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Upper Chambers in EU: Scrutinising the Belgian and German Bicameralism[2]

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1. Introduction

The Lisbon Treaty and the Early Warning System (EWS) represent the culmination of a long process of European treaties reform, among whose aims was to increase the EU democratic legitimacy. Which was not only undertaken through the enlargement of the European Parliament's functions, but also through a greater involvement of National Parliaments (NPs) in the EU decision-making process. However, diverging from its democratic aims, the EU reaffirmed its blindness toward the internal constitutional setting of its Member States (MS) and the Lisbon Treaty does not take into account the long rooted history and traditions of each NPs. But rather, NPs are treated equally notwithstanding their structural and procedural organisation, as well as their powers and functions. The Treaty only makes the distinction between monocameral and bicameral systems, and indicates that in case of bicameral systems, the two votes shall be distributed between the two chambers of the parliament. Literally, according to Art. 7 (2) Protocol No. 2 annexed to the Lisbon Treaty "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".

It follows that in bicameral systems, the two votes are assigned regardless of their internal distribution of competences and regardless the formal role played by each chamber in the national decision-making process. In other words, according to the Treaty provision, the votes cannot be liberally allocated in line with the national division of competences but rather, in bicameral system, the houses must have one vote each. It follows that 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 has important consequences for the national constitutional settings and their parliamentary structures. Moreover, on the same, the provision seems to reinforce generally the

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role of upper houses and, in the literature, some scholars predicted a potential "Rise of the Senates" (Kiiver 2012) at the EU level, with a positive implication for the decision making process. Because, "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).
Although potentially true, we should remark that the mechanism needed to be accommodated in each national parliament in accordance with their national constitutional framework. On this, we should be aware that there is no one model of bicameralism, neither is there any unique institutional arrangement, but each model is the outcome of national constitutional designers for maximizing the benefits (Llanos & Nolte 2003). Diversity, thus, 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). Facing this diversity, bicameralism ends up being "a term of convenience covering a great variety of types of legislatures" (Uhr 2006, 478), which varies in terms of size, length of terms, basis of composition, mode of election (Borthwich 2001) and obviously on the relative legislative power strength.
In this respect, the implementation of the EWS strongly depends on some national features and the domestic impact is expected to be intensely mediated by the idiosyncrasies of each Member States. Hence, National Constitutions, parliamentary norms and procedures, national culture, party system and, obviously, country's attitude toward EU, are expected to influence and shape the way the mechanism is implemented in each bicameral system.
Having in mind this premise, the paper investigates the impact of the Lisbon Treaty procedures on German and Belgium bicameralism. Specifically, it focuses on how the two upper houses have adapted to the EU and, more in detail, how they have implemented the EWS.
The two countries were selected for two sets of reasons. The first reason looks at the EU membership: they are both founding fathers of the European Union and, thus, both have been involved in the integration process since the start. The second reason is related to their national form of State: they are both federal countries, with strong and powerful sub-national authorities.
However, there is another reason for this case selection, which looks specifically at their bicameral structure. The two countries were selected for their strong differences in terms of role played by their respective upper chambers in their national constitutional realities. Those divergences will be helpful for underling the differentiate impact of the EWS in bicameral systems.
Therefore, in order to better understand the way the mechanism was accommodate, the paper starts with a short review of the history of the German and Belgium federal systems and it examines the role and the power of each respective upper house. Then, the paper continues with a general overview of the deepening of the European integration process and it investigates how the two countries assured the parliamentary involvement in the EU decision-making process. In this section, specifically focus is devoted to the implementation of the EWS and to the role played by the upper houses.

2. The German federal system

Federalism in Germany has a long history dating back to the medieval era. However, only with the fall of the Roman Empire, the States could freely rationalise their territorial organisation, which in the nineteenth century -under Prussian leadership-, was possible only through federal means. Lasted for more than fifty years, the federal structure was challenged by the internal political vulnerability. In this way, the failure of the monarchical system, followed by the instability of the

newly established Weimar Republic and the next formation of the National Socialist regime, led to the abolishment of the federal structure and the establishment of a totalitarian state until 1945. Only at the end of World War II, the occupying powers fostered the West German provinces - *Länder* - to adopt a federal system. The decentralisation choice was regarded as the best solution, which could have avoided concentration of political power in Germany and, thus, safeguard it against any risks for authoritarian degenerations. Beside the Allies' requests, federalism was already deeply rooted in the German constitutional history and the country favourably accepted it. Under the supervision of the Western Allies, the eleven prime ministers of the *Länder* convened on 10 August 1948 in Herrenchiemsee -in Bavaria- in order to draft a Constitution for West Germany[3]. After a series of meetings, the Basic Law (*Grundgesetz* BL)[4] was enacted by the Parliamentary Council and ratified by the Land Parliaments on 23 May 1949.

Art. 20 (1) of the German Basic Law contains the fundamental principles of the German Constitution, "the Federal Republic of Germany is a democratic and social federal state". The principle of democracy is founded on the premise of popular sovereignty, which represents the principle of legitimacy and responsibility for all the constitutional bodies. In this respect, Art. 20.2 BL ordains "all state authority is derived from the people. It shall be exercised through elections and other voters and through specific legislative, executive and judicial bodies". Thus, the Article also proclaims the strict separation of powers among the branches of the government. Back to Art. 20 (1) BL, the federal structure of the country is protected against any constitutional amendment by Art. 79 (3) BL, which ordains that "Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible". Thus, only a new constituent power may overcome this provision. This is the well-known 'eternity clause', which protects the core principle of federalism and establishes that "the existence of a plurality of *Länder*, a minimum of substantial autonomy, and substantial participation rights in the legislative process are guaranteed" (Heun 2011, 47).

On the federal settlement, the original formulation of the BL was founded on a strict separation of powers between the federal government and the *Länder*, which scholars used to define as "dual federalism". But in practice, mainly after the 1969 Finance Reform, the extensive use of the instruments of cooperation, so-called 'Joint-tasks' -granted in Art. 91a and 91b BL- promoted a system of cooperative federalism, based on intergovernmental relations[5]. However, with the latest constitutional amendments, 2006- 2009[6], the system seems to have moved back to a dual character. Besides this dual or cooperative approach, the German ratio of divided powers continues to be based on a vertical distribution of competences, which divides legislative and executive powers, conferring the most of legislative powers to the federation, while assigning to the *Länder* the implementation of federal laws (Art. 83 BL). Despite the above, the BL proclaims that the legislative power rests with the *Länder*, however practically, the Federation is the main lawmaker and it retains the most of the legislative powers, while their implementation is mainly the responsibility of the *Länder* (Oeter 2006; Kommers and Miller 2012).

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[3] For an in-depth historical analysis of German federalism see Antonucci 1997; Golay 1958; Gunlicks 2003; Pinson 1966; Renzsch 1989

[4] Unless otherwise specified, in this section all references to Articles refer to those of the Basic Law

[5] Mainly after the 1969 Finance Reform which "strengthened the trend toward a broader unitary system under the slogan of 'cooperative federalism' did not lead to a strengthening of the federation vis-à-vis the *Länder* in general. On the contrary, as a result of the increase in central decision-making at the federal level with a strengthened participation of the *Bundesrat* or, in other words, through more 'joint and intertwined decision-making' (*Politikverflechtung),* the *Länder* as a whole gained additional influence in federal policy-making. One should not overlook the fact, however, that the individual *Land* more likely lost an autonomous roo, for maneuver" (cited in Gunlicks 2003, 172)

[6] For an in-depth analysis of the latest German constitutional amendments see Moore and Jacoby 2010; Palermo 2010

Specifically, as for the distribution of legislative powers, having in background Art. 31 BL, which proclaims the supremacy clause, in Art. 70 (1) BL is stated that "insofar as this Basic Law does not assign legislative power on the Federation", the residual legislative power rests with *Länder*. In this respect, the following paragraph clearly ordains that "the division of authority between the Federation and the *Länder* shall be governed by the provisions of this Basic Law concerning exclusive and concurrent legislative powers" (Art. 70 (2) BL)[7]. For the first, Art. 73 BL lists the exclusive legislative competencies assigned to the Federation. While for the concurrent legislation, *Lände*r only have the right to legislate "so long as and to the extent that the Federation has not exercised its legislative power by enacting a law" (Art. 72 (1) BL). Yet, the federal government can acquire legislative concurrent competencies on matters falling within specific listed clauses of the Constitution (Art. 72 (2) BL), if and to the extent the maintenance of equal living conditions and legal or economic unity requires it[8]. An important change on concurrent matters was brought by the 2006 constitutional reform, accordingly the *Länder* saw recognised the right to deviate from federal law in specific concurrent matters, listed in Art. 72 (3) BL[9].

