

EUROPEAN UNION



Committee of the Regions

Comparative overview of consultative practices within the second chambers of EU national legislatures

**This report was written by Pierre Schmitt (Leuven Centre for Global Governance Studies). The author thanks Dr. Axel Marx for his comments on a first draft of the report.
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1 Executive summary

This study presents a comparative overview of useful consultative practices within EU Member States' second chambers that could serve as a model and source of inspiration for the definition of the role of the Committee of the Regions (CoR) in the (future) EU decision-making process.

In order to guarantee a solid degree of legitimacy to second chambers and to avoid continuous debates on reforms, a clear differentiation between second chambers and first chambers has to be assured, both with regard to their composition and to their legislative competences.

As far as their composition is concerned, the differentiation may be expressed through a second chamber representing subnational entities, as provinces, regions, departments, municipalities, etc. while the first chamber represents the people on a population basis. Territorial representation constitutes a common feature between most second chambers in European Member States and the CoR at the European level and should be maintained for the latter since it constitutes its core mandate. Another feature differentiating chambers and simultaneously strengthening the legitimacy of second chambers rests upon the personal expertise of their members. Hence, an ideal composition of a future CoR would combine these two features. In practice, one could imagine a system with a CoR composed of members selected by associations of regional and local authorities according to open criteria including territorial factors – to ensure a proper representation of local and regional authorities within the EU – but also factors relating to the expertise and the high profile of the individuals so as to guarantee the quality of the debates and consultations within the CoR. Moreover, gender balance should also be taken into consideration.

The question whether the political factor should be maintained within the selection procedure raises opposing views. On the one hand, the political link with regional and local authorities ensures the political legitimacy, guarantees that the political preferences of citizens are represented and strengthens the contacts with the European Parliament via the political groupings. On the other hand, the independence from political parties permits to enhance the leverage in scrutinising the executive's policies, to select individuals on the basis of their expertise or quality instead of their political appurtenance, to avoid continuous fight against opposing parties and to permit to the members to express their own views.

A balance has to be found between these competing interests to determine an ideal membership of the future CoR. *A priori*, a conversion of the CoR in a third chamber would imply that the political function and composition of the CoR is maintained. It would indeed seem difficult to justify such extension of the CoR's role and powers whilst simultaneously depriving it from its political legitimacy. Yet, the political factor should not become preponderant so as to undermine the effects of the factor based on the expertise and personal quality of candidates. Hence, one could imagine a partial composition of the future CoR by members selected on the basis of political and territorial considerations, while another part of the membership would consist in experts. Such selection of experts could be made according to the more pressing policy issues that would be brought to the fore in the CoR assembly. Such practice could be achieved through improving the ties between the CoR and the associations of local and regional authorities in the Member States. The CoR as representative of the territorial component at the EU level would be well placed to communicate the European agenda to the local level and bring up policy issues of relevance for associations of local and regional authorities at the EU level, thereby making use of its extensive associations of local and regional authorities' network throughout the EU. Alternatively, the CoR could be partially composed of University Senators based on the Irish example.

Most second chambers exercise different legislative competences than those of their corresponding first chambers. The examination of the competences of the thirteen second chambers in European Member States provides for a wide array of models that may inspire the definition of the role of the future CoR: on one extremity are the second chambers that only have consultative powers and intervene as reflection chambers, while at the other extremity one finds second chambers enjoying extensive veto powers over draft legislative acts issued by the first chambers. Transposed at the European level, these models would at least grant the CoR consultative legislative competences meaning that it would mainly be able to influence policy by engaging in dialogue with the European Parliament and the Council and suggest amendments. A stronger position in the legislative decision-making process would enable the CoR to scrutinise Commission proposals before they are submitted, possibly taking account of the CoR's amendments, to the Council and the European Parliament or to suggest amendments during the first reading. Both the European Parliament and the Council could overrule the CoR's opinions with a persisting majority vote at the end of the second reading. A further scenario would permit the CoR to act as a chamber of revision passing legislation approved by the European Parliament and EU Council with eventual veto powers in an up-or-down vote. Its main role would be to revise legislation in its core policy domains that are tabled in the European Parliament and the Council. The CoR's

express consent could be required on all European draft legislation involving regional and local interests. However, it seems more realistic to advise a more flexible and soft mechanism by which the CoR would be granted a suspensive veto power upon European draft legislation involving regional and local interests. When needed it would delay legislation in order to ask the European Parliament and the EU Council to reconsider their draft legislation.

In addition to legislative competences, most second chambers in EU Member States also exercise different types of oversight over the executive actions – other than a no confidence vote *strictu sensu* – that could certainly be taken into consideration as interesting sources of inspiration for the construction of a future CoR. The confidence vote would remain with the European Parliament, while the CoR could discuss and reject European Commission proposals and engage into constructive dialogue with the European Commission.

A specific competence of the Belgian Senate as conciliator could also serve as an interesting model. The future CoR could be seized of conflicts of interests between the European level on the one hand and the national, regional and/or local levels on the other hand. It could issue non-binding reasoned opinions suggesting a solution for the conflict between these actors. Such a reasoned opinion could serve as a basis for the discussions between the parties involved in the dispute in order to reach a consensus. If no consensus could be found, the expiration of a specific period of time – in Belgium there are two periods of thirty days – would terminate the conciliation procedure and the legislative process would proceed.

Finally, second chambers are generally considered as providing institutional stability. Hence, they are frequently endowed with constituent power and intervene in constitutional revisions. Based on this model, the future CoR could have a veto power in the case of amendments to the European Treaties. In addition, the CoR's power to bring cases to the Court of Justice of the European Union could be extended to all questions relating to the legality of EU legislation.

2 Introduction

In order to anticipate the forthcoming changes within the EU political system, several scenarios have been developed in a 2014 study ordered by the CoR on its Future Role and Institutional Positioning.¹ One of these scenarios – the fifth scenario – assumes that the CoR would act as a third legislative chamber representing the local and regional actors. The CoR would become a new EU institution and a territorial chamber next to the European Parliament and the Council. Under this scenario the EU would on the more explicit federal structure of a constitutional union mirroring a ‘United States of Europe’ with different types of government providing more consistency.² The more federal structure would represent the citizens in the European Parliament, the Member States in the Council and the local and regional authorities in the CoR. The legislative decision-making would rest with these three chambers. The Commission would maintain its right of initiative and its current executive role.

