the principles of subsidiarity and proportionality establish a direct relationship between the NPs and the European Institutions. The information are no longer mediated by national governments, but rather are directly forwarded by the European level. This practice was already established through the 'political dialogue' and the Commission had already expressed its wish "to transmit directly all new proposals and consultation papers to national Parliaments, inviting them to react so as to improve the process of policy formulation"[2]. However, differently from the 'political dialogue', the Lisbon Treaty formally establishes a more incisive mechanism. Specifically, Protocol No. 2 on the application of the principles of subsidiarity and proportionality introduces the so-called EWS (Art. 6 Protocol. No.2), which formally involves NPs in the European legislative procedure and, precisely, in the initial phase of the EU decision-making process.

This mechanism is thus an ex ante subsidiary control to all EU draft legislative acts, which recognises an individual power to each chamber to express concerns on subsidiarity (Art. 6 (1) Protocol. No. 2). However, the mechanism can be triggered only collectively and two different procedures are established.

The first, the so called 'Yellow card', the EWS is formally triggered if one third of the votes allocated to NPs issues a branch of the subsidiarity principle (i.e. 19 votes) -a quarter in the justice, freedom and security area-. The second procedure, the so-called 'Orange card' –Art. 7 (3) Protocol No. 2 TEU/TFEU-, is limited to draft legislative acts subject to the ordinary legislative procedure (the co-decision procedure). In this case, the majority required is higher and reasoned opinions shall represent at least the simple majority of votes attributed to NPs, i.e. 29 votes.

As for the 'Yellow card', after the review, the initiator of the contested draft legislative act has three choices: maintaining, withdrawing, or amending the proposal and, in any case, "reason must be given for this decision" –art. 7 Protocol No. 2 TEU/TFEU-. In the case of the 'Yellow card' once the initiator gives its own reasons about why subsidiarity is nevertheless respected, the procedure is considered closed and it does not imply any further consequences. Differently, the 'Orange card' introduces a "heightened" (Dougnas 2008, 660) form of NPs' participation. This procedure is limited to draft legislative acts subject to the ordinary legislative procedure and it operates only if the reasoned opinions are adopted by the majority of the NPs. In this case, after the review, the decision is reserved to the sole Commission, who "may decide to maintain, amend

[2] See Commission Communication, A citizen's agenda. Delivering results for Europe, COM (2006) 211 final of 10 May 2006, then endorsed by the European Council (See Brussels European Council of 15/16 June 2006, President Conclusions, point 37)

or withdraw the proposal" (Art. 7 (3) Protocol N.2). If the Commission decides to maintain the proposal, it shall "justify why it considers that the proposal complies with the principle of subsidiarity". At this point, the reasoned opinions of the Commission as well as of the NPs are submitted to the legislative authorities of the European Union, who must take "particular account" of both positions (Art. 7 (3) (a) Protocol. N. 2). Hence, both the NPs and the Commission's reasoned opinions shall be submitted to the Council and the European Parliament, which before the conclusion of the first reading, "shall consider whether the legislative proposal is compatible with the principle of subsidiarity" – Art. 7 (3) (a) Protocol No. 2 TEU/TFEU-. If a majority of votes cast in the Parliament or a 55% of the members in the Council considers that the proposal violates the subsidiarity principle, the procedure stops and the "legislative proposal shall not be given further consideration" (Art. 7 (3) (b) Protocol No. 2)[3].

## 3. THE LISBON TREATY: DEFINITIONAL ISSUES AND BICAMERAL IMPLICATIONS

With the introduction of the 'political dialogue' and later with the EWS, the participation of the NPs in the European decision-making process is today formalised. Since then, NPs have started to actively participate and establish a direct dialogue with the European institutions and the de-parliamentarisation thesis seems to be replaced by a change in the parliamentary attitude toward EU affairs. NPs have started to shape their institutional grounds and powers according with the new European provisions. Although with some exceptions, they stopped to being just national actors and they started to recognise their new role, embedded in a wider a more complex constitutional setting. However, in the Lisbon Treaty there are still some issues that cause a lot of ambiguities about the proper implementation of the mechanism. To start, the text neither provides a clear definition (Kiiver 2006, 19) "nor a list of the institutions that are actually meant by 'national parliaments' (Kiiver 2011, 539, 2012).

Obviously, according to Art. 2 TEU and Art. 10 TEU, the democratic foundation of EU is based on representative democracy, which necessarily implies the presence of representative assemblies, directly elected by the people and with the power to adopt legislative acts[4]. The sole difference

[3] According to Bermann, "it is very likely that the majority of government votes needed in the Council to enact legislation at the EU level is already lacking" (2009, 160)

[4] The use of the term 'national parliaments' proved to be extremely inadequate for the complex Belgian constitutional settlement. In this way, Belgium enlarged the understanding of the term and added a Declaration to the Lisbon Treaty, which reflects the Belgian federal system, "where no hierarchy of power is in place and all the authorities are placed on an equal footing under the Belgian constitutional law" (Romaniello 2013). The Declaration No. 51 states as

explicitly acknowledged by Art. 8 of Protocol No. 1 and Art. 7 (1) of Protocol No. 2 is between unicameral and bicameral Parliaments.

However, beyond this basic classification, the institutional landscape of NPs is profoundly heterogeneous (Kiiver 2012; Kaczynski, 2011; Olivetti 2013, Lupo 2013, 2013a[5], 2013b). This heterogeneity is far more evident in bicameral systems, where diversity has been the rule over time and among the countries: "bicameral institutions have been adopted by class societies and by federal states, by republican polities and by unitary political systems. They have been used to maintain the status quo, to amalgamate the preferences of different constituencies, and to improve legislation, and have been justified in all of these terms" (Tsebelis and Money 1997, 13). In this sense, the institutional arrangements and the powers recognised to upper houses vary a lot and any generalisation risks to lose the peculiarity of each constitutional system.