2.1 The German *Bundesrat*

The *Bundesrat*, together with the *Bundestag*, the Federal Government, the Federal President, and the Federal Constitutional Court, is a constitutional organ of the federation. According to Art. 50 BL, it is the place through which the *Länder* participate in the legislation and administration of the Federation and in matters concerning the European Union. In this respect, the *Bundesrat* is more than a second chamber and it cannot be simply described as an "upper house" of Parliament. But rather, as made clear by the German Constitutional Court[10], the Chamber should be seen as the federal organ, which assures the involvement of the *Länder* in the national decision-making process.

The institutional arrangement of the *Bundesrat* is a peculiar German invention that dates back to the Empire in the nineteen century (see Pezzini 1989; Patzelt 1999). It is a very complex institution[11] "since it is manifestly un-parliamentary in nature: it comprises sub-national governments and is thus an inter-executive body with a legislative function" (Kiiver 2009, 1294). Therefore, it does not represent directly the people, but it is composed of members of the Land governments "which appoint and recall them" (Art. 51 (1) BL). In this respect, since it is up to the Land governments to appoint the members, the *Bundesrat* is a permanent constitutional body and usually membership changes following Land elections. The number of delegates is regulated in Art. 51 (2) BL, which

[7] Until 2006 Art. 75 BL also assigned to the Federation the power to enact framework legislation. Accordingly, the federation was empowered to enact general provision of law, while leaving the regulation of the details to the *Länder*

[8] This is the so-called 'necessity clause'

[9] Art. 72.3 BL "If the Federation has made use of its power to legislate, the *Länder* may enact laws at variance with this legislation with respect to: 1. hunting (except for the law on hunting licenses); 2. protection of nature and landscape management (except for the general principles governing the protection of nature, the law on protection of plant and animal species or the law on protection of marine life); 3. land distribution; 4. regional planning; 5. management of water resources (except for regulations related to materials or facilities); 6. admission to institutions of higher education and requirements for graduation in such institutions. Federal laws on these matters shall enter into force no earlier than six months following their promulgation unless otherwise provided with the consent of the Bundesrat. As for the relationship between federal law and law of the *Länder*, the latest law enacted shall take precedence with respect to matters within the scope of the first sentence".

[10] According to the German Constitutional Court only the Bundestag is considered to be parliament, while the Bundesrat as the representation of the Länder is not, cf. BVerfGE 37, 363 (380), See Palermo 1997

[11] "During the drafting process, the nature of the second 'federal' chamber was heavily debated. An important group favored a senate on the US model, while others advocated the traditional German Bundesrat solution. Finally, a deal was struck. The delegates voted in favour of a bicameral system with a Bundesrat or Federal Council, but also opted for somewhat centralised system of distribution of revenues and financial resources."(Oeter 2006)

ordains that "Each Land has at least three (3) votes. *Länder* with more than two (2) million inhabitants have four (4) votes; with more than 6 million, 5 votes; and with more than seven (7) million, six (6) votes". The delegates must follow the instructions of their Land governments and they must vote "as a unit" (Art. 51 (3) BL). Thus, they can only vote unanimously for and consistently with their respective Land government. Problems can arise if the Land government is made up of a coalition government, in that case if "parties in the government do not agree on how to vote, the *Bundesrat* members from that Land will most likely abstain" (Gunlicks 2003, 346). However, since abstention "has an effect of negative vote, [because] only positive votes are counted […] All coalition governments sign detailed agreements before they form a government, and these include provisions concerning voting procedures in the *Bundesrat*"[12] (Gunlicks 2003, 346).

2.2 Functions of the German *Bundesrat*

The *Bundesrat* does not participate to the legislative process on an equal footing with the *Bundestag*. The Basic Law recognises the *Bundesrat's* right to initiate legislation (Art. 76.1 BL) and to comment bills initiated by the Federal Government (Art. 76.2 BL). According to Art. 77 (1) BL, federal laws adopted by the *Bundestag* are submitted by its President to the *Bundesrat* 'without delay'. At this point, the powers of the *Bundesrat* depends on the matters involved. Generally, the *Bundesrat* has a suspensive veto over legislation, however in specific cases, identified in the Basic Law[13], the *Bundesra*t wield an absolute veto. As for the latter, the bill can only pass with the *Bundesrat's* consent (Art. 78 BL), while for the former, the position of the *Bundesrat* can be overruled by a new vote in the *Bundestag* (Art. 77 (4) BL).

Prior to the 2006 Reform, most of the federal legislation needed the *Bundesrat* approval, this was mainly due to the extensive interpretation of the *Länder* competences, under the previous Art. 84 (1) BL, made by the German Constitutional Court. The Court extended the approval requirements for federal regulation of state administrative procedures and agency organisation, and it decided that "a federal statute needs approval as a whole if only one provision of the statute concerns administrative procedure or organisation"[14] (Heun 2011, 70). Although, successively the Court made a distinction between substantive and procedural provisions[15], the *Bundesrat's* powers had already been strengthened (See Kommers and Miller 2012, 114). This reinforced role, accompanied by the presence of different majorities in the two Chambers, which occurred several times in

[12] In the famous Immigration Act Case 2002, The German Constitutional Court argued "The Bundesrat is a collegial constitutional body of the federation that consists of delegations sent by the Land governments. It is not formed by the Länder […] The votes of a Land are to be cast uniformly in accordance with Article 51.3 [2] of the Basic Law. The act of casting Land's votes occurs with the voluntary announcement of the votes of a Land" (106 BVerfGE 310) (translation taken from Kommers and Miller 2012, 110-112)

[13] "Actions constitutionally requiring the Bundesrat's consent include proposed constitutional amendments, all laws affecting state tax revenues, and all laws and directives impinging on the administration of federal law by the Lander" (Kommers and Miller 2012, 114)

[14] 8 BVerfGE 274, 294f; 55, 274, 326f

[15] 37 BVerfGE 363, 380 "There are a number of cases in which the Bundesrat's consent is necessary for the amendment of a law that originally required the Bundesrat's consent. This is apparent when the amending law that originally required the Bundesrat's consent. The same is true when the amendment affects those provisions of the original statute that triggered the need for the Bundesrat's consent. Also included is the case in which a statute amends another statute requiring consent and containing substantive norms as well as provisions respecting the state's administration. To be sure, the amending statute may be confined to substantive matters. But it might make such changes in this realm that it gives an essentially different meaning and scope to the administrative provisions it does not expressly amend.."

Germany[16], were the main cause of political gridlock in the country. In this respect, the 2006 reform tried to reduce the frictions between the two Chambers in two ways. First, it reduced the matters under the concurrent legislation and abolished the frame legislative competences[17]. Second, it reduced the matters falling within the approval requirement. The reform was the upshot of a compromise between the *Länder* and the federal government, with both gaining in terms of exclusive competences.

3. The Belgian federal system

Differently from the German experience "the modern Belgian state is a product of secession" (Deschouwer 2005b, 92). Dating back to the seventies, the process of federalisation represented an attempt to accommodate the rising tensions in the state. Hence, all reforms were efforts to appease the internal cleavages and, specifically, "ethno- territorial, socio- economic and political" ones (Reuchamps 2013, 375) and any step toward federalism was not intentional, but rather "the reforms of the state negotiated since the 1960s have been basically attempts to avoid federalism" (Deschouwer 2012, 49). Despite the above, already in the seventies the government had claimed that 'the unitary state had become obsolete' and granting more autonomy to the sub-national entities became the only way to appease the internal tensions and avoid political gridlock (Covell 1993).

Today, based on a dual federal structure, the first article of the Constitution -as revised in the 1993[18]-, explicitly states that "Belgium is a federal state composed by Communities and Regions" (Art. 1 Be Const)[19]. Thus, conceived as a device to 'hold together' (Linz & Stepan 1996) the increasing Dutch-French language divide, the Belgian federalism is at the same time, the response to the cultural claims of the Flemish movement and the response to the economic concerns, widely felt in Wallonia (Alen 1993, Alen & Ergec 1994; Fitzmaurice 1994; Deschouwer 2012). In other words, the 1970 Constitutional reform represented an important compromise between the 'two incompatible definitions of the country' (Deschouwer 2012): on the one hand, the Flemish proposal of a reform based on the language communities and on the other, the francophone proposal to create regions. Today, the federal model is based upon three Communities[20] (Art. 2 Be Const.), the Flemish Community, the French Community and the German-speaking Community, which hold cultural and linguistic powers[21]; and three regions (Art. 3 Be Const.): Flanders, Wallonia and Brussels which hold socio-economic competences[22]. The regions' boundaries are defined in geographical terms, while the communities follow the linguistic boundaries and in practice they mostly overlap with the regions (Craenen 2001).