The aim of this study is to produce a comparative overview of useful consultative practices within EU Member States’ second chambers that could serve as a model and source of inspiration for the definition of the role of the CoR in the (future) EU decision-making process as a third legislative chamber representing the local and regional actors.

Second chambers generally represent different interests than those defended by the first chambers. They may for instance serve to represent minorities, whether territorial, ethnic, linguistic or political-party minorities, which would not be – or not sufficiently be – protected within the elected first chamber representing the majority of the population. As will be demonstrated in this study, most second chambers in European Member States represent subnational entities, as provinces, regions, departments, municipalities, etc. This territorial representation constitutes a common feature between second chambers at the national level and the Committee of the Regions at the European level.

Hence, this study examines the role of second chambers and their interaction with first chambers, local and regional authorities and external stakeholders. Moreover,

¹ CoR 2014 study on ‘CoR’s Future Role and Institutional Positioning’ drafted by the Leuven Centre for Global Governance Studies, ISBN 978-92-895-0791-2 (hereafter CoR 2014 study on CoR’s future role and institutional positioning).

² T.O. Hueglin and A. Fenna, *Comparative federalism: a systematic inquiry*, Peterborough, Broadview Press, 2006, p. 16.

the study focuses on the consultative and expert functions of their members. This analysis also pays attention to the possible political affiliation and groupings of the second chamber members. Consequently, any relevant information on the expertise of members of second chambers and on their (in)dependence *vis-à-vis* political parties is also taken into consideration. The high profile of the members of second chambers has indeed a direct influence upon the quality of the debates and consultations within second chambers, which increases the political weight of such second chambers. Similarly, the (in)dependence *vis-à-vis* political parties and the voting mechanisms – *via* the affiliation to political parties, *en bloc* to represent a subnational entity or otherwise – have important implications in terms of both the functioning and the role of second chambers.

While in the 1970s, around 45 countries had a two-chamber legislature, this number has nowadays risen to nearly 80.³ Among the reasons underlying this resurgence, one notices that ‘without necessarily seeking to embrace federalism, many of the world's nations are pursuing decentralisation policies which justify an independent representation at central level, and bicameralism is the only system appropriate for such contexts.’⁴

Prior to examining key findings in literature on second chambers (section 3) and to presenting the second chambers in the national legislatures of EU Member States (section 4), this section briefly introduces the main trends and roles of second chambers. These elements will provide a framework to interpret research results relating to consultative practices of second chambers in subsequent stages and permit to assess possible recommendations.

The designation of members of second chambers generally results from direct/indirect elections or the appointment by the Government/the head of State. In specific cases, their appointment may result from other procedures, such as the designation by universities of six Senators in Ireland.

Bicameralism is often associated to federalism.⁵ Indeed, most 20 federal parliamentary systems in the world have an upper house.⁶ The opposite is not

³ French Senate, ‘Bicameralism around the world: position and prospects’, available at <http://www.senat.fr/senatsdumonde/introenglish.html> (EN), at p. 1.

⁴ *Ibid.*, at p. 2.

⁵ W. Swenden, *Federalism and Second Chambers. Regional Representation in Parliamentary Federations: the Australian Senate and German Bundesrat Compared*, Brussels, Peter Lang, 2004, p. 25.

⁶ Five federal States do not have bicameral legislatures, namely the United Arab Emirates, Venezuela, the small island federations of Comoros in the Indian Ocean, Micronesia in the Pacific and St. Kitts and Nevis in the

always true. For instance, France, the Netherlands and the United Kingdom are examples of non-federal States that have bicameral legislatures. In the federations where members of the second chambers are directly elected or where they are indirectly elected by state legislatures – as in Austria – they generally represent regional interests. Where these members are appointed by the Government, their credibility as representatives of regional interests is weakened.⁷

Second chambers are often criticised and misunderstood. There are numerous debates, both in literature and among politicians, questioning the functioning, and even the existence, of second chambers. As will be demonstrated in section 4, such debates have frequently been translated into reform processes, some of which are on-going for numerous years, as in France, Italy, Spain and the United Kingdom.⁸ In some countries, as Denmark and Sweden, second chambers have been abolished.⁹ In other states, such as the Czech Republic and Poland, the contrary has occurred and bicameralism has been recently established.

However, second chambers may play important roles, notably with regard to institutional stability, legislative decision-making process and scrutiny of government policy.

From an institutional perspective, second chambers are generally considered as providing stability. Hence, they are frequently endowed with constitutional powers and intervene in constitutional revisions. For instance, the French Senate has a veto in the case of constitutional amendments, as opposed to its delaying power over ordinary legislation. In Belgium and the Netherlands, both Houses approve constitutional amendments by a two-thirds majority.¹⁰

Caribbean. It is important to note that nearly a third of the unitary countries in the world practise bicameral parliamentarism.

⁷ R.L. Watts, 'Federal Second Chambers Compared', Presentation at Conference on "Federalizing Process in Italy. Comparative Perspectives". An international conference organised by the Department for Institutional Reforms, Italy, and the Forum of Federations, Rome, February 17-19, 2010, p. 7.

⁸ See *inter alia* P. Norton, 'Adding Value? The Role of Second Chambers', *Asia Pacific Law Review*, Vol. 15 No. 1, 2007, pp. 3-18; E. Roller, 'Reforming the Spanish Senate: Mission Impossible?', *West European Politics*, Vol. 25(4), 2002, pp. 69-92.

⁹ Following a 2009 referendum, the Romanian Senate should also be abolished, but this decision has not yet been put into practice.