Thus, the Lisbon Treaty reaffirms the EU blindness toward the internal constitutional setting of its Member States and NPs are treated equally (Art. 7(1) of the Protocol No. 2), notwithstanding their powers and functions in the State. In fact, in bicameral systems, the two votes are assigned regardless of their internal distribution of competences and regardless of the formal role played by each chamber in the national decision-making process. In this way, the upper houses have seen their positions reinforced at the European level. Contrary to the fact that upper houses have usually fewer formal powers compared to the lower ones: e.g. the confidence relationship is prerogative of the sole lower house –except Italia and Romania- and upper houses usually play a less crucial role in the legislative process. Today, they have acquired an autonomous power to participate in the EU decision-making on equal footing with the lower ones, with important legal consequences in the national constitutional systems (Kiiver 2012).

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follows: "Belgium wishes to make clear that, in accordance with its constitutional law, not only the Chamber of Representatives and Senate of the Federal Parliament but also the parliamentary assemblies of the Communities and the Regions act, in terms of the competences exercised by the Union, as components of the national parliamentary system or chambers of the national Parliament"

[5] Interesting is the observation raised by Lupo about the choice to use the term 'National Parliaments' instead than 'Parliaments of Member States': "It is, in fact, well-known how the phenomenon of European integration is generally placed in contraposition to the nationalistic tendencies which have long prevailed throughout the continent, and how the development of this phenomenon, following forms and modalities which differ greatly from the traditional character of inter-national organisations, often tends to be considered as one of the indices of the overcoming of the logic of the nation-state in the contemporary world. It thus comes as no surprise that the entire European construct has endeavoured – and, indeed, continues to endeavour – to resist the call to a return to every form of terminology that makes explicit reference to the idea of the nation (especially where it is conceived in an ethno-linguistic manner). And yet, contrary to this tendency, the term "national" re-appears, in the European treaties, precisely in the very discipline addressed to those who, with more neutral terms which are only slightly more articulate, could have been called the "Parliaments of the Member States". This essentially seems to be due to practical identification reasons, which establish the need to distinguish, with a concise and unambiguous formula, every reference to such parliaments with regard to those made at the European Parliament and also those which, as we have just seen, Article 6 of Protocol 2 defines as "regional parliaments with legislative powers" (2013b)

Today, in the literature there is a substantial gap on the role of upper houses in the European decision-making process (except De Ruiter 2015; Guasti 2011) and most scholars have generally approached the issue, without exploring their potential role in the EU. Thus, most of the studies have neglected their role and NPs have been investigated as a sole actor, focusing just on the powers granted to the lower house. The main reason for this gap rests on the general misperception of their "secondary-ness" (Uhr 2006, 478) when compared to their "Big brother" (Scully 2001). In fact, while the latter has always been considered as the emblem of the democratic representation principle and thus the core of national decision-making process, the modes of the election of upper houses vary a lot according to the specific national constitutional settings. Moreover, specifically in the executive-legislative relationship, the confidence vote is deemed to be one of the strongest legal mechanism for assuring executive accountability, which generally is prerogative of the lower chamber alone, while -although some exceptions exist- there is no confidence vote in the upper chamber.

Despite all the above, we should be aware that there is no such institutional creature as "insignificant bicameralism" (Liiphart 1999, 211). Where bicameralism exists, it always matters and "even unelected or indirectly elected upper houses with limited legislative powers can exercise great policy power" (Uhr 2006, 478). This situation is termed "Cicero's puzzle" (Money and Tsebelis 1992) and it refers to the "power able to be deployed by upper houses in the face of constitutional pre-eminence of lower houses" (Uhr 2006, 478). Moreover, the lack of the confidence vote implies important consequences in terms of relationships with the executive and with the EU institutions. And what it should be made clear is that it does not weaken the position of the upper house with respect to the executive, but rather the absence of this legal prerogative assures the impartiality of the house, which is more likely to act independently from the executive and it "may therefore provide an important forum for parliamentary scrutiny, strengthening parliament's overall control over government" (Russell 2001, 448; see also Druckman Martin and Thies 2005; Russell and Sanford 2002).

The next section explores more in detail the differences among the upper houses in the EU Member States.

## 4. UPPER HOUSES IN EU PARLIAMENTARY DEMOCRACIES

With 28 Member States and 41 Parliamentary chambers in total, in the European Union 13 Countries have a bicameral system. These are Austria, Belgium, the Czech Republic, France,

Germany, Italy, Ireland, the Netherlands, Poland, Romania, Slovenia, Spain, and the United Kingdom. Among them, only 3 countries hold the classical territorial model, which identifies bicameralism as the characteristic feature of federal systems (Levmore 1992, 159). While in the others Member States, the presence of the upper house is justified on other important reasons but, mainly, focused on the need to assure a balance of power in the system, with the upper house playing the role of chamber of reflection against the lower one (Barbera and Fortunato 1989) and providing "second thoughts" (Campion 1953, 20) to the legislative process, as well as assuring stability in policy and government.