The dual federal structure is echoed in a dual and complex institutional arrangement (Bursens and Massart-Piérard 2009; Mastromarino 2013). At the federal level, according to Art. 36 of the

[16] In 1960, the conservative Bundestag was counterweighted by a Social Democratic Bundesrat. In 2000, the Bundesrat was formed by a conservative majority, while the Bundestag had a Social Democratic majority. In 2011, the situation reversed.

[17] Some of these matters became exclusive *Länder* competences, such as in the field of education, public employees of the *Länder* and the local government levels.

[18] Fourth State Reform

[19] Unless otherwise specified, in this section all references to Articles refer to those of the Belgian Constitution.

[20] "The federalization process is described by the term 'communitarisation' in Belgium. This is due to the role of the constituent linguistic/cultural communities played in decentralisation, or more precisely, in the move towards a congruence between state and society" (Erk 2008, 31)

[21] Chapter IV, Section II, First sub section, Art. 127-130 BE Const. Listed in the Art. 4 and 5 Titre II of the Special Law on Institutional Reform, 8 August 1980 and successive reforms.

[22] Chapter IV, Section II, Second Subsection, Art. 134, listed in Art. 6.1 Titre II of the Special Law on Institutional Reform, 8 August 1980 and successive reforms

Constitution, Belgium is a bicameral parliamentary monarchy and the legislative power is collectively exercised by the King, the Chamber of Representatives and the Senate. The two chambers vary strongly in terms of functions and composition and today, with the 2014 Constitutional Reform, the powers of the Senate were further reduced. On the sub-national level, all the three linguistic communities and three territorial regions have their own parliaments (labelled Council) and governments. The asymmetry is very strong both in terms of institutions and competences[23].

The Belgian federal structure is clearly an *unique* one (Fitzmaurice 1994). Looking at the relationship between the different levels of government, in the system, there is neither a hierarchy of norms nor a supremacy clause and the relationship between the federal and federated autonomies are based on the principle of exclusive allocation of competences[24].

This exclusivity of competences is reflected on the international ground (Wouters and De Smet 2001). According to Art. 167, paragraph 1 of the Constitution, the King, as the head of the federal executive, is in charge of the foreign relations "without prejudice to the powers of the Communities and Regions" to regulate international cooperation[25]. In this respect, the regions and the Ccmmunities are empowered to conclude international agreements and the only two limitations that they have to respect are, first, the logic of parallelism between internal and external competences and, second, the general principles of the Country's foreign policy. This is the so-called *in foro interno in foro externo* principle, a distinguishing characteristic of the Belgian federal system (Lejeune 1994; Alen and Peeters 1998), which establishes a parallelism between the internal and foreign powers and it further implies a prohibition on the federal executive to conclude international treaties on matters which fall within the exclusive competence of the sub-national authorities. Hence, the internal system of distribution of the exclusive powers *ratione materiae* between the different levels of government was transposed on the international ground, which empowers the sub-national authorities, within the scope of their national competence, to operate internationally in the same matters[26].

Obviously, the principle also applies to the European Union and later it will be examined which implications entail in terms of participation to the EU decision-making process.

3.1 The Reformed Belgian Senate

In Belgium, the problem of the internal fragmentation did not find appeasement with the establishment of the federal system, but rather the increasing autonomy reinforced the internal

[23] Since 1980, the Flanders have merged their institutions and competences and today exists only one Flemish government, one parliament and one public administration, competent for both community and regional matters. On the opposite, the French Community and the Walloon Region preserve their institutional distinctiveness while, in terms of repartition of powers, the power was further dispersed and differentiated, accruing the asymmetry in the system. Finally, the complexity is further emphasised by the peculiar settlement established in the Region of Brussels, which is "located in Flemish territory, but predominantly French speaking and with a mission as European Capital and substantial foreign population" (Woodward, 2003).

[24] Art. 35 of the Be Const. states that the Communities and the Regions exercise residual powers and that the federal authority is only competent for those matters constitutionally enumerated. However, this article should be further implemented by a Special Act, which should precisely indicate the enumerated federal competences. Yet, it has not been regulated and the Communities and the Regions continue to be competent for those matters enunciated in the Special Law on Constitutional Reform 8 August 1980.

[25] Be Const. Art. 167 § 1er. Le Roi dirige les relations internationales, sans préjudice de la compétence des communautés et des régions de régler la coopération internationale, y compris la conclusion de traités, pour les matières qui relèvent de leurs compétences de par la Constitution ou en vertu de celle-ci.

[26] The treaty-making power of the sub-national Authorities should be conceived broadly, covering the entire treaty making process, form the negotiation to the approval by the respective parliaments and the ratification. Art. 167, paragraph 4 Be Const., Art. 81 of the Special Law on Institutional Reform of 8 August 1980

divisions and today "the evolving Belgian state is an example of ongoing federalism whereby the central authority has been almost completely emptied of any meaningful political power" (Deschouwer 2005b, 96).

In this process, the role of the Belgian Senate was progressively weakened. The membership was designed for representing the internal linguistic cleavages and thus it would have been the right place where the division had to be accommodated, but this was not the case. The lack of a federal identity and the fact that the internal fragmentation was accommodated through an increasing recognition of the sub-national authorities' powers, completely emptied the mediating role of the Senate and "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. Hence, the Belgian system shows an inverse trend, with the deepening of the devolutionary process and the increased role of the sub-national authorities; the Senate's role decreases accordingly (Romaniello 2013).

The recent Constitutional Reform, enacted the 6 January 2014, confirms this trend and it drastically reduces the Senate's powers and changes its composition. As for the composition, under the revised Art. 43.2 Be. Const., the principle of representation of the internal linguistic divide is formally recognised for the Senate, as was already in place for the Chamber of Representatives. However, while this latter continue to be directly elected[27], according to the new Art. 67 Const.[28], the Senators will be appointed by the sub-national authorities. Specifically, the number of the senators was reduced and the new Senate is now composed by sixty(60) representatives in total. Among them, fifty (50) senators will be appointed by the sub-national parliaments and they will have a double mandate and ten (10) will be 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 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. The co-opted senators should be chosen following the party lists that obtained a national electoral quota in the House of Representatives election, it follows that the selection will be spread along the voters of the House of Representatives.

To sum, today there is no longer a direct election of the Senate but rather, the distribution of the seats – Art. 68 Const.- is based, on the one side, on the results of the regional and community elections –except the one (1) senator selected by the Parliament of the German Community – and, on the other side, as for the ten (10) co-opted senators, it takes into account the results of the elections of the House of Representatives. In this regards, with the abolishment of the provision

[27] The House of Representatives is composed by one hundred and fifty members –Art. 62 and 63 Be Const. - directly elected in multimember districts on the base of a proportional representation voting system), the decreasing role of the Senate, indirectly enhances its role in the national-decision making process

[28] According to the previous Art. 67 Be Const. the senators were chosen by electoral colleges and community councils of the French, Flemish and German linguistic groups. Specifically, forty (40) senators were elected directly: twenty-five (25) by the Dutch Electoral College and fifteen (15) by the French Electoral College . Additional twenty-one (21) senators were appointed from within their own members by the community parliaments: ten (10) by the Flemish community parliament, ten (10) by the French community Parliament and one (1) by the German community Parliament. Finally, ten (10) senators are co-opted: six (6) selected by the directly elected Dutch senators and the appointed Flemish community senators and four (4) by the directly elected French senators and the appointed French community senators.

which used to define the Senate's terms of mandate[29], the new Art. 70 Be Const., ties the mandates of the Senators with their respective sub-national Parliaments, while the ten (10). co-opted senators follows the renewal of the Chamber of Representatives – Art. 70.2 Be Const.- In this way, the term of the Senate becomes independent from the Chamber of Representatives and the reformed Constitution also abolishes the provision established in the previous Art. 46.4 Be Const., which so far have regulated the automatic dissolution of the Senate, in the case of dissolution of the House of Representatives prior to the end of its formal mandate. Today, this does no longer apply and the Senate will continue its own legislature. This independence is mitigated by the new Art. 44 Be Const., which states that the Belgian Senate is no longer a permanent institution and, thus, it will be up to its internal standing orders to define its working organisation and the number of plenary sessions per year.