¹⁰ Senators also intervene in the appointment of constitutional judges. All bicameral Member States in Western Europe having a Constitutional Court use this method: in France, 3 of the 9 members of the Constitutional Council are appointed by the President of the Senate; in Germany, 8 out of 16 members are appointed by the *Bundesrat*, 3 out of 14 judges in Austria are appointed by the Federal Council; in Spain the proportion is of 4 out of 12; in Italy the two chambers appoint 5 constitutional judges out of 15 together; in Belgium, judges of the Constitutional Court are appointed by the King from a dual list presented by the Senate and the Chamber of Representatives in turn. In certain

However, in certain cases, the establishment of second chambers has responded to requests for more democracy and better representation of minorities or territorial entities. For instance, the (re)establishment of second chambers in the last decades in post-communist Eastern Europe (i.e. Czech Republic, Poland and Romania) has resulted from a dynamic approach to enhance democracy rather than institutional stability. Nevertheless, once established, these second chambers provide for institutional stability and are consequently endowed with constitutional powers.

In the ordinary legislative decision-making process, certain second chambers have legislative powers similar to those of the lower assembly. Ordinary legislation may generally be introduced in either house, except in the Netherlands – where legislation is considered in the lower house but the upper house has a veto.

As a first exception, certain second chambers as the National Council in Slovenia only have consultative powers. They do not vote on legislation but advise on its content.

A second exception concerns restrictions of financial powers. The Austrian *Bundesrat*, the British House of Lords, the Czech Senate and the Irish Senate have no budgetary powers, while the Spanish Senate has no power to amend the budget unless the Government authorises this.

The third exception concerns a restriction of legislative powers in the ability to propose or to amend legislation. In the Netherlands, the Senate may only approve or reject legislation voted by the other chamber without having the competence to initiate or amend legislation. Similarly, the Austrian *Bundesrat* has no right of amendment. The fourth and last exception leaves the possibility for first chambers to decide in the last resort. Such system is applicable in the Czech Republic, France, Ireland, Poland and Spain. Specific additional rules apply in each country, as will be examined in section 4.

Next to the legislative and constitutional role of second chambers, another role exercised by certain second chambers¹¹ is the oversight of government policy. It has been noted in this regard that ‘in recent years an increased awareness of the particular role that second chambers can play in this area has emerged. Owing to their position as assemblies that are less frequently placed under the political

countries, Senates may also submit cases to the Constitutional Court. This is particularly widespread in the Czech Republic, Poland, Romania and Slovenia.

¹¹ This role is not exercised by all second chambers, as will be demonstrated in section 4.

spotlight or subject to governmental pressure and party influence, second chambers frequently have an independence which makes it easier for them to criticise government policy. This criticism, furthermore, is not necessarily negative but can fall within the framework of a constructive and long-term evaluative assessment.’¹²

Following this brief introduction outlining the general trends and roles of second chambers, section 4 further examines the second chambers within the national legislatures of EU Member States. Subsequently, a selection of detailed case studies on consultative practices in second chambers is suggested in section 5. The thorough examination of these case studies enables an assessment of their efficiency and their examination in view of an eventual – full or partial – transposition at the level of the CoR. The last parts of the study provide for a comparative overview of useful consultative practices within the second chambers of national legislatures (section 6), a presentation of models of second chambers in function of the key features of second chambers in the EU Member States (section 7), a table summarising these models (section 8), recommendations (section 9) and final conclusions (section 10).

¹² French Senate, ‘Bicameralism around the world: position and prospects’, available at <http://www.senat.fr/senatsdumonde/introenglish.html> (EN), at p. 10.

3 Second chambers in the literature

An overview of the literature on second chambers¹³ permits the identification of a certain number of common characteristics to all second chambers, which are particularly relevant for a study on consultative practices.

In general, ‘second chambers are often characterised as embodying a particular measure of wisdom, balance and expertise.’¹⁴ They work under less public opinion and media pressure than the corresponding first chambers and have in general more time to examine the files and to investigate areas that are sometimes neglected by first chambers, which have to deal with more urgent matters.

Nevertheless, as mentioned in the previous section, second chambers are often criticised and misunderstood. This is not only true within political debates but also in literature, especially with regard to the need to reform certain second chambers.¹⁵

A core notion discussed in these debates is the legitimacy of second chambers. It rests upon various factors including *inter alia* their composition and the regional/territorial balance, the level of expertise of their members and the political

¹³ See for instance G. Tsebelis and J. Money, ‘Bicameral Negotiations: The Navette System in France’, *British Journal of Political Science*, 1995, 25(1), pp. 101-129; G. Tsebelis and J. Money, *Bicameralism. Political Economy of Institutions and Decisions*, New York, Cambridge University Press, 1997, 250 pp.; S.C. Patterson and A. Mughan (eds.), *Senates. Bicameralism in the contemporary world*, Columbus, Ohio State University Press, 1999, 360 pp.; S.C. Patterson and A. Mughan, ‘Fundamentals of Institutional Design: The Functions and Powers of Parliamentary Second Chambers’, *The Journal of Legislative Studies*, 2001, pp. 39-60; M. Russell, ‘What Are Second Chambers For?’, *Parliamentary Affairs*, 2001, 54, pp. 442–458; R. Watts, ‘Models of Federal Power Sharing’, *International Social Science Journal*, 2001, pp. 23-32; T. König, ‘Bicameralism and Party Politics in Germany: an Empirical Social Choice Analysis’, *Political Studies*, 2002, 49(3), pp. 411-437; E. Roller, ‘Reforming the Spanish Senate: Mission Impossible?’, *West European Politics*, Vol. 25(4), 2002, pp. 69-92; W. Swenden, *Federalism and Second Chambers : regional representation in parliamentary federations : the Australian Senate and German Bundesrat compared*, Brussels, Lang, 2004, 423 pp.; A. Vatter, ‘Bicameralism and policy performance: The effects of cameral structure in Comparative Perspective’, *The Journal of Legislative Studies*, 2005, 11(2), pp. 194-215; T.O. Hueglin and A. Fenna, *Comparative Federalism: A Systematic Inquiry*, Toronto, Broadview Press, 2006, 390 pp.; J. Uhr, ‘Bicameralism’, in R.A.W. Rhodes, S. Binder and B.A. Rockman (eds.), *Oxford Handbook of Political Institutions*, New York, Oxford University Press, 2008, pp. 474-494; P. Norton, ‘How Many Bicameral Legislatures Are There?’, *Journal of Legislative Studies*, 2009, 10(4), pp. 1-9; A. Rasmussen and D. Toshkov, ‘The effect of stakeholder involvement on legislative duration: Consultation of external actors and legislative duration in the European Union’, *The European Union Politics*, 2013, 14(3), pp. 366-387; M. Russell, *The Contemporary House of Lords: Westminster Bicameralism Revived*, Oxford, Oxford University Press, 2013, 352 pp.