Moreover, beside the different justifications for bicameralism, the composition and functions of upper chambers strongly diverge. Also among federal states, there are important variances: as for the composition, the German and Austrian *Bundesrat* are clearly representative of sub-national authorities, with the first clearly un-parliamentary in nature (Falcon 1997: 277; Ruggiu 2006: 205) and composed of representative of the territorial governments and the second composed of delegates elected by the respective Land Parliament[6]. Finally, in Belgium, the Senate embodies the national linguistic divide more than the territorial units[7]. As for the functions, the German *Bundesrat* is usually described as a strong federal chamber able to effectively involve the *Länder* in the national decision-making process. The Austrian *Bundesrat* –despite the formal powers- has a marginal impact in the national decision-making process. The reasons stand on its incapability to really reflect and represent the interests of sub-national authorities, becoming more a "chamber of political partisans than a chamber of *Länder"* (Gamper 2008, 103). Finally, in Belgium, the Senate "has over the years lost in competence and in prestige" (Vandamme 2012, 525; see also Delpéréé and Dopagne 2010). In fact, with the deepening of the devolutionary process and the increased role of the sub-national authorities, the Senate's role decreased accordingly and, today, the recent

[6] As for the composition of the Bundesrat, according to Art. 34.1 B-VG, its members represent the Länder, however they are not directly elected by the citizens but rather, each Land Parliament elects its respective delegates, who should not 'belong' to the Land Parliament but "must however be eligible to it" (Art. 35.2 B-VG). According to these provisions, the number of delegates is slightly proportional to the number of inhabitants in each Land, with a maximum of twelve members for the Land with the largest number of citizens and a minimum of three members, for the smallest ones (Art. 34.2 B-VG)

[7] According to the new Art. 67 of the Belgian Constitution , the Senators are indirectly elected by the sub-national authorities. Specifically, the number of the senators is reduced, the new Senate is composed by sixty (60) representatives in total. Among them, fifty (50) senators are appointed by the sub-national parliaments and they have a double mandate and ten (10) are co-opted by the same member of the Senate. About the firsts, twenty-nine (29) are appointed by the Flemish Parliament among its members and they are the representatives of the Flemish linguistic group. Twenty (20) senators are representative of the French linguistic group, among them ten (10) are appointed by the Parliament of the French Community among its members, eight (8) among the members of the Parliament of the Walloon Region and two (2) by the French linguistic group in the Parliament of the Brussels region. Finally, one (1) is the representative of the German Community and is appointed by the Parliament of the German Community. As for the ten (10) co-opted senators, according to the Article, respectively six (6) are appointed by the 29 Senators representing the Flemish linguistic group and four (4) by the 20 Senators representing the French one and the choice follows the and the selection will be spread along the voters for the House of Representatives

Constitutional Reform, enacted on 6 January 2014, confirms this trend and it drastically reduces the Senate's powers.

In non-federal states, the structural organisation of the upper chambers also largely diverges. In Italy and Romania, the Senates are directly elected, with the first elected on a regional basis[8] and, the second following the same electoral *ratio* established for the lower chamber[9]. Also, in the Czech Republic and in Poland[10], members are directly elected, with the latter composed by members elected in 100 single-member constituencies. In Spain[11], members are partly directly elected in the provincial boundaries and partly appointed by the *Comunidades Autonómas*. In France[12] and Netherlands[13], upper houses are composed of representatives appointed by local authorities. In the United Kingdom, the House of Lords[14] embodies the *elite model*, with not elected members and, although drastically reduced, characterised by hereditary peers.

Finally, the Irish[15] and Slovenian[16] upper houses are an example of 'vocational' chamber, representing the different interests of social and professional categories, with the latter also assuring local representation.

In bicameral systems divergence exists also in functional terms. In this respect, multiple attempts were made, mostly in political science studies, to categorise the upper chambers' power to influence and to intervene in the legislative and scrutiny procedures (Lijphart 1999). Guasti (2011) adapting the classification introduced by Patterson and Mughan (2001), differentiated upper chambers on a continuum from 'symmetric' - where the two houses are equal in terms of powers and functions- to 'asymmetric' powers –when the upper house is subordinated to the other-.

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[8] Art. 57.1 Const. "the Senate is elected on regional basis, with the exception of the seats assigned to the overseas constituency". The reference to the 'regional basis' is not intended in terms of regional representation, but rather it specifies only the Senate electoral districts, which are drawn on regional boundaries

[9] According to Art. 62 RC the two Chambers "shall be elected by universal, equal, direct, secret and free suffrage", in this respect they are elected according to the same electoral system following the ratio of "single vote, according to the principle of proportional representation" (Art. 5.1 of Law no. 35/2008)

[10] The Polish Senate is composed of 100 senators elected every four years by universal, equal, direct, proportional and secret ballot. Senators are elected by majority in 100 single-member constituencies

[11] The Spanish Senate is composed of 266 members, 208 elected in the provincial boundaries and 58 indirectly elected by the Comunidades Autonómas

[12] The French Senate is composed of 348 members, elected by a college made up of members of the National Assembly, regional councilors and general councilors of each department and delegated from municipal councils

[13] The Erste Kamer is elected every four years and it is composed of 75 members elected by the 12 provincial councils in which the national territory is divided

[14] The reforms have drastically reduced the number of hereditary peers and today, there are three categories of members in the House of Lords: around 600 life peers, 92 hereditary peers and 26 bishops and archbishops. The life peers are appointed to Lords for life, but the title is not hereditary and it is conferred by the Queen on the basis of the prime minister's advice

[15] The Seanad Eireann is composed of 60 members: 43 are elected from a list of candidates representing the professional fields of culture, agriculture and fisheries, organised labour, industry and commerce, and public administration: 6 are elected by the graduates of the Irish universities and the other 11 are appointed by the prime minister

[16] The Slovenian Upper House is composed of 40 members, they are indirectly elected representatives of: (4) employers; (4) employees; (4) farmers, craftsmen and self-employed; (6) non-economic sector; (22) local interests

According to the authors this classification capture "the relative power dispersion between the two houses of parliament, at least in the light of the constitutional assignment of powers and functions to the lower and upper houses" (2001). On a similar *ratio,* Swenden (2004) built up an index of bicameral strength based on the powers and composition of upper chamber *vis-à-vis* the lower one. However, differently from the first classification, Swenden tried to capture the effective powers of upper chambers.