3.2 The Limited functions of the newly reformed Belgian Senate

Looking now at the changes in terms of competences, the reformed Constitution drastically reduces the Senate's powers and it completely reviews the relation with the House of Representatives. This latter will continue to be the sole Chamber tied by the confidence relationship with the Executive (Art. 46 Be Const.), while the Senate, already with limited power to control the government responsibility, further loses any right of inquire –Art. 56 Be. Const.- and of petition– Art. 57 Be Const.-. The House of Representatives will be the sole authority holding both rights, while the Senate retains just the right to request that some issues[30] –with a specific majority (Art. 56.2 Be Const.)- may be subject to an information report. It follows, that today only the House of Representatives can question the Government's political responsibility.

Following this ratio, the legislative competences of the Senate were considerably reduced. While Art. 36 Be Const. continues to State that the legislative function is collectively exercised by the King, the Chamber of Representatives and the Senate. In practice, the powers of the Senate are rather limited. In the Belgian system, matters are regulated through three different legislative procedures. The first includes all the matters that require the consent of both chambers and it is the so-called integral bicameralism, the second consists of all the matters that require an optional bicameral procedure –restricted bicameralism- and, the third, regards all the matters regulated through the mono-cameral procedure. The Constitutional reform drastically reduces the matters under the first two procedures -respectively listed in Art. 77 Be Const.[31] and 78 Be Const.[32]- and in

[29] Four years

[30] Art. 56.2 Be Const. "Le Sénat peut, à la demande de quinze de ses membres, de la Chambre des représentants, d'un Parlement de communauté ou de région ou du Roi, décider à la majorité absolue des suffrages exprimés, avec au moins un tiers des suffrages exprimés dans chaque groupe linguistique, qu'une question, ayant également des conséquences pour les compétences
des communautés ou des régions, fasse l'objet d'un rapport d'information. Le rapport est approuvé à la majorité absolue des suffrages exprimés, avec au moins un tiers des suffrages exprimés dans chaque groupe linguistique.

[31] Art. 77 La Chambre des représentants et le Sénat sont compétents sur un pied d'égalité pour : 1° la déclaration de révision de la Constitution ainsi que la révision et la coordination de la Constitution; 2° les matières qui doivent être réglées par les deux Chambres législatives en vertu de la Constitution; 3° les lois à adopter à la majorité prévue à l'article 4, dernier alinéa; 4° les lois concernant les institutions de la Communauté germanophone et son financement; 5° les lois concernant le financement des partis politiques et le contrôle des dépenses électorales; 6° les lois concernant l'organisation du Sénat et le statut de sénateur.
Une loi adoptée à la majorité prévue à l'article 4, dernier alinéa, peut désigner d'autres matières pour lesquelles la Chambre des représentants et le Sénat sont compétents sur un pied d'égalité.

[32] Art. 78 § 1er. Sous réserve de l'article 77, le projet de loi adopté par la Chambre des représentants est transmis au Sénat dans les matières suivantes : 1° les lois prises en exécution des lois à adopter à la majorité prévue à l'article 4, dernier alinéa; 2° les lois visées aux articles 5, 39, 115, 117, 118, 121, 123, 127 à 129, 131, 135 à 137, 141 à 143, 163, 165, 166, 167, § 1er, alinéa 3, 169, 170, § 2, alinéa 2, § 3, alinéas 2 et 3, et § 4, alinéa 2, 175 et 177, ainsi que les lois prises en exécution des lois et articles susvisés, à l'exception de la législation organisant le vote automatisé; 3° les lois adoptées

the art. 74 Be Const. recognises the residual legislative power to the House of Representatives, collectively exercised with the King. Moreover, the revised Art. 75 Const. limits the Senate's power of legislative initiative to the sole matters listed in Art. 77 Be Const., which require a compulsory bicameral procedure. Thus, only for those matters, which refer to the State constitutional structure and its institutions, the Senate and the House of Representative are on equal footing – art. 77 Const. -. For all the other matters, also for the so-called optional bicameral procedure, the position of the House of Representatives prevails (Deschouwer 2005a).
Hence, the Sixth State Reform strongly reduced the Belgian Senate's powers, moreover its role as a chamber representing the linguistic divide is further undermined by the same rationale of the Belgian federalism, which based on the logic of consociationalism "reduces the need for a strong federal second chamber whose representatives articulate regional interests in federal decision-making" (Swenden 2005).

4. German federalism and the role of the *Bundesrat* in EU affairs

The German participation in the European process is strongly influenced by its federal structure. Thus, the role of the *Bundesrat* in the EU decision-making process can only be understandable if the interests of *Länder* are taking into account. In fact, according to Art. 50 BL, the *Bundesrat* is the place through which the *Länder* "participate in the legislation and administration of the Federation and in matters concerning the European Union". Thus, the *Bundesrat* is more than a second chamber and it cannot be simply described as an "upper house" of Parliament. But rather, as made clear by the German Constitutional Court[33], the Chamber should be seen as the federal organ, which assures the involvement of the *Länder* in the national decision-making process.
Through these lenses, we should remember that European matters were treated as part of national foreign policy, which in light of Art. 32 BL was an exclusive competence of the federal level. Thus, the federal government, before the introduction in 1992 of the new Art. 23 BL, had the exclusive power –conferred by Art. 24 (1) BL[34]- to transfer sovereign powers to the International organisations. This was the so-called 'opening clause' (Suszycka and Jasch 2009), or "power of integration" (Jeffery 1997), which stated that "The Federation may by a law transfer sovereign powers to international organisations", fully legitimised the executive to transfer powers, including those of the *Länder*, to European institutions. Which, with the deepening of the European integration process, also affected the exclusive *Länder* competences and those federal level competences exercised by the *Länder* through the *Bundesrat* (Jeffery 1996). In other words, "Article 24 (1) BL was insensitive to the internal distribution of competences within the German Federal Republic between the federal level and the *Länder*, so that the federal level could agree, without

conformément à l'article 169 afin de garantir le respect des obligations internationales ou supranationales; 4° les lois relatives au Conseil d'Etat et aux juridictions administratives fédérales.
Une loi adoptée à la majorité prévue à l'article 4, dernier alinéa, peut désigner d'autres matières que le Sénat peut examiner conformément à la procédure visée au présent article.
§ 2. A la demande de la majorité de ses membres avec au moins un tiers des membres de chaque groupe linguistique, le Sénat examine le projet de loi. Cette demande est formulée dans les quinze jours de la réception du projet de loi. Le Sénat peut, dans un délai ne pouvant dépasser les trente jours : - décider qu'il n'y a pas lieu d'amender le projet de loi; - adopter le projet de loi après l'avoir amendé.
Si le Sénat n'a pas statué dans le délai imparti ou s'il a fait connaître à la Chambre des représentants sa décision de ne pas amender le projet de loi, celui-ci est transmis au Roi par la Chambre des représentants.
Si le projet a été amendé, le Sénat le transmet à la Chambre des représentants, qui se prononce définitivement, soit en adoptant, soit en amendant le projet de loi.

[33] According to the German Constitutional Court only the *Bundestag* is considered to be parliament, while the *Bundesrat* as the representation of the *Länder* is not, cf. BVerfGE 37, 363 (380), See Palermo 1997

[34] Under Art. 24 BL the *Bundesrat* retained a soft 'suspensive veto' but no power to stop transfer of powers to the European level

necessarily having to secure the consent of the *Länder*" (Jeffery 1996, 254). In this sense, it appears immediately clear that since the first inception, the "process of European integration has posed a persistent challenge to the legal status of the *Länder* and to their political quality as constituent states, and therefore also to the fundamental federal structure of the Federal Republic" (Hrbek 1999, 218).

In this respect, the *Länder* started perceiving the deepening of the European integration process as a threat for their national constitutional status. For those reasons, facing effective limitations on their sovereign powers, particularly with respect of most concurrent federal level competences, the *Länder* struggled to restore the balance between their role and those of the federation and the European Union. The *Länder's* increasing loss of "capacity for legislative codetermination through the *Bundesrat"* (Jeffery 1997, 58) was faced through the affirmation of the concept of 'European domestic policy', based on the "argument that EU policy is no longer foreign policy in the traditional sense, but with the growing scope of European legislation with direct effect in the member states, has adopted the character of *domestic* policy"[35] (Jeffery 1997, 56).

However, those claims received a first attention only in the Nineties, when in the expected ratification of the Maastricht Treaty, the *Länder* calling for their power of veto in the domestic ratification process (Jeffery 1994), managed to obtain the adoption of their demands.

4.1 Historical origins: slow involvement of the *Bundesrat* in EU affairs

The law authorising the ratification of the Treaty of Rome contained a mere information duty on the side of the government. art. 2 stated as follow "The federal Government should keep the *Bundestag* and the *Bundesrat* constantly informed of the activities of the Council of the European Economic Community and of the Council of the European Atomic Energy Community. When a decision of one of the Councils necessitates a German Law or involves legislative provisions applying directly in the Federal Republic of Germany the information should be given before the Council takes a decision" (reported in Niblock 1971, 38).