¹⁴ Council of Europe, European Commission for Democracy Through Law (Venice Commission), Report on Second Chambers in Europe, ‘Parliamentary complexity or democratic necessity?’ by P. Gélard, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL\(2006\)059-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2006)059-e) (EN), at p. 11.

¹⁵ See *inter alia* P. Norton, ‘Adding Value? The Role of Second Chambers’, *Asia Pacific Law Review*, Vol. 15 No. 1, 2007, pp. 3-18; E. Roller, ‘Reforming the Spanish Senate: Mission Impossible?’, *West European Politics*, Vol. 25(4), 2002, pp. 69-92.

balance. Legitimacy refers primarily to the justification of the action of the public authority.¹⁶ Yet, in contemporary analysis, this notion is closely related to that of democracy, which implies in the case of second chambers that legitimacy focuses on the composition of the second chamber and the representation entailed by this composition. Indeed, '[t]he actual political importance of second chambers depends not only on their formal constitutional powers but also on their method of selection' and '[s]econd chambers that are not directly elected lack the democratic legitimacy, and hence the real political influence, that popular election confers.'¹⁷ The following parts of this study will demonstrate that most second chambers represent subnational territorial entities and that these second chambers generally enjoy a strong democratic legitimacy. Yet, not all of these chambers are directly elected by the population since some are composed of members designated through other means. For instance, the German *Bundesrat* is not directly elected but is nevertheless considered as legitimate and very powerful. As a consequence, it seems that more than the criterion of direct election, a representation of the population of the country is requisite in the assessment of the legitimacy of a second chamber.

The European Member States in which second chambers' legitimacy are most criticised are the United Kingdom and – to a lesser extent – Ireland. There is no territorial representation in these second chambers and the vast majority of citizens are excluded from their designation process. The essential ingredient of legitimacy is lacking and there is a gap between the second chamber and the citizen.¹⁸ Yet, these second chambers enjoy a certain degree of legitimacy granted through their composition – representation of vocational interests and universities in Ireland and appointment of members mainly on the basis of their relevant expertise and experience and perhaps personal distinction in the United Kingdom. Such composition can also generate legitimacy¹⁹ but second chambers mainly composed of experts do not in general enjoy a strong democratic legitimacy.

¹⁶ R. Barker *Political Legitimacy and the State*, Oxford, Clarendon Press, 1990, p. 23

¹⁷ A. Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, New Haven, Yale University Press, 1999, p. 206.

¹⁸ B. Doherty, 'Seanad Éireann', *Constitution Review Group Report 4: The National Parliament*, Dublin, Government of Ireland, 1996, p. 26.

¹⁹ D. Shell, *The House of Lords*, 1st edn., Manchester University Press, Manchester, 2007, p. 164; J. Steffek, 'The Legitimation of International Governance: A Discourse Approach', *European Journal of International Relations*, 2003, pp. 249-275 at p. 257. For further discussion on these concepts, see C. Holst (ed.), *Expertise and Democracy: Arena Report No 1/14*. Oslo, available at

<http://www.sv.uio.no/arena/english/research/publications/arena-publications/reports/2014/report-01-14.pdf> (EN).

Hence, it seems difficult to assess second chambers' legitimacy. Given the lack of any hard measure permitting this evaluation, it seems that the 'perceived legitimacy'²⁰ should be the prevailing concept to assess a second chamber's legitimacy. The yardstick would be that a second chamber should be perceived as sufficiently legitimate to exercise its powers.

As a conclusion, it seems that the issue of legitimacy may be the most debated in respect of second chambers mainly composed of members lacking any territorial connection with the population expressed either through election or through other means of representation, such as experts or selected individuals. Consequently, one may suggest introducing elements of direct popular election or other mechanisms favouring the territorial connection of members of second chambers in order to increase their legitimacy and to enhance their function of representation.

A number of key elements have been identified in literature to justify their existence and their added value to the parliamentary system. In a 2007 paper on 'Adding Value: The Role of Second Chambers', Lord Norton of Louth considers that the two functions justifying their existence are those of representation and reflection.²¹ In another 2001 paper on 'What are Second Chambers for?', Meg Russell identified four such elements, namely (1) the representation of different interests, (2) the independence from the executive, (3) the acting as a veto-player and (4) the performance of different parliamentary duties.²² This four-pillar justification will serve as structure for the following analysis of the key findings in literature on the second chambers' functions justifying their existence.

3.1 Representation of different interests

'Firstly, in composition terms, the upper house may introduce representation of a different set of interests to those which exist in – and frequently dominate – the lower house.'²³

²⁰ M. Russell, 'Legitimacy and Bicameral Strength: A Case Study of the House of Lords', available at http://www.google.be/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CCUQFjAA&url=http%3A%2F%2Fwww.ucl.ac.uk%2Fconstitution-unit%2Fresearch%2Fparliament%2Fhouse-of-lords%2Ftabs%2Flegitimacy_bicameral_strength.pdf&ei=rA6oU5OVIonB7Aag5YHAAG&usg=AFQjCNFOqrjNoMQYD5n_n_bNiyHGJnwklg&bvm=bv.69411363,d.ZGU (EN) p. 3.

²¹ P. Norton, 'Adding Value? The Role of Second Chambers', *Asia Pacific Law Review*, Vol. 15 No. 1, 2007, pp. 3-18.

²² M. Russell, 'What Are Second Chambers For?', *Parliamentary Affairs*, 2001, 54, pp. 442-458, at p. 443.

²³ *Ibid.*

Interestingly, it is possible for a second chamber to represent particular groups or territorial entities without being directly elected.²⁴ The second chamber may for instance serve to represent minorities, whether territorial, ethnic, linguistic or political-party minorities, which would not be – or not sufficiently be – protected within the elected first chamber representing the majority of the population.