Despite the theoretical efforts, all of those classifications are characterised by a fundamental gap: they look at the formal powers of the upper chambers and they are not able to fully grasp the reality. In both classifications, the House of Lords is depicted as a weak chamber, while in practice and particularly since the House of Lords Act 1999, an important change has been attested (Russell 2013; Russell and Sciara 2006). The UK bicameral structure always defined as an 'extremely feeble' (Sartori 1994, 188) bicameralism, characterised by an upper chamber having "little public profile but no actual power" (Shell 1993, 335) has been replaced by a more assertive House of Lords, able to check over the executive policy-making and to play a crucial role in the system. According to Russell, "the 1999 reform both strengthened the Lords as an institution, and made Britain more plural in partisan terms" (Russell 2013, 293) and brought "the old Westminster model, based on a strong central executive with Commons majority […] closer to the consensus model" (Russell 2013, 293).

Beyond any assessment on the appropriateness of all those classifications, they nonetheless clearly capture the complexity and the highly heterogeneity of bicameral systems, which strongly clash with the European approach and the establishment of the EWS based "on unqualified equality of Members States" (Kiiver 2012, 63).

In the next session, the hypothesis on the potential "rise of the Senates" (Kiiver 2012) is verified by looking at the practice of both the 'political dialogue' and the EWS procedure.

## 5. UPPER CHAMBERS' INVOLVEMENT IN THE EU DECISION-MAKING PROCESS

Looking at the 13 bicameral countries in the European Union, upper houses –in absolute terms- were much more active than lower houses. Both the number of opinions sent though the 'political dialogue' to the European Commission and the reasoned opinions sent through the EWS, are higher than the ones sent by the lower houses. This first analysis apparently supports Kiiver's argument, which sustained a "rise of the Senates" as one of the possible phenomena with the establishment of the EWS. This argument was based on the fact that, differently from the national

level, 'the EWS grants the senate co-equality with lower chambers in terms of vote weight so that they do not have to fight for it themselves" (Kiiver 2012, 66). The argument is supported if we look at the numbers in absolute terms.

However, going into further details, four main groups stand out from the whole picture. First, we have very active upper chambers participating both in the political dialogue and in the EWS (German Bundesrat, Austrian Bundesrat, France Senate and Italian Senate). Second, there are upper chambers mostly on equal footing in terms of subsidiarity concerns with the lower one, but strongly involved in the 'political dialogue' (Czech Senate and UK House of Lords). Third, upper chambers participating on the same ground with the lower ones (Spanish Senate; Irish Senate; Eerste Kamer of Netherlands; Senate of Poland and Romanian Senate). Finally, there are upper chambers characterised by a limited degree of involvement in EU affairs (Belgian Senate, Slovenian Senate).

From this catalogue, it is already evident how difficult it is to make any possible generalisation. On this point, while in 2012 Neuhold and Streklov found that "upper houses flag up a branch with the subsidiarity principle more often than lower houses" (2012, 17) denoting a "willingness of upper chambers to develop a profile of their own in EU affairs and become more independent player" (2012, 17). The aims of the following section are to underline the differential patterns of upper chambers' participation in the EU decision-making process. In this analysis, I will not include the Senates, which have the same level of participation of the lower ones, as in most of the cases this strictly depends by a common participation through a joint committee or by reaching joint positions[17].

### 5.1. The most Active Upper Chambers in the EU

#### 5.1.1 The Franch Sénat and the European Oriented Approach

According to the number of opinions and reasoned opinions sent to the EU institutions, the French Senate proved to be much more active than the lower chamber in both the 'political dialogue' and EWS. The different approaches adopted by the two chambers are rooted in the different attitude toward the European integration process, and specifically on the aims of subsidiarity control.

The *Assemblée nationale* has always been characterised for its pro-European approach (Sprungk 2007) and it has always been in favor of a greater involvement of NPs in the EU Affairs as a means to uphold the European legitimacy. Therefore, it does not conceive the subsidiarity control

[17] Exceptions are Romania and Poland.

as a formalistic mechanism aimed at protecting the national prerogatives and at limiting the European integration process, but rather as a means to guarantee the legal and operational added value of European legislation and to assure a wider involvement of the public opinion on EU affairs[18]. For those reasons, the *Assemblée national* made a rather limited use of the EWS, fearing its negative impact on the European Integration process.

On the same, the *Sénat* has always pledged for an enhanced participation of the NPs in the EU decision-making process. Since 1995, with the so-called Guéna report[19], the Senate had tried to enhance the democratic legitimacy of the Union supporting the idea of a "European Senate", where all NPs should had had a seat and should had played a crucial role in questions of subsidiarity. However, different to the *Assemblée nationale,* the *Sénat* uses both the political dialogue and the EWS as a means to obtain justifications from the Commission about the necessity and the extent of the European Union action[20]. In this sense, it is far less concerned with the possible negative implications that the EWS may create on the European level and it uses it as a means to check the European decision-making process. Moreover, the *Sénat* has a broad understanding of the principle of subsidiarity, which deems impossible to be disentangled from that of proportionality[21].