Hence, between the 1957-1992, the procedures for the scrutiny of European legislative proposal – of both Houses - strongly depended on the right of information provided under art. 2 of the Act of Ratification of the Treaty of Rome. However, in 1986, during the revision of the Treaties of Rome, the federal Government further extended its commitments of information towards the *Bundesrat* - *Bundesratverfahren*[36]- which recognised its right to be comprehensively informed on all EC proposals related to the federal states' competences. Moreover, according to those commitments - art. 2 on the Transposition of the Single European Act[37]- and the agreement signed between the *Länder* and the federal Government[38], "the *Bundesrat* [acquired] the right to express its view on these matters and the federal Government [had] the duty to take the *Bundesrat*'s view into account

[35] "The federal level has the responability 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)

[36] This procedure the so-called *Bundesratverfahren* represent the formal procedure which assures an intrastate participation of the *Länder* through the *Bundesrat* see Baldini 2000

[37] Law on the Single European Act of 19 February 1986, *Bundesgesetzblatt* 1986 II, 1102

[38] Agreement on 17 December 1987 'Vereinbarung zwischen der Bundersregierung und den Regierungen der Länder über die Unterrichtung und Beteiligung des Bundesrates und der Länder bei Vorlagen im Rahmen der Europäischen Akte (EEAG) vom 28. February 1986"

when formulating its own position. The federal Government was only entitled to ignore the view of the *Bundesrat* majority on matters within the Federation's exclusive legislative domain and/or if imperative considerations of foreign or integration policy were at stake" (Saalfel 1996, 17).

Despite those obligations and the fact that the *Länder* could participate and express their view through the *Bundesrat* on EU issues, the federal Government often failed to promptly inform the *Bundesrat*. Thus, timeliness has been one of the major obstacles in the scrutiny of EU legislative proposals, which in practice weakened the effective *Länder* involvement in the European decision making process.

An important change was marked with the negotiation of Maastricht Treaty. The *Länder* strongly claimed for a reinforcement of their prerogatives on national and EU level and they invoked the argument of 'European domestic policy'. Moreover, the need to reform the national Constitution after German unification represented an important juncture, which led in 1992 to the codification of the *Bundestag*'s and *Bundesrat*'s rights to information in the Basic Law.

Art. 23 [39] BL, the so-called 'Article on European Union' represented the most important constitutional novelty with respect the European Union[40].

Article 23(1) BL sets up the relationship between Germany and the European Union and entrenches in the Text the position of the German Constitutional Court, which commits the EU to respect "the democratic, social and federal principles, the rule of law, the principle of subsidiarity and the guarantee of a level of protection of basic rights essentially comparable to that afforded by this Basic Law". In the light of those principles, the right of the Federation to transfer sovereign powers is now contingent upon the consent of the *Bundesrat*, which finally saw recognised its

[39] Article 23 [The European Union]

(1) With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social, and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the *Bundesrat*. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79.

(2) The *Bundestag* and, through the *Bundesrat*, the *Länder* shall participate in matters concerning the European Union. The Federal Government shall keep the *Bundestag* and the *Bundesrat* informed, comprehensively and at the earliest possible time.

(3) Before participating in legislative acts of the European Union, the Federal Government shall provide the *Bundestag* with an opportunity to state its position. The Federal Government shall take the position of the *Bundestag* into account during the negotiations. Details shall be regulated by a law.

(4) The *Bundesrat* shall participate in the decision-making process of the Federation insofar as it would have been competent to do so in a comparable domestic matter, or insofar as the subject falls within the domestic competence of the *Länder*.

(5) Insofar as, in an area within the exclusive competence of the Federation, interests of the *Länder* are affected, and in other matters, insofar as the Federation has legislative power, the Federal Government shall take the position of the *Bundesrat* into account. To the extent that the legislative powers of the *Länder*, the structure of Land authorities, or Land administrative procedures are primarily affected, the position of the *Bundesrat* shall be given the greatest possible respect in determining the Federation's position consistent with the responsibility of the Federation for the nation as a whole. In matters that may result in increased expenditures or reduced revenues for the Federation, the consent of the Federal Government shall be required.

(6) When legislative powers exclusive to the *Länder* are primarily affected, the exercise of the rights belonging to the Federal Republic of Germany as a member state of the European Union shall be delegated to a representative of the *Länder* designated by the *Bundesrat*. These rights shall be exercised with the participation and concurrence of the Federal Government; their exercise shall be consistent with the responsibility of the Federation for the nation as a whole.

(7) Details respecting paragraphs (4) through (6) of this Article shall be regulated by a law requiring the consent of the *Bundesrat*.

[40] The Law on 21 December 1991, introduced the so-called "European amendments", in particular Art. 23 and changes in Art. 24, Art. 50 and the introduction of Art. 52 Sec. 3a on the European Chamber of the *Bundesrat*

involvement in EU matters. Moreover, the establishment of the European Union and any further treaty amendments are subject to the 'eternity clause' of Art. 79(3) BL of the Basic Law. "This implies that the federal structure of Germany as protected explicitly by Article 79(3) BL cannot be affected or impaired by future steps towards the European integration" (Suszycka and Jasch 2009, 1241).

Art. 23(2) BL provides for the involvement of the *Bundestag* and the *Bundesrat* in 'matters concerning the European Union'. It entrenches the federal executive's duties to inform 'comprehensively and at the earliest possible time' both chambers of parliament. The *Länder* participation in EU affairs is guaranteed through the *Bundesrat*, whose tasks in Art. 50 BL were reformed accordingly[41]. Differently to the former provisions settled in art. 2(1) of the Law on the Transposition of the SEA, the information obligation are extended and the *Bundesrat's* participation – Art. 23(4) BL- shall be guaranteed "insofar as it would have been competent to do so in a comparable domestic matter, or insofar as the subject falls within the domestic competence of the *Länder*.

In detail, according to paragraph (5) and (6) of Art. 23 BL, "the degree of *Länder* participation in European Union matters depends on the qualification of the issues in question" (Ress 1995, 51), specifically the Federal Government shall (a)"take into account" the *Bundesrat*'s position in matters within the exclusive competence of the Federation; (b)"pay the greatest possible respect" to the *Bundesrat*'s position when legislative powers of the *Länder*, the structure of Land authorities, or Land administrative procedures "are primarily affected"; (c) and delegate the exercise of the rights belonging to the Federal Republic of Germany as a member state of the European Union "to a representative of the *Länder* designed by the *Bundesrat'*, when exclusive competence of the *Lander* are primarily affected. The 2006 Constitutional reform, Art. 23 was amended and today, it clearly lists the exclusive powers of the *Länder*, namely school education, culture or broadcasting (Art. 23(6) BL). With the Lisbon Treaty, the so-called Article on European Union article was further amended and a new paragraph was added[42], which today recognises to the *Bundestag* and *Bundesrat* the right to bring an action before the Court of Justice of the European Union to challenge a legislative act of the European Union for infringing the principle of subsidiarity' (Art. 23 (1a) BL).

Most of the novelties were then introduced by the revised *Act on the Exercise by the Bundestag and by the Bundesrat of their Responsibility for Integration in Matters concerning the European Union* (so-called 'Responsibility for Integration Act' or Integrationsverantwortungsgesetz IntVG), which entered definitely into force on 22 September 2009. The Law takes into account the novelties of the Lisbon Treaty and recognises to the *Bundesrat* a full involvement in the procedures. However, it leaves to the parliamentary standing orders to establish the suitable scheme with regard to the subsidiarity check, namely on "how a decision on the delivery of a reasoned opinion in accordance with Article 6 of the Protocol on the application of the principles of subsidiarity and proportionality is to be obtained" (section 11 and 12 IntVG).

4. 2 The Structural organisation of scrutiny in the Bundesrat

In the *Bundesrat*, we should make the distinction between the Committee for European Union and the Chamber for European Affairs. The first has a long tradition dating back to the sixties and has its legal basis in Art. 23 of BL. The second is regulated by Art. 53(3a) BL and Art. 45 of standing

[41] Art. 50: "The *Länder* shall participate through the *Bundesrat* in the legislation and administration of the Federation and in matters concerning the European Union.