The fact that bicameralism is often associated to federalism entails that second chambers frequently represent the different parts of the federal State. However, second chambers in unitary States may also represent subnational entities, as in France. The territorial representation is the commonest form of representation in second chambers, with subnational entities – as provinces, regions, departments, municipalities, etc. – represented in the second chamber. As stated in a 2006 report of the Venice Commission, second chambers ‘are necessary, and will become increasingly so, in federal states and ones that are constitutionally regionalised or heavily decentralised, where second chambers represent geographical areas whereas first chambers represent peoples.’²⁵

An interesting parallelism may be drawn with the EU, which combines features both of an international organisation and of a federal system.²⁶ Although the theme of federalism in the EU remains a matter of controversy in literature²⁷ a trend is emerging in favour of the federalisation of the European system. In 2010, a network of European ‘Federalists’ – the Spinelli Group – was established in order to promote a federal and post-national Europe, a ‘Europe of the citizens’.²⁸ In a 2013 speech, the former President of the European Commission, Mr. Barroso said that a ‘functional federalism’ was needed to counter emerging threats to European unity. He further stated that ‘federalism is in itself a concept with two faces: searching for unity whilst recognizing, respecting and reconciling genuine autonomy. At its very core is the idea of unity in diversity. Now, what can be more European than that? [...] This is what functional federalism means in practice: we take one step at a time, yet we can only do that successfully if we have the larger

²⁴ P. Norton, ‘Adding Value? The Role of Second Chambers’, *Asia Pacific Law Review*, Vol. 15 No. 1, 2007, pp. 3-18, at p. 6. See the case of the Irish Senate, as described in section 4.

²⁵ Council of Europe, European Commission for Democracy Through Law (Venice Commission), Report on Second Chambers in Europe, ‘Parliamentary complexity or democratic necessity?’ by P. Gérald, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL\(2006\)059-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2006)059-e) (EN), at p. 11.

²⁶ F. Knüpling, ‘Federalism and Multi-level Governance: Comparing the EU with other Federal States’, available at <http://cor.europa.eu/en/activities/governance/documents/9030a584-7703-47e9-9905-e11741d4a6bd.pdf> (EN).

²⁷ For further information, see E. Cloots, G. De Baere and S. Sottiaux (eds.), *Federalism in the European Union*, Oxford, Hart Publishing, 2012.

²⁸ See <http://www.spinelligroup.eu/> (EN).

context and a long-term vision in mind.’²⁹ Despite ongoing debates in literature on the federal feature of the EU, there seem to be sufficient elements to establish a parallelism between the EU and a federal system, which may serve as an interesting starting point to examine the issue of bicameralism at the European level.

Territorial minorities may be further protected by systems in which each territorial entity is represented by an equal number of members, irrespective of its population. Such mechanism, as exists in the United States Senate for US States, provides for an efficient protection of small and less populous areas. In addition, members of second chambers may be required to vote in territorial blocks, rather than by political parties. This is the case in the German *Bundesrat*, where members have to vote *en bloc* and *per Land*, as will be further described in the next section.

Such vote in territorial blocks aims also to avoid the influence of party discipline. Ronald L. Watts notes that the impact of party discipline upon the representation of regional interests within the federal legislative chambers should not be underestimated. ‘Whether due to the pressures for party discipline within parliamentary federations, or the emphasis upon party representation in proportional representation electoral systems, or the combined effect of both, party considerations have tended often to override regional differences (although not totally) within federal second chambers. This has especially been the case where party representation has differed between the two houses. A particularly notable example of clashing party representation between the two federal legislative chambers in recent years has been the operation of the German *Bundesrat*. Indeed, [...] this tendency led there to pressures for reform. Even in federations where the separation of powers exists between executive and legislature resulting in less pressure for strict party discipline, there has been an increasing tendency recently for polarization along ideological rather than regional lines, as has become apparent within the US Senate. Generally, the net effect of the impact of the operation of political parties has been to moderate, although not eradicate, the role of federal second chambers as a strong voice for regional interests in federal policy-making. Nevertheless, the existence of federal second chambers in federations has generally induced political parties to take greater account of regional interests than might otherwise have been the case.’³⁰

²⁹ Former President of the European Commission J.M. Barroso, ‘Speech: more integration would boost European cooperation’, 22 April 2013, excerpts are available at http://ec.europa.eu/debate-future-europe/ongoing-debate/articles/barroso_federalism_20130422_en.htm (EN).

³⁰ R.L. Watts, ‘Federal Second Chambers Compared’, Presentation at Conference on “Federalizing Process in Italy. Comparative Perspectives”. An international conference organised by the Department for Institutional Reforms, Italy, and the Forum of Federations, Rome, February 17-19, 2010, p. 14. *Emphasis added*.

3.2 The independence from the executive

‘Secondly, and less often formally acknowledged, second chambers will tend to provide a more independent view in what are frequently party-dominated parliaments, reflecting certain aspects of their powers and composition.’³¹

In general, second chambers have reduced powers over political executives, as will be demonstrated in section 4. Except for the Italian Senate and the Romanian Senate, second chambers have no confidence vote on the governments’ actions, as opposed to first chambers. The confidence vote makes party discipline in the first chamber essential to the stability of the government. Hence, the discipline may in turn threaten the efficient exercise of this scrutiny role. As stated by D.M. Olson, ‘[p]aradoxically, the very system intended to ensure parliament’s control over the executive has led to exactly the opposite flow of control.’³² Given that party discipline tends to be less strict in second chambers, they are able to counter-balance the ‘executive-dominated’ first chamber. Consequently, although second chambers have no confidence vote over governments, they may be more inclined to discuss and reject aspects of government bills than the first chambers. Hence, the parliament’s overall control over government may be furthered through this bicameral oversight.

This independence is further guaranteed by the terms of office, that are in general longer for second chambers than for first chambers. The fact that members of second chambers do not have to face re-election as frequently as members of first chambers increases their independence from political parties and their ability to express their own views.

In general, ‘second chambers are often characterised as embodying a particular measure of wisdom, balance and expertise.’³³ The high profile of the members of Senates has indeed a direct influence upon the quality of the debates and consultations within second chambers, which increases the political weight of such second chambers. The example of the House of Lords in the United Kingdom has been intensely discussed in literature with regard to the issues of independence, expertise and relations with the executive. The absence of any elections and the expertise of members of the House of Lords has permitted the reduction of the

³¹ M. Russell, ‘What Are Second Chambers For?’, *Parliamentary Affairs*, 2001, 54, pp. 442-458, at p. 443.