This diverse attitude toward both the European Union and the assessment of the subsidiarity principle generally explains the different participation of the two houses in both the political dialogue and specifically in the EWS procedure.

### 5.1.2 Upper Chambers in Federal Systems: Effective territorial representation

In federal systems a more active participation of upper houses is expected compared to the lower ones. However, this hypothesis is estimated to take place only if the upper house effectively represents the territorial interests. Both the German and the Austrian case confirm this hypothesis.

In Germany, since the inception of the European integration process, the active participation of the German *Bundesrat* in EU affairs was seen as the only way to preserve the national constitutional balance of power. The *Lander*, facing effective limitations on their sovereign powers, particularly with respect of most concurrent federal level competences, struggled to restore the balance

[18] COSAC Secretariat, Annex to the 8th biannual report of COSAC: National Parliaments' replies to the questionnaire, prepared for XXXVIII COSAC meeting held in Berlin, 13-15 May 2007, pp. 42-46

[19] Sénat, Rapport d'information, no. 224, deuxième session extraordinaire 1994-1995 du Sénat, sur la réforme de 1996 des institutions de l'Union européenne

[20] COSAC Secretariat, Annex to the 8th biannual report of COSAC: National Parliaments' replies to the questionnaire, prepared for XXXVIII COSAC meeting held in Berlin, 13-15 May 2007, pp. 48

[21] Sénat, Rapport d'information, no. 88 on the dialogue with the European Commission on subsidiarity of 21 November 2007

between their role and those of the federation and the European Union. Thus, The *Länder's* increasing loss of "capacity for legislative codetermination through the *Bundesrat"* (Jeffery 1997, 58) was faced in two ways. First, the *Länder* claimed for the concept of 'European domestic policy', according to which EU policy should no longer be conceived as foreign policy but rather has having 'the character of *domestic* policy"[22] (Jeffery 1997, 56). Second, they boosted national reforms and the recognition of their powers to participate and express their views through the *Bundesrat* on EU issues[23].

The Austrian *Bundesrat*, as the German one, is much more active than the *Nationalrat* both in the political dialogue and the EWS procedure. However, compared to the German *Bundesrat*, the level of participation showed to be lower. This difference between the two federal houses is based on the centralistic character of the Austrian federation (zentralistischer Bundesstaat)[24]. In fact, Austria has always been defined as a weak federal system, characterised by a strong degree of centralism "with the constituent units often serving mainly as agents and subordinates of the federal government" (Watts 1996, 23). Hence, despite the Constitution confers them the residual legislative authority, the *Länder* are "relegated to the position of administrative subunits" (Erk 2008, 18). On the same point, the Constitution confers to the *Bundesrat* important legislative and oversight functions[25], however in practice the federal house rarely use them and so far it has had a

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[22] "The federal level has the responsibility for foreign policy […] I want to make that perfectly clear. However, decisions [taken] within the framework of the European Community concern more and more matters which touch on the essential interests of the Länder or fall under the exclusive competence of the Länder. Foreign policy in the framework of the European Community in in consequences and to a growing extent also domestic policy. The Länder are not demanding, as is often erroneously maintained, a share in foreign policy. But they are insisting on their share in domestic policy […] The federal level must make more effort [to establish] a joint decision-making process with the Länder in the framework of the European Community and give the Länder the leeway to make their interests and concerns count" (Minister President of Rhineland- Palatine, Bernhard Vogel in Bundesrat 1986, reported in Jeffery 1997, 59)

[23] For a more in-depth analysis of the Bundesrat involvement in the EU decision-making process see Chapter 7-8-9

[24] On this point, Erk argued "The Austrian federation seems to work more as a unitary system because all political issues are set in a pan Austrian frame of reference. This is because the federation lacks territorially based societal heterogeneity to sustain a principled commitment to federalism. Societal homogeneity induces a centralist political outlook at all levels of government which undermines the notion of self-rule in constituent units essential for federalism(…) The empirical evidence strongly suggests that the Austrian federation's centralist disposition stems from its social structure, not its formal constitution" (2004, 20). See also Bußjäger 2012.

[25] According to art. 24 B-VG "the legislative power of the Federation is exercised by the National Council jointly with the Federal Council". In this respect, all laws should be enacted by both Chambers and the majority required in the Bundesrat is "the presence of at least one third of the members and an absolute majority of the votes cast" (Art. 37.1 B-VG). The Constitution recognises to the Bundesrat the right to initiate legislation –at least one third of its members- (Art. 41.1 B-VG), although in practice most of the bills are initiated by the Federal government. Despite the above, the Bundesrat does not participate to the legislative process on an equal footing with the Nationalrat. The procedure starts with the submission of the legislative proposal in the Nationalrat (Art. 41.1), which after having adopted the bill, procedure, with the exceptions listed in Art. 42.5 B-VG , continues in the Bundesrat. According to the provisions provided for by the Constitution, it can be distinguished two different procedures with respect to the powers recognised to the Bundesrat. The first, which represents the majority of the cases, the Bundesrat can raise a 'reasoned objection'. This is the so-called suspensive veto power, through which the Federal Chamber can only delay legislation but cannot stop the enactment of the bill. Accordingly, the Bunderat has eight (8) weeks for raising its objection (Art. 42.3 B-VG) and then if the Nationlarat decides to maintain the original resolution, the Bundesrat's

marginal impact in the national decision-making process. The reasons stand on its incapability to really reflect and represent the interests of the sub-national authorities, becoming more a "chamber of 'political partisans' than a chamber of *Länder"* (Gamper 2008). In the Austrian *Bundesrat*, party affiliation plays an important role and its members follow the instruction of the respective Land parliaments, which mostly in periods of coalition government becomes a duplication of the existing majority in the *Nationalrat* and thus supportive of the governmental decisions (Schäffer 2007).