[42] Constitutional amendments were made to art. 23, 45 and 96 of the BL

orders and was set up for facing the increased workload in the House and assuring a faster scrutiny procedure of EU proposals.
As for the first, it has already been underlined that the *Bundesrat* has had a special Standing Committee on European Affairs since 1957, the so-called 'special Committee for the Common Market and Free Trade Zone', which was lately replaced by a Committee for European Community Affairs in 1965 and, from 1993 on, labelled 'Committee for European Union'.
The Committee has a general mandate to assure coordination in the field of European affairs. In fact, the House usually works through its specialised select Committees and also on European matters, the Commission proposals are examined both by the competent select committees and by the 'European Committee'. Specifically, the main responsibility of the European committee is to "draw up the report and formul[ate] an opinion for the *Bundesrat*" which is based on "both its own discussion and of opinions forwarded by the other committees consulted" (Niblock 1971, 41). The Committee – Art. 11 standing orders- is composed by Ministers from each of the 16 *Länder*. It is responsible for scrutinising all European documents, which may be relevant and affect the interests of the *Länder*.
As for the Chamber for European Affairs, with the ratification of the Single European Act and the introduction of *Bundesratverfahren*[43], the number of European documents available dramatically increased. Thus, the *Bundesrat,* in order to deal with the augmented amount of work and assure a faster and effective scrutiny, set up in 1988, a special Committee within the *Bundesrat*, 'so-called 'Europa Kammer'[44], which could assemble more frequently than the *Bundesrat.* The Europa Kammer acquired fully legitimisation with the 1992 Constitutional Amendments. A new Article 53(3a) was added, which now states "For matters concerning the European Union the *Bundesra*t may establish a Chamber for European Affairs, whose decisions shall be considered decision of the *Bundesrat*. The number of votes to be uniformly cast by the *Länder* shall be determined by paragraph (2) of Article 51". The Constitutional amendments fully recognised the power of the Europa Kammer to convene and approve resolution, which are considered decision of the whole *Bundesrat* (Art. 45b(1) Standing Orders). The Chamber is composed by a delegate of each *Länder* (Art. 45b (2) Standing Orders), and 'Members and representatives of the Federal Government of the Land governments may participate in meeting of the Chamber for European Affairs, other persons may attend only with the permission of the Chairperson (Art. 45g Standing Orders).
In sum, the Committee for European Union Affairs is one of the select parliamentary committees of the *Bundesrat,* whose role is to issue recommendations to the Chamber, for decisions that should be taken in matters dealing with European Affairs. The Chamber of European Affairs, on the contrary, convenes when matters have been referred to it and "which require urgent or confidential treatment" (Art. 45d Standing Orders). In this case, it is the Chamber of European Affairs, which takes the decision on behalf of the plenary.

4. 3 The Procedural organisation of scrutiny in the *Bundesrat*

With the entry into force of the Lisbon Treaty and the introduction of the EWS, the *Bundesrat* did not establish any specific scrutiny procedure with regard to the subsidiarity check, but rather it was simply integrated into the regular scrutiny process.
Under Art. 23(3) BL, the federal Government is obliged to comprehensively and promptly inform the *Bundestag* and the *Bundesrat* of matters concerning the European Union. Those obligations have been further specified in the "Act on Cooperation between the Federal Government and the

[43] the formal procedure which increased the Bundesrat's rights to information and to make recommendations on European issues
[44] For an evaluation of the Activity of the Europa Kammer see Amirante 2000

German *Bundesrat* in Matters concerning the European Union" (EUZBGL)[45], which clearly sets up a precise list of all EU documents that shall be forwarded to the *Bundesrat*. It follows that the federal chamber has the same access to information as the lower one; however its degree of participation and involvement in the decision- making process strictly depends on the qualification of the issues in question.

In this regard, Art. 23(4) BL states that 'the *Bundesrat* shall participate in the decision making process of the Federation insofar as it would have been competent to do so in comparable domestic matter, or insofar as the subject falls within the domestic competence of the *Länder'*, which implies that the federal Government is committed, with different degrees to respect the *Bundesrat's* position.

Specifically, the federal Government shall (a)"take into account" the *Bundesrat*'s position in matters within the exclusive competence of the Federation (Art. 23(4) BL); (b)"pay the greatest possible respect" to the *Bundesrat*'s position when legislative powers of the *Länder*, the structure of Land authorities, or Land administrative procedures "are primarily affected" (Art. 23(4) BL); (c) and delegate the exercise of the rights belonging to the Federal Republic of Germany as a member state of the European Union "to a representative of the *Länder* designed by the *Bundesrat'* (Art. 23(5) BL), when legislative powers exclusive to the *Länder* are primarily affected. Those latter, since the Constitutional reform of 2006, have been clearly identified, namely school education, culture or broadcasting (Art. 23(6) BL).

Consequently, in order to identify those EU proposals, which need a further scrutiny in the House, the EU Secretariat of the *Bundesrat* carries out a pre-selection process. In this phase, the criteria of prioritisation are obviously to look at what extent the EU proposal has an impact on the interest of the *Länder*, or more, if it concerns exclusive *Länder's* competences. On the bases of this pre-selection, the Secretary General on behalf of the President of the *Bundesrat* assigns the proposal to the relevant or more specialised Select Committees.

Thus, the Committee for European Affairs does not monopolise EU matters, but rather the *Bundesrat* mainly works through its specialised select committees, which scrutinise the proposal and then give recommendations to the Committee for European Affairs. In this first phase of scrutiny, the Committees may question the members of the Federal Government (art. 40(2) standing orders) and, if necessary, in order to have more insights on the proposal, they may 'conduct hearings of experts' (art. 40(3) standing orders).

At this point, is up to the Committee for European Affairs to deliberate on the proposal and to take the position of the other select committees into account. This phase of scrutiny is guided primarily by considerations arising from policy on the European Union and European integration. Moreover, the Committee also examines whether there is a sufficient legal basis in European law and whether the principles of subsidiarity and proportionality have been respected. After the deliberation, the Committee prepares and sends a report to the plenary for a decisive vote. In fact, decisions of the *Bundesrat*, which shall have legal effects externally, must always be taken by the assembly, which meets at public meetings about twelve times a year.

However, in exceptional cases, when a faster response is required and for the treatment of objects that need to be discussed confidentially, the Basic Law provides in Art. 52(3a) a Chamber for European Affairs, whose decisions are taken on the behalf of the plenary. In this case, as already underlined, this chamber mirrors the composition of the *Bundesrat*, and the voting procedure and rights of the *Länder* are similar of those established in the plenary.

[45] Gesetz über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union (EUZBLG)

Today, the German *Bundesrat* is among the most active upper chambers in the EU. Since now, it has raised 10 reasoned opinions and has sent more than 200 opinions.
The Federal chamber is more active also with respect to its Big Brother. Since the introduction of the so-called Barroso initiative and the entry into force of the Lisbon Treaty, the two chambers diverged in terms of active participation. "In the period 2010-12, the Bundesrat passed 386 resolutions that dealt with EU issues, 336 of which referred directly to documents from the European Commission (87 per cent). In the same period the *Bundestag* adopted 124 EU-related resolutions, of which only 38 directly referred to European Commission documents" (Höing 2015, 197). In the period 2009- 2013 the *Bundesrat* issued 694 resolutions on EU proposed regulation[46].
Thus, the number of opinions submitted by the *Bundesrat* within the political dialogue is significantly higher than the rate of participation of the lower house. The same is witnessed with regard to the EWS, where the *Bundesrat* submitted more reasoned opinions than the *Bundestag*.
Those differences can be understandable looking at the different representation patterns, and although some studies showed that also the *Bundesrat* follows the party logic for the scrutiny of the EU proposal, Lander government are nonetheless more attentive to protect their own competences and worried about any further transfer of powers. In this respect "in the *Bundesrat* scrutiny is more likely to be initiated over new EU legislation. This indicates that the Lander governments are wary of any further transfer of competences. Second in the *Bundesrat* scrutiny is much more likely to be initiated over proposals handled under the co-decision procedure. This could indicate that the Lander are distrustful of the federal government representing their regional interests" (Finke 2013, 22). In order to reinforce its right of information, as we have already mentioned, –according to Art. 23 (7) BL- the *Law on the Cooperation of the Federation and the Lander in Affairs of the European Union*[47]' (EUZBLG) was adopted. This law was first adopted in 1993. Successively amended in 2006 by Art. 2 of the Act of 5 September 2005 and in 2009 by the Act of 22nd September 2009. In 2013, a new draft was presented but has not yet been adopted. The last draft of the Act would introduce important novelties to the Law and would further extend the *Bundesrat*'s right of information and participation in the EU decision-making process.