³² D.M. Olson, *Democratic Legislative Institutions: A Comparative View*, M.E. Sharpe, 1994.

³³ Council of Europe, European Commission for Democracy Through Law (Venice Commission), Report on Second Chambers in Europe, ‘Parliamentary complexity or democratic necessity?’ by P. Gélard, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL\(2006\)059-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2006)059-e) (EN), at p. 11.

impact of party considerations.³⁴ The members of the House of Lords do not have to fight against opposing parties nor to face re-election; they sit for lifetime and cannot be expelled, which increases their independence. This composition has been judged as ‘intrinsically beneficial to this activity. Those with an expertise or some experience in the field covered by a bill will tend to contribute to debate. Operating in a less partisan environment than the Commons and one largely neglected by the mass media (interested more in the partisan clashes in the Commons), it is possible for members to engage in a constructive dialogue with government ministers.’³⁵

Finally, the small size of second chambers may influence its efficiency. Indeed, ‘smaller chambers are more intimate, members know each other better, and decision-making – both in the chamber and its smaller committees – will tend to be more efficient.’³⁶

3.3 The acting as a veto-player

‘Third, the second chamber acts as a ‘veto-player’ within the policy-making process, particularly if it has strong formal powers. The merit of this role is hotly disputed.’³⁷

Certain second chambers may block legislation, which turns them into ‘veto-players’ in the policy-making process.³⁸ Through this tool, second chambers may favour a broader consensus on policy rather than through a mere political party-majority in the first chamber. As declared by a former Canadian Prime Minister, Sir John Macdonald, second chambers may be the place for ‘sober second thought’ so that bills are undergoing proper and careful consideration before finally becoming law. Yet, the consideration of a bill by a second chamber in turn entails an extension of the procedure and delay.

³⁴ See Lord Norton of Louth, *House of Lords: Official Report (Hansard)*, 13 March 2007, Vol. 690, col 707.

³⁵ P. Norton, ‘Adding Value? The Role of Second Chambers’, *Asia Pacific Law Review*, Vol. 15 No. 1, 2007, pp. 3-18.

³⁶ M. Russell, ‘What Are Second Chambers For?’, *Parliamentary Affairs*, 2001, 54, pp. 442-458, at p. 449.

³⁷ *Ibid.*, at p. 443.

³⁸ G. Tsebelsis, ‘Decision-Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism’, *British Journal of Political Science*, 1995.

The veto power of the second chamber may be either suspensive³⁹ – it may be overruled by the first chamber and merely delays the adoption of the legislation – or absolute – it blocks the adoption of legislation. The absolute veto power is often associated to constitutional matters in which the consent of both second chambers is required. Yet, in Germany, the *Bundesrat* also has an absolute veto power over all federal legislation involving competences of the *Länder*. In these areas, the *Bundestag* has no possibility to override the absolute veto, even by unanimity. This specific case will be further examined in points 4.5 and 5.1 of this study.

3.4 The performance of different parliamentary duties

‘Finally, and less commonly noted, is the way in which second chambers can spread the burden of parliamentary work, often allowing functions to be carried out complementary to those pursued in the first chamber.’⁴⁰

Members of second chambers work under less public opinion and media pressure, which leaves them more time to carry out legislative scrutiny work in detail. They may undertake committee investigations on controversial issues, as euthanasia for example, which has been subject to intense investigations notably in the Belgian Senate, the Spanish Senate and the House of Lords in the United Kingdom. Other sensitive topics, as the life imprisonment for murder and the legalisation of cannabis for medical use have similarly been scrutinised by second chambers.

In a similar vein, numerous authors refer to the ‘reflection’ function of the second chambers. This concept is called, somewhat misleadingly⁴¹, the ‘redundancy effect’ by Samuel C. Patterson and Anthony Mughan in their 1999 book on *Senates: Bicameralism in the Contemporary World*.⁴² This reflection may lead the second chamber to seek to persuade or to force the first chamber to take a decision, notably through the veto-power of certain second chambers.

³⁹ This is for instance the case of the Austrian *Bundesrat*, which may merely postpone the publication of legislation proposed by the *Nationalrat* for a few weeks and the *Nationalrat* can overrule the decision of the *Bundesrat* by reiterating its previous bill. A similar competence exists also for the German *Bundesrat* on all federal legislation not involving competences of the *Länder*.

⁴⁰ M. Russell, ‘What Are Second Chambers For?’, *Parliamentary Affairs*, 2001, 54, pp. 442-458, at p. 443.

⁴¹ P. Norton, ‘Adding Value? The Role of Second Chambers’, *Asia Pacific Law Review*, Vol. 15 No. 1, 2007, pp. 3-18, at p. 7.

⁴² S.C. Patterson and A. Mughan (eds.), *Senates. Bicameralism in the contemporary world*, Columbus, Ohio State University Press, 1999, 360 pp.

This specific function is reinforced by the fact that second chambers are generally considered as embodying expertise and wisdom, as further developed in points 6.1.2 and 7.2.2 of this study. This feature rests notably on the modes of selection of its members and on its relatively small size, which permits a more intimate and informal character of its discussions.

Next to these justifications for second chambers, there are also a number of potential problems entailed by bicameralism that are pointed in literature.⁴³ One of these issues is the danger of legislative gridlock, through the veto-power of the second chamber. However, one may assume that if a second chamber decides to oppose its veto on draft legislation, it has legitimate reasons to justify its decision and in the end, this results in an improvement of the legislation.

Another danger is the duplication of work causing unnecessary delay. This is especially true for second chambers having equal powers than the first chambers, as the Italian Senate, the Romanian Senate and to a lesser extent, the Spanish Senate.⁴⁴ Yet, as will be further detailed below in the study, the Italian Senate is subject to intense discussions as to a probable reform and the Romanian Senate has been subject to a 2009 referendum which resulted in the decision to abolish the Senate. This abolition has not been put into practice though.