Despite all the above, in the last two years 2013-2014, the Austrian Bundesrat surprisingly increased its participation in the EWS and, in 2013, issued six reasoned opinions. Looking at the content of the reasoned opinions, the Austrian Bundesrat appears very concerned on the excessive use of delegated/implementing acts[26]. In all cases but one[27], the *Bundesrat* lamented the frequency of their adoption. The position is well developed in the opinion sent to the Commission on COM(2013)751 final. Here the *Bundesrat* clearly pointed out that the excessive use of delegated/implementing acts causes two negative impacts "on the one hand, this makes proposals tabled by the European Commission less easily readable and comprehensible, which certainly does not serve the purpose of bringing the European Union closer to its citizens. On the other hand, if Member States' tasks are delegated to the European Commission very frequently and in large numbers, the issue concerned may be difficult to grasp even for experts"[28]. According to the *Bundesrat*, this makes impossible for national parliaments to understand and scrutinise the EU decision. For this reason, it clearly wished that "in the future, a discussion should be initiated about ways and means of reducing the number of delegated/implementing acts, assuring the involvement of expert committees comprising representatives of Member States"[29].

### 5.1.3. The Peculiarity of the Italian Senate

objection can be overruled simply with a decision taken by "the presence of at least half of members" of the Lower Chamber. In the second procedure, the Bundesrat can exercise an absolute veto and stop the enactment of the bill. However, the Constitution establishes few cases where the consent of the Bundesrat is required (Art. 44.2 B-VB) and, practically, it has never been exercised. The Constitution also recognises to the Bundersrat, together with the Nationlrat, the power to control and to address questions to the Federal Government (Art. 52 B-VG)

[26] COSAC Twenty-second BI-annual report 'Developments in European Union. Procedures and Practices Relevant to Parliamentary Scrutiny', 4 November 2014.

[27] On COM(2013)028 Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1370/2007 concerning the opening of the market for domestic passenger transport services by rail. The issue at stake was a competence of federal states.

[28] Communication from the European Affairs Committee of the Federal Council of 3 December 2013 to the European Parliament and the Council, pursuant article 23 f (4) of the Austrian Constitution on COM (2013) 751 final Proposal for a Regulation of the European Parliament and of the Council adapting to Article 290 and 291 of the Treaty on the Functioning of the European Union a number of legal acts providing for the use of the regulatory procedure with scrutiny.

[29] Ibidem

The Italian Senate participation in the EU represents a peculiar case. The Senate is among the most active upper chambers in EU affairs and, mainly in the political dialogue, it is the one – among bicameral systems- which sent the highest number of opinions. The Senate is thus much more active with respect the Chamber of Deputies. This difference can be explained not only looking at the structural and procedural organisation of scrutiny (Fasone 2011) but also for the existence of a different attitude with respect their participation in the EU.

The different attitude is determined by the different views that the respective officials have. The Chamber of Deputies is much more concerned about the possible negative implications that the 'independent' parliamentary participation in the EU decision-making process might create on the national form of government (Esposito 2013, 9). While, the Senate considers this direct dialogue with the Commission a positive feature, since it actually enables the houses to act independently from the Government (Capuano 2011, 5) and to participate directly in the European decision-making process.

This difference is reflected also in the participation in the EWS and the Chamber of Deputies has recently declared: "subsidiarity checks […] should not be a priority"[30]. Specifically, the Chamber affirmed: "the National Parliaments can better perform their potential if they primarily contribute in shaping the substance of the EU policies and decision. Conversely NPs should not act merely as 'watchdog' of the national competences against the EU legislative action and therefore should not consider the subsidiarity check as a priority"[31]. Conversely, the Senate stressed on the importance of the EWS has a means for "denouncing any excess of legislative power"[32].

Beyond those differences, what really surprises in the Italian symmetric bicameral system is the lack of coordination between the two houses. The two houses have always adopted reasoned opinions on different subject matters, except in one case[33]. Moreover, also in this case, there was no coordination and the two houses developed two different arguments for assessing the breach of the principle of subsidiarity[34].

To sum up, with the Lisbon Treaty and the establishment of the 'unicameral logic' the Italian perfect bicameral system came to be further mitigated by the emergence of important structural and procedural differences. Those divergences imply that both houses standing on equal powers differ in terms of practical implementation. Today, the Italian Senate remains among the most

[30] COSAC Report 2014 above n. 25
[31] Annex to COSAC Report 2014, 228 above n.25
[32] Annex to COSAC Report 2014, 316 above n.25
[33] COM/2012/0788 approximation of laws, regulations and administrative provisions on manufacture, presentation and sale of tobacco and related products.
[34] The reasons developed by the two houses were not only based on different arguments, but they also diverged in the assessment of the legal basis of the proposal.

active chamber at the European level, while the Chamber continues to have a more cautious approach.

## 5.2. Upper Chambers actively involved in the 'political dialogue' with the European Commission

### 5.2.1 The active participation of the Czech Senate

The Czech Senate is the second most active upper chamber in the political dialogue with the European Commission, while in terms of reasoned opinions the number equals that of the lower chamber. The active participation of the Czech Senate may appear as the reflection of the classical political cleavage between executive majority and opposition. In fact, since 2010 a different majority has existed between the two houses (Hrabalek and Strelkov 2015). However, this was not always the case, and before this political 'cohabitation', the Senate proved to be much more active in EU affairs than the lower house. In this sense, the Czech Senate seems much more independent from the party-logic approach and "although the actual day-to-day work of the Senate has been organised from the beginning along party lines, the rules of candidacy and the majority-vote election system provide a space for independent candidates to be elected"[35]. Today "Senators are mostly mayors, medical doctors and other personalities who have distinguished themselves in their electoral districts" (Guasti 2011, 6).