5. The Belgian multi-participation to the EU

The peculiarity of the Belgian system, which mirrors the exclusivity of competences also at the international ground, has important consequences in terms of participation in the EU decision-making process.
Since 1991, Belgian regions and communities have mobilised in order to change the logic of representation in the EU Council of Ministers and after the 1988 and 1993 Belgian constitutional reform, the sub-national authorities were anxious to protect their new prerogatives. In this way, together with German Lander, they managed to see reformed the exclusiveness assured only to the members of governments of the MS to be part of the EU Council. The Maastricht Treaty revised the logic of participation and the current formulation of Art. 16(2) TEU "acknowledges that central governments are not necessarily the competent interlocutors at the European level" (Beyers & Bursens 2006, 1064). Today, it is practice for Belgium – according to the repartition of competences- to be represented at the EU Council of Ministers by regional or community governments and the decisions approved bind the member state as a whole (Franck *et al. 2003,* Kovziridze 2002).

[46] http://www.bundesrat.de/SharedDocs/downloads/DE/statistik/gesamtstatistik.pdf;jsessionid=74B5F9D6FB9784358F078FD3692BC54E.2_cid339?__blob=publicationFile&v=3

[47] Entwurf eines Gesetzes über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union (EUZBLG)

The responsibility to represent the State as a whole necessitated the establishment of some form of coordination between the executives of the federal and the federated levels. This appeared even more indispensable in the case of mixed competencies, where different policy aspects of the same matter are usually allocated to different levels of government. It follows, that in order to define a common position before the EU Council of Minister, all the authorities were obliged to coordinate (Beyers and Bursens 2006; 1064 Swenden 2005, 198).
The Cooperation Agreement between the federal government, the communities and the regions was signed the 8th March 1994. Thus, differently from the German experience, where the *Bundesrat* already represents the Lander executive interests, in Belgium this first kind of cooperation took the form of non-hierarchical intergovernmental bargaining[48].

In parallel to the executives participation in the EU decision-making, the National Parliament, as well as the regional and communities councils, started to feel the need to follow more closely the EU policies and to become a valid interlocutor in the conduct of European affairs. Historically, a first initiative to establish a parliamentary committee dealing with EU was taken in 1962 when the 'European Affairs Committee' was created in the House of Representatives, which disappeared in 1979. Following the model of the German Bundestag European Committee, later the House of Representatives established a new committee in May 1985, the so-called 'Advice Committee in charge of European Affairs'. In the Senate, it was only in 1989 that an Advice Committee in charge of European Matters was finally set up. The two Committees started to hold joint session and, in 1993, with the third institutional reform and the further reduction of the Senate's power, the 'Federal Advisory Committee for European Questions' received its bicameral status.
The Federal Advisory Committee for European Questions is composed of ten deputies, ten senators and the Belgian members of the European Parliament. And today, it represents the main forum for discussing and scrutinising EU policies.
However, it is not the unique one and, when we deal with the scrutiny of European matters, the role of the sub-national councils should be taken into account. Indeed, the paper has already stressed on the absence of a hierarchy of norms and on the fact that the relationship between the federal and the federated level is based on a dual complex system, founded on the principle of exclusive allocation of competences. This duality is reflected on the international and on the European grounds. The regions and the communities, according to the principle *in foro interno in foro externo*, are empowered to conclude international agreements in their field of competences, in behalf of the whole State.

5.1 The Lisbon Treaty and the multi-parliamentary Belgian system

The Lisbon Treaty and the introduction of the EWS represented an important challenge for the multi-parliamentary Belgian system. The EU proved again its incapacity to take into account the peculiar institutional settings of its Member States. It follows that the use of the terminology 'national parliaments' was extremely inadequate for the complex Belgian constitutional settlement, with "sub-national assemblies -proud of their distinctiveness and equality" (Kiiver 2006a, 5). For those reasons, considering the EU approach strongly inconsistent to its legal framework, Belgium challenged the EU's understanding of what should be conceived as a 'national parliament', and asked for the inclusion of the Declaration No.51 in the Treaty, as the best way to safeguard the

[48] 8 March 1994 Cooperation agreement between the federal authority, the Communities and the Regions concerning the representation of the Kingdom of Belgium in the Council of Minister of the European Union. *Belgian Moniteur*, 17 November 1994.

legal parity between the federal and the federated level. Today, the declaration No. 51 states as following:

"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"

The Declaration, "completely in line with the *foro interno foro externo* principle"(Vandamme 2012, 527), mirrors the Belgian federal system and it represents a symbolic recognition of the distinctive Belgian multi-cameral parliament. In this respect, by triggering the classical 'bicameral blueprint', the declaration should be read in connection with the protocol No. 2 which not only entitles the Belgian parliaments to participate to the EWS, but it also recognise them the right to bring an action "on grounds of infringement of the principle of subsidiarity" (Art. 8 Protocol No.2) before the European Court of Justice. Clearly, it is a Belgian matter to define the procedures and to accommodate the Lisbon provisions with its complex constitutional settings and to identify how to assure the participation of its 'multi-cameral parliament' in the European decision making process.
The 19th December 2005, anticipating the provisions set in the Treaty establishing a Constitution for Europe, all the Belgian assemblies, "in order to ensure a regional voice in the process of subsidiarity monitoring" (Popelier & Vandenbruwaene 2011, 221), drafted an inter-parliamentary cooperation agreement. The agreement sets the procedures for the implementation of the EWS in accordance with the Declaration No. 51 and although has not yet entered into force, it is nonetheless practically implemented.

The Cooperation agreement sets two important issues. First, it regulates how to allocate the two votes casted for the subsidiarity check among its 'seven chambers'. Second, it appoints the Council of State as the institution in charge for settling the judicial disputes between parliaments, with regard to potential conflicts of competences for the subsidiarity check.
In this regard, the procedure typically starts with the Senate transferring EU documents to all the Belgian assemblies. In this phase, when the National Parliament receive the EU legislative drafts, the regional and community parliaments have two weeks for expressing their intention to scrutinise the text and within this term one week to check in terms of competences before the Council of State. Thus, by the end of the fifth-week[49] and within their field of competence, each parliament, if it is the case, can issue a breach of the subsidiarity principle and communicates it – through a justified motivation- to all the other assemblies, sending it to the Secretary of the President of the seven Assemblies. At this point, the allocation of the vote follows the competence principle and, accordingly, the agreement envisages three different procedures. The first regulates if the competence is a federal one, in this case the two votes are shared out between the House and the Senate. The second allocates the votes among the federated authorities, if the draft corresponds to an exclusive regional or community matter. In this case the two votes will be cast only if the opinion comes from two sub-national parliaments belonging to different language administrations[50]. Finally, in the so-called mixed affairs, the two votes will be cast when at least one federal and one sub-national body issue an opinion of infringement.

[49] The five-week was based on the six-week term of the Treaty establishing a Constitution for Europe

[50] The Language administrations established in the cooperation agreement are four: (i) French, (ii) Dutch, (iii) German, and (iv) the bilingual French-Dutch regime

Moreover, the agreement contains a sort of clause for the transfer of EU documents. Currently, it is up to the Belgian Senate to receive all the EU drafts, which then are transferred to all the other assemblies. In the agreement is underlined the need, that by the day of its entry into force, all the assembly should receive directly the EU documents without any mediation of the Senate. However, the Senate continues today to play this mediating role.

This agreement represents an important novelty in the Belgian legal system. So far, although contested by some legal scholars (Poirier 2006; Popelier & Vandenbruwaene 2011), the cooperation agreements have always been deemed as an exclusive settlement for regulating the intergovernmental relations and thus prerogative of the executive branches. In this regard, scrutinising in depth the legal provisions lay down in Art. 92bis of the special law on the institutional reform 8th August 1980, nothing is stated about this exclusiveness, but rather the article just establishes that the cooperation agreement -negotiated by the regions, the communities and the state- should be reached by the "competent authorities". The article does not identify who are the competent authorities but thereafter it explicitly lists a range of specific cases where the parliamentary endorsement is compulsory.
Through the analysis of the text, it follows that the exclusiveness is more the result of a customary practice and a *default* interpretation of the article than the existence of a specific legal provision.
In line with this position and in opposition to some legal scholars (Popelier & Vandenbruwaene 2011, 221), which argued in favour of the Art. 48bis -introduced in the 2003 amendment to the Special Law on institutional Reform- as 'a sufficient legal basis for a regional assembly to conclude a co-operation agreement", the Council of State did not endorse these latter and questioned[51] the legal basis for parliaments to conclude a co-operation agreement.
Thus, with no explicit legal basis and the failure of the Constitutional Treaty, the 2005 cooperation agreement did not enter into force. Nonetheless, it is practically implemented.