A final danger is that the second chambers' position is not taken into consideration by the first chamber and the executive, so that much of the benefit of bicameralism is lost. Governments have constantly searched to denigrate second chambers. This may be facilitated if the second chamber's composition is less obviously democratic, as in the United Kingdom. On the other hand, the fact that members of second chambers do not have to face re-election as frequently as members of first chambers – or not at all as in the case of the United Kingdom – increases their independence from political parties and their ability to express their own views. As discussed in point 7.5 of this study, the powers of second chambers as supervisors of the government's actions may be enhanced if the second chamber's members are independent from political parties, enjoy longer terms of office and operate under less media pressure. As to the relation with the first chamber, the position of the second chamber varies from one Member State to another. In certain cases – generally in constitutional affairs or, in the case of Germany, for any federal law

⁴³ *Ibid.*, at p. 454.

⁴⁴ E. Roller, 'Reforming the Spanish Senate: Mission Impossible?', *West European Politics*, Vol. 25(4), 2002, pp. 69-92; L. Moreno, 'El Futuro de la Federalización en España,' Paper presented at the II Simposio de Historia Actual, Instituto de Estudios Riojanos, Logroño, 26-28 December 1998.

involving regional competences – second chambers have veto power. In other cases, their role consists mainly in being a reflection chamber with consultative powers. In such situations, the weight of their opinions largely depends on the degree of legitimacy that they enjoy. The institutional mechanisms permitting to strengthen their legitimacy – including the representation of another set of interests than those represented in the first chamber, the expertise of their members, etc. – are discussed throughout this study and summarized in the final conclusions presented in section 10.

4 Presentation of the second chambers within the national legislatures of EU Member States

This section proposes an initial screening of the existing ‘second chamber’ models in the EU, with a focus on consultative and expert functions of the second chambers and their members. It also examines the possible political affiliation and groupings of the second chamber members.

The structure of the presentation for each of the thirteen second chambers in European Member States serves as a basis for the establishment of a general typology of second chambers, which is developed in section 7 of this study. It starts with general information on each second chamber, as the number and the mode of (s)election of its members. This introduction is in general followed by a point scrutinising the composition of the second chamber with a particular attention on the issue of territorial representation and/or expertise of its members. Further points analyse the competences of second chambers starting with their legislative competences, their constitutional powers and their oversight powers on the executive’s actions. Finally, EU affairs and subsidiarity scrutiny are discussed, followed by eventual reform proposals – only for those second chambers currently concerned by such discussions.

These elements permit to classify the EU Member States’ legislatures in categories following symmetric or asymmetric bicameralism with regard to their composition and their legislative competences. Moreover, the relations of second chambers with the executive play a very important role in the analysis of second chambers, as well as their powers in constitutional affairs. In addition, certain specificities are pointed for individual second chambers as interesting sources of inspiration for a future CoR.

4.1 Austria: Regional Chamber (*Bundesrat*)

General

Austria has a bicameral Federal Parliament consisting of the Federal Chamber (*Nationalrat*) and the Regional Chamber (*Bundesrat*). The 183 members of the

Nationalrat are elected for a period of five years by universal suffrage. The 62 members of the *Bundesrat* are elected by the state parliaments (*Landtage*) on the basis of proportional representation for the duration of the respective state parliament's term, which is five years (except in Upper Austria where it is six years). The *Bundesrat* is permanently in session and its legislative activities are not divided into legislative periods.

Territorial representation

Each of the nine *Länder* is represented in the *Bundesrat* by a minimum of three and a maximum of twelve members, depending on the size of the population of the *Land* concerned.⁴⁵ The members of the *Bundesrat* hold a 'free mandate' in the exercise of their functions. Hence, they cannot be recalled by their state parliament before the end of the legislative period. Its chairmanship changes every six months pursuant to the alphabetical order of the names of the *Länder*.

Legislative power

The *Bundesrat* has the power to introduce a proposal for a bill in the *Nationalrat*. However, it has no power of amendment of bills proposed by the *Nationalrat* and may merely postpone the publication of legislation for a few weeks (this is the so-called 'suspensive' veto). In such situation, the *Nationalrat* can overrule the decision of the *Bundesrat* by reiterating its previous bill.

The *Bundesrat* does not intervene in matters relating to budgetary or financial affairs.

Constitutional power

Nevertheless, constitutional laws or constitutional provisions in ordinary legislation concerning the competences of *Länder* and the competences of the *Bundesrat* require the approval of the *Bundesrat*. Such approval may only be granted by a specific quorum of at least half of the members of the *Bundesrat* and a two-thirds majority of the votes cast. Moreover, one third of the members of the *Bundesrat* may request the revision of the Constitution to be submitted to referendum. This requirement of approval translates into practice into an 'absolute' veto power of the *Bundesrat* in these areas.

⁴⁵ The Federal President of Austria determines the number after a census organised every ten years. The *Land* with most citizens obtains twelve seats and the other *Länder* obtain a number of seats corresponding to the ratio of the number of their citizen to that of the *Land* having the largest number of citizens.

Any member of the *Bundesrat* may challenge federal legislation before the Constitutional Court as to its conformity with the Constitution, as long as the action is supported by one *Land* Government or one third of the members of the *Nationalrat*.

Relations with the executive

The *Bundesrat* scrutinises the Federal Government's exercise of powers and may question its members or request for any information. However, it does not have a right to vote a no confidence *vis-à-vis* the Federal Government.

EU affairs and subsidiarity scrutiny⁴⁶

The Federal Constitution (*Bundesverfassungsgesetz*, BVG⁴⁷) lays down the general rules regarding political scrutiny in EU matters. More specifically, the rights and obligations of the Federal Parliament pertaining to subsidiarity monitoring are enshrined in the BVG by means of the *Lissabon-Begleitnovelle* (L-BN) (an amendment act), adopted by the Parliament on 8 July 2010.⁴⁸

Article 23 BVG explicitly recognises the rights of both Chambers to engage in subsidiarity monitoring and to issue reasoned opinions on the compatibility between EU draft legislation and the subsidiarity principle. The *Nationalrat* and *Bundesrat* each have one vote in the EWS. Moreover, the L-BN introduced a duty of cooperation between the Federal Government and the Federal Parliament in terms of exchange of information and expertise (new Art. 23 e (1) and Art. 23 g (2) BVG), as well as a duty of cooperation between the *Bundesrat* and the *Länder* (Art. 23 g (3) BVG).