In any case, the Senate "took a much more autonomous views even if it contradicted the governmental position and even if they represented the strongest party in the government" (Král 2010, 19). Moreover, the Senate took a very different attitude toward EU issues and it is much more active than the lower house, which to some extent echoes the approach adopted by the French Senate. It is important to remember, that in October 2007 it was the Senate which pledged a procedure before the Constitutional Court as for the conformity of the Lisbon Treaty with the Czech Constitution.

Another interesting aspect is that conversely to the lower house, the Czech Senate has increased its scrutiny of the European Council and today, European committee meetings of the house, as well

[35] IRI The International Republican Institute, Election Watch Czech Republic 2010 http://www.iri.org/sites/default/files/Czech%20Republic%20Pre-Election%20Watch,%20October%202010%20Senate%20and%20Municipal%20Elections_0.pdf

as plenary sessions are held before and after each European Council summit, "in order to discuss the programme, the government's positions and the outcomes of the European Council"[36]
In conclusion, "the Senate to whom the government is not directly accountable [had a more] autonomous attitude toward the European agenda" (Král 2010, 19).

### 5.2.2 House of Lords: non-partisan membership and effective scrutiny of EU affairs

Grounded in the constitutional keystone of Parliamentary sovereignty [Dicey 1915 (1982)], the UK membership to the EU had profound legal and political consequences for its constitutional principle (see Cygan 2007). The EU membership represented a real interference with the supreme role of the Parliament in domestic legislation. Under these terms, the UK Parliament could not accept its marginalisation in the EU decision-making process and, in the immediate wake of membership, it realised that should have retained some role and restore its influence over the executive (Kolinsky 1975). In this respect, the role of the House of Lord is crucial, because in a system characterised by the majoritarian model, with the government having a dominant position in the House of Commons, the House of Lords' capacity to check over the executive is thus strengthened by its less partisan orientation.
This aspect is evident if we look at the main differences between the working procedures of the European Committee in the Lords and the one in the Commons. On the one hand, in the House of Lords the emphasis is on detailed reports, rather than on broad coverage of all documents. On the other hands, the non-partisan approach of the Lords, escaping the majoritarian trap[37], puts the importance on the expertise and commitment, -considered to be more important factors than party balance[38]. The House of Commons, on the contrary, does not investigate the merits of EU proposals and focuses on their political and legal importance. The main reasons rests on the internal party cleavage, because "it would be difficult or impossible for a cross-party committee to reach agreement on documents which address issues of political party controversy"[39].
Today, the EU's scrutiny represents one of the House of Lords' major activities and holding the UK Government to account for its actions on the European decision-making process is an

[36] Annex COSAC 22nd Bi-Annual report 2014 2014, 96.
[37] "the whole party battle is played out in a much lower key in the House of Lords than it is in the Commons. There is neither the same temptation to relentlessly to pursue party advantage in the upper chamber, nor the same remorseless drive to ensure party cohesion. The forces which insist that the vast majority of issues which come before the Commons become subject to some degree of inter-party conflict do not operate in the same irresistible manner in the Lords" (Shell 1996a, 92)
[38] Session 2002-03, House of Lords, Select Committee on the European Union, Review of Scrutiny of European legislation, HL Paper 15, December 2002, p. 27
[39] Session 2001-02, House of Commons, European Scrutiny Committee, European Scrutiny in the Commons, HC 152-xxx, 30th Report, 11 June 2002, p. 16

important part of the Lords' select Committee on European Union, and although it is unable to bind ministers to particular behaviour, the House of Lords successfully influences the executive. In the last COSAC report, the UK House of Lords stressed on this point and affirmed that the EWS and the participation in the inter-parliamentary cooperation "enhanced national Parliaments' capacity to hold national Governments to account"[40].

Moreover, looking at the content of the reasoned opinions and also at the time adopted, the House of Lords showed to be more independent from the government than the House of Commons. The latter proved to be more attentive to government's position and in most of the cases was in line with it[41].

### 5.3. Understanding the low participation of the Belgian and Slovenian upper chambers

#### 5.3.1 The Belgian Senate: a void Upper House

It is generally argued that upper houses in federal systems are expected to be more active in the EU decision-making process, however this should be further accompanied by an effective territorial representation in the house.

The peculiar feature of the Belgian federal system is the complete absence of any hierarchy of norms which not only recognises a national legal equality of all authorities within their respective field of competences, but this equality is also affirmed at the international level, the so-called in foro interno in foro externo principle. It follows that the use of the term 'national parliaments' in the Lisbon Treaty proved to be extremely inadequate for the complex Belgian constitutional settlement. Hence, Belgium enlarged the understanding of the term and added a Declaration to the Lisbon Treaty, which reflects the Belgian federal system, "where no hierarchy of power is in place and all the authorities are placed on an equal footing under the Belgian constitutional law" (Romaniello 2013). The Declaration No. 51 states as follows:

"Belgium wishes to make clear that, in accordance with its constitutional law, not only the Chamber of Representatives and Senate of the Federal Parliament but also the parliamentary assemblies of the Communities and the Regions act, in terms of the competences exercised by the Un-ion, as components of the national parliamentary system or chambers of the national Parliament"

[40] COSAC 22nd Bi-Annual report 2014 p. 23

[41] i.e. COM(2010)0379 Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal worker

This Declaration was seen as the best way to guarantee the legal parity between the Federal State and its sub-national authorities. On the national level, the participation in the EU decision-making process is regulated by an inter-parliamentary draft agreement signed on 19 December 2005 (Popelier and Vandenbruwaene 2011), which although lacks a specific legal basis, it is nonetheless practically implemented and guarantees the participation of all the national and sub-national assemblies in the framework of subsidiarity check (Romaniello 2013).