5.2 The role of the Belgian Senate today

The last Institutional reform strongly revised the entire constitutional framework of the Belgian system. The sixth State reform curtailed the powers of the Senate and completely modified its structural organisation.
The Senate is no longer a permanent body but it holds plenary meeting eight times a year. The number of sectoral committees was drastically reduced. The Advice Committee in charge of European Matters disappeared and, today, the Senate counts only three sectoral Committees. Specifically, the Committee on Institutional Affairs; the Committee on transversal matters – Community competences; Committee on transversal matters -Regional competences.

As for the powers, we have already underlined, that the monocameral legislative procedure[52] represents today the ordinary procedure, while the competencies of the Senate mainly fall in the field of institutional matters: i.e. the revision of the Constitution, the special laws and ordinary acts with an institutional character.
Thus the powers of the Senate are today rather limited, the Belgian Senate can no longer influence most of the relevant and daily policies of the Country, while on the contrary its composition empowers the federated authorities to be involved on matters regarding the institutional structure of Belgium.

[51] Council of State, Division Legislation, Advice No. 44.028/AV of 29 Jun. 2008, *Parl. Doc.* Senate, 2007-08, No. 4-568/1, 33
[52] The legislative power is executed by the House of Representative and the King

The Belgian Senate could be the place of coordination among the regions and communities, however it is unlikely that it will be able to effectively represent them. Because, deprived from any relevant power, differently from the German *Bundesrat*, cannot have a say in most of the decisions that impact on the policy of the federated authorities.
The Belgian Senate is now looking for its role in the newly established constitutional settlement and unless it proactively affirms itself as a new place of coordination between the region and communities, it is predestined to become an empty institution.

It is noteworthy that during the negotiation of the parliamentary cooperation agreement, the Belgian Senate tried to "revamp its faded status in the Belgian constitutional system" (Vandamme 2012, 527). Namely, some proposals supported a project for a stronger Senate with enhanced cooperative federal powers and thus as the place *par excellence* of the territorial representation. The proposal found however a strong opposition among the sub-national representatives and the scheme of a new Senate as a "type of *Länderkammer*" (Vandamme 2012, 527) was perceived, -especially in the Flemish assembly- more as a threat to the federated autonomy than a possibility to institutionalise the place of cooperation. "Thus, instead of granting a 'co-operative' key role for the Senate, all seven Belgian assemblies reached by the end of 2005 a horizontal agreement on how to co-ordinate the new Lisbon's powers" (Vandamme 2012, 527). Although just an attempt, the symbolic reaction of the Senate to reaffirm its representative role was nonetheless remarkable. However, the incapacity of the current Senate to represent the federated entities is further emphasised in the Belgian constitution, the article 42 still states that the senators represent the nation, while the intent of the institutional reform was to transform the Senate into a chamber representing the federated authorities.

Today, with a Senate completely emptied of its powers, the institution tries to reaffirm its potential to become the place of coordination on the EU level.
The information report issued by the sectoral committee on trasversal matters – communities competences - analyses the impact of the EU legislation on the national system[53].
On the implementation of the EWS, some part of the doctrine described the Senate as the best institution able to play a role of mediation between the national and European level.
Patrice Popelier stressed on the fact that the Senate, today, does not have competencies, which deals with European matters. However, due to the practical difficulties of regional and communities to participate in the EWS, the Senate can play the role of coordinator, spreading information and knowledge through the information reports. The Senate could thus assure the preliminary technical support on the evaluation of the principle of subsidiarity in matters of the federated authorities. On the same, the Senate could organise debates and discussion on the subsidiarity principle, which could be helpful for harmonising the different positions of the federated parliaments on the procedure. Moreover, discussions could be organised on the subsidiarity principle on federal matters, which nonetheless have an impact on federated competencies. In this respect, the coordinating role of the Senate would be useful not only for respecting the deadline for issuing reasoned opinions and thus endorse a more effective participation in the EU decision-making process, but also for assuring an internal coordination between federated authorities, on the one side, and those latter with the federal state, on the other.

[53] Rapport d'information sur la transposition du droit de L'Union européen en droit Belge" Session 2014-2015 18 May 2015

Today, the Belgian Senate is among the chambers with the lowest rate of participation. So far, it has sent just three reasoned opinions and one of them was a concern of subsidiarity issued by the Flemish Parliament. All of the reasoned opinions were sent before the enactment of the Constitutional reform and today the role of the Belgian Senate is expected to be rather limited, unless the federated entities start to recognise it as a place of coordination. However, also in that case, the Senate will play the role of mediator between the federated authorities and the European level, without acquiring any independent role.

6. Conclusion

The European integration process, and more specifically, with the Lisbon Treaty, the introduction of the EWS represented an important challenge for the European parliamentary systems.

The Lisbon Treaty finally recognises the role of the NPs in the complex institutional architecture and calls them to "contribute actively to the good functioning of the EU". However, the Lisbon Treaty reaffirms the EU blindness toward the internal constitutional setting of its Member States and, in the EWS, NPs are treated equally (Art. 7(1) of the Protocol No. 2), notwithstanding their powers and functions in the State.

The establishment of the mechanism appears thus to reinforce the role of upper houses, because regardless of the internal constitutional setting of its Member States, the EWS establishes an equally distribution of votes between the two houses of the parliament. According to the procedure, the vote cannot be liberally assigned but rather, in bicameral systems, the houses must have one vote each. In this way, upper houses acquired an autonomous power to participate on equal footing with lower houses into the EU decision-making process and to independently adopt a reasoned opinion on the assessment of the compliance of EU draft legislative acts with the principle of subsidiarity.

Under this preliminary analysis, a potential "rise of the Senates" (Kiiver 2012) at the EU level was predicted. Because, "If we reason that subsidiarity enforcement is about keeping the exercise of legislative competences domestic where possible, under the EWS senates enjoy a voice that is completely out of proportion with the voice that they have when legislative competences actually are domestic" (Kiiver 2012, 65).

Contrary to this hypothesis, this research, stressing on the differential domestic adaptation to the European integration process (Bergman 1997; Maurer and Wessels 2001; Mittag and Wessels 2003; Saalfeld 2005; Raunio 2005; Kiiver 2006b; O'Brennen and Raunio 2007), emphasized that differential participation patterns should be expected and that those divergences reflects the profound heterogeneity of the institutional landscape of NPs (Kiiver 2012; Kaczyński, 2011; Lupo 2013, 2013a, 2013b; Olivetti 2013).

In this respect, the German and Belgian cases give evidences that the implementation of the European mechanism strongly relates to the national constitutional framework.

The German *Bundesrat* is among the most active upper chambers, both in the political dialogue and the EWS. It was lengthily pointed out that since the first inception of the 'process of European integration, [Europe] has posed a persistent challenge to the legal status of the *Länder* and their political quality as constituent states' (Hrbek 1999, 218). European matters were treated as part of national foreign policy, which in light of Art. 32 BL was an exclusive competence of the federal level. Thus, the federal government, before the introduction in 1992 of the new Art. 23 in the BL, had the exclusive power –conferred by Art. 24 BL (1)[54]- to transfer sovereign powers, including

[54] Under Art. 24 BL the *Bundesrat* retained a soft 'suspensive veto' but no power to stop transfer of powers to the European level.

those of the *Länder*, to European institutions. Clearly, the *Länder* started perceiving the deepening of the European integration process as a threat for their national constitutional status and the active participation of the German *Bundesrat* in EU affairs was seen as the only way to preserve the national constitutional balance of power. In other words, the prompt reaction of the *Bundesrat* was aimed at strengthening its rights of participation in the EU decision-making process as a crucial pre-condition for facing the effective limitations on *Länder* sovereign powers, particularly with respect of most concurrent federal level competences. In other words, the *Länder*, through the *Bundesrat*, struggled to restore the balance between their role and those of the federation and the European Union. With the Lisbon Treaty, the *Bundesrat* started to actively participate in the EWS and to be strongly involved in the EU decision-making process, while reinforcing its information right on the national level.

On the contrary, The Belgian Senate is among the chambers with the lowest rate of participation. 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. 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. Today the role of the Belgian Senate is expected to be rather limited, unless the federated entities start to recognise it as a place of coordination.

To sum, contrary to the predicted hypothesis, which claimed for a potential rise of the Senates this paper showed that the implementation of the EWS and, thus, the participation of upper chambers in EU affairs strongly relates to their national constitutional setting.
In federal systems, the German Bundesrat by effectively representing the Lander interest is fully legitimised to be involved and participate in the EU decision-making process. In this respect, the chamber has a key role in the mechanism. On the contrary, in Belgium, the federated entities, jealous of their autonomy, perceive a potential mediating role of the Senate as threat for their powers. The Belgian communities and regions, despite the practical difficulties, prefer to participate directly in the mechanism.

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