It follows that in Belgium, the role of the Belgian Senate came to be undermined by the lack of a federal identity and the reforms tended to recognise and institutionalise the internal fragmentation, while strengthening the role of the sub-national authorities. Hence, the Belgian system shows an in-verse trend, with the deepening of the devolutionary process and the increased role of the sub-national authorities, the Senate's role decreases accordingly. In this way, the Belgian Senate "has over the year lost in competence and in prestige" (Vandamme 2012, 525; see also Delpéréé and Dopagne 2010), becoming the weakest chamber of the federal parliament. The recent Constitutional Reform, enacted on 6 January 2014, confirms this trend and it drastically reduces the Senate's powers.

### 5.3.2 The Slovenia *National Council* and the National Constitutional limits

The exclusive participation of the lower house (National Assembly) in the EU EWS may appear as an evidence of a lack of interest of the upper house (National Council) toward EU issues. However, this is not the case, but rather the internal division of competences, which completely excludes the participation of the upper house in EU affairs, determines this deficiency.

With the entry into force of the Lisbon Treaty and the equal recognition to each chamber the right to participate in EU affairs and to raise issues of subsidiarity concerns, the National Council expected an extension of its powers, in conformity with the provisions of the European Treaties. However, this did not happen and the 'Cooperation Between the National Assembly and the Government in matters Concerning the European Union Act' only regulated the relationship between the executive and the lower house, while establishing that the National Council should be just kept informed of the procedure.

The National Council tried to oppose this provision and claimed for the unconstitutionality of the Cooperation Law before the Constitutional Court. The National Council argued that the Cooperation law was inconsistent with the Constitution as it failed to establish the role of the National Council in matters concerning the European Union. It appears clear that the National Council wanted to see recognised its right to get involved in EU matters on an equal footing with the National Assembly, in compliance with the provisions established in the EU Treaties.

The Constitutional Court, with the decision U-I-17/11, on 18 October 2012, ruled that the Cooperation Law did not breach the Constitution and confirmed the prominent role of the National Assembly in dealing with EU matters. Furthermore, the Court argued that the treaties of the European Union "do not determine how Member States should formulate and adopt their positions in matters concerning the European Union under national law or what role the national parliaments and their individual chambers should have in such procedures", but rather, this is a national prerogative and the National Council could participate in EU affairs according to the national constitutional powers determined by Art. 97 of the Slovenia Constitution.

# 6. CONCLUDING REMARKS

The Treaty of Lisbon introduced important novelties aimed to improving the participation of NPs in the EU decision-making process. The most important is the introduction of the EWS, which formally involves NPs and gives them the power to express concerns on subsidiarity directly to the European institutions. Thus, NPs have acquired an individual power with respect the scrutiny of compliance of EU draft legislative acts with the principle of subsidiarity.

The paper highlighted the contrast between the blind and equal approach adopted by the EU and the complexity of national constitutional settings. In bicameral systems, the composition and functions of upper chambers strongly diverge, while the EWS assigns two votes to each National Parliament. It follows that in bicameral systems, the two votes are assigned regardless the internal distribution of competences and regardless the formal role played by each chamber in the national decision-making process. Thus, upper chambers have acquired an autonomous power to participate in the EU decision-making on equal footing with the lower ones. This provision does not only impact on the EU level but it also entails considerable repercussions in the national constitutional framework.

Despite those important legal consequences, the literature on NPs has so far almost completely neglected the role of upper houses in EU affairs and bicameral systems have usually been considered as a sole actor, focusing mainly on the role played by the lower houses. The aim of this research was to fill this gap and to bring the upper houses in the European discourse.

Scrutinising the 13 bicameral systems, the paper investigated the participation of upper chambers in the EU and, conversely to the hypothesis of the potential "rise of the Senates" (Kiiver 2012), it proved that the active participation of upper houses in EU is intensely mediated by the idiosyncrasies of each Members States.

Specifically, four different groups emerged from the whole picture. First, we have very active upper chambers participating both in the political dialogue and in the EWS (Germany, Austria, France and Italy). Second, there are upper chambers mostly on equal footing in terms of subsidiarity concerns with the lower ones, but strongly involved in the 'political dialogue' (Czech Republic; United Kingdom). Third, upper chambers participating on the same ground with the lower ones (Spain; Ireland; Netherlands; Poland and Romania). Finally, there are upper chambers characterised by a limited degree of involvement in EU affairs (Belgium; Slovenia).

Thus the aim of this research was to emphasise the differential patterns of upper chambers' participation in the EU decision-making process. First, there are chambers such as the French Senate, which sees its involvement as a means to contribute to the legitimation of the European Union. Second, the UK House of Lords sees the participation as a means to check over the national government's decisions. Others, such as the Slovenia National Council, see their involvement in the EU decision-making as an "opportunity structure" (Neuhold and Streklov 2012). That is a means to ex-tend the national prerogatives and reinforce their role also at the national level.

Moreover, in federal States, the active participation of upper chambers was to some extent expected, however also in this case any generalisation is hazardous. The non-partisan membership and the effective territorial representation of interests proved to be two essential features for an active involvement in EU affairs.

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