⁴⁶ For further information, see CoR 2013 study on 'The Subsidiarity Early Warning System of the Lisbon Treaty – the role of regional parliaments with legislative powers and other subnational authorities' drafted by the Leuven Centre for Global Governance Studies, ISBN 978-92-895-0758-5 (hereafter CoR 2013 subsidiarity study), pp. 13 and following and CoR 2010 study on 'The role of Regional Parliaments in the process of subsidiarity analysis within the Early Warning System of the Lisbon Treaty' drafted by the European Institute of Public Administration - European Centre for the Regions (EIPA-ECR, Barcelona), ISBN 978-92-895-0541-3 (hereafter CoR 2010 subsidiarity study), pp. 7 and following.

⁴⁷ The BVG is available at http://www.ris.bka.gv.at/Dokumente/ErV/ERV_1930_1/ERV_1930_1.pdf (EN - not including amendments adopted after 1 March 2010), or at <http://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/10000138/B-VG%20c%20Fassung%20vom%2030.10.2012.pdf> (DE).

⁴⁸ The L-BN is available at http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2010_I_57/BGBLA_2010_I_57.pdf (DE).

By analogy to what is the case for the *Nationalrat*, a specialised EU committee is established in the *Bundesrat* so as to conduct the subsidiarity scrutiny on its behalf.⁴⁹ Any member of the EU committee may request the submission of a reasoned opinion on the incompatibility of draft EU legislation with the subsidiarity principle.⁵⁰ Such a request has to be motivated.⁵¹ The EU committee takes a decision by simple majority, relying on the regular provisions of the *Bundesrat*'s Rules of Procedure. Any member of the *Bundesrat* that is not part of the EU committee may assist in the committee's work without the right to vote. If the *Bundesrat* or half of the representatives of at least three *Länder* demand, the EU Committee must delegate the procedure to the plenary assembly. In such cases, the EU Committee is obliged to present a report on the matter.⁵²

The two Chambers work independently, although there is a good practice of mutual information-sharing both at the administrative level and at the level of political groups. The *Nationalrat* and *Bundesrat* have no general obligation to consult each other or to take the other Chamber's positions into consideration. However, pursuant to the BVG and their respective Rules of Procedure, the Chambers are obliged to exchange information when a reasoned opinion is issued or when taking legal action for infringement of the subsidiarity principle before the Court of Justice of the European Union. The Chambers extend the right of information about their decisions in EU matters to Austrian members of the European Parliament.⁵³

At the regional level, a national contact point (embedded within the Government office of Lower Austria in Vienna (*Verbindungsstelle der Bundesländer*)) facilitates the exchange and circulation of documents, information and views and in this way contributes to a better preparation and coordination of work within the *Bundesrat*. Moreover, there is a platform for exchange of information, namely the 'Föderalismuskonferenz', which is composed of the President of the *Bundesrat* and the presidents of the state parliaments. Through these mechanisms, the state parliaments are made aware of discussions planned in the *Bundesrat*, and acting through their presidents, they may petition the chair of the conference of the presidents of the state parliaments to discuss certain issues on their behalf if

⁴⁹ Paragraph 13a of the Rules of Procedure of the BR, available at <http://www.parlament.gv.at/PERK/RGES/GOBR/gobr2.shtml#P13a> (DE).

⁵⁰ Members of the *Bundesrat* dispose of a free mandate and thus are allowed to represent a different opinion than the one delivered by their parliaments. This issue is relevant from the point of view of the political composition of the BR. Members of the *Bundesrat* sit in political groups, which may differ from parties forming the majority in the State Parliaments. A member of the *Bundesrat* may thus oppose the opinion delivered by his/her parliament because of a different political affiliation.

⁵¹ Paragraph 13 b (7) 3 of the Rules of Procedure of the *Bundesrat*.

⁵² CoR 2010 subsidiarity study, p. 10.

⁵³ CoR 2010 subsidiarity study, at p. 11.

deemed necessary, notably in relation to subsidiarity concerns over European draft legislation.⁵⁴

4.2 Belgium: Senate (*Sénat/Senaat*)

General

The Belgian Federal Parliament is bicameral. The House of Representatives is composed of 150 directly elected members. It is the political chamber *par excellence*: it decides on the budget, votes motions of confidence and is the primary legislator. The Senate is an assembly for long-term ‘reflection’ which represents the Belgian federated entities. Until 2014, the Senate used to be composed of 71 Senators⁵⁵ and three members of the Royal Family. Since the (sixth) State reform package agreed upon in October 2011, no further separate elections have been organised for the Senate. The Senate is composed by 60 Senators, as further explained below, and may not be composed by two-third of Senators of the same gender.

Territorial representation

Since the Belgian federal elections of 25 May 2014, the Senate has been converted into a non-permanent joint organ bringing together 50 Senators of the federated entities⁵⁶ and ten co-opted Senators (based on the electoral results of the House of Representatives). Given its composition, the Senate has a specific role of conciliator charged with solving conflicts of interests between the different entities in Belgium.

Legislative and constitutional power

As a result of the aforementioned State reform, its competences are mostly limited to State reforms, constitutional affairs, special legislations involving federated

⁵⁴ CoR 2013 subsidiarity study, at p. 25; CoR 2010 subsidiarity study, at p. 19.

⁵⁵ 40 Senators were directly elected, 21 Senators were appointed by the Communities and ten Senators were co-opted by their peers.

⁵⁶ 29 Senators are designated by the Flemish Parliament, ten designated by the Parliament of the Federation Wallonia-Brussels, eight designated by the Walloon Parliament, two designated by the francophone group of the Brussels-Capital Region Parliament and one designated the Parliament of the German-speaking Community.

entities and the association of these entities to certain appointments (Constitutional Court, Council of State and Superior Council of Justice).

Yet, when the institutional legislation requires a co-operation between the State and federated entities, the Senate has a consultative role.

Relations with the executive

Since 1993, only the House of Representatives scrutinises the Federal Government's exercise of powers.

EU affairs and subsidiarity scrutiny⁵⁷

All documents sent by the European Commission arrive in a specific mailbox⁵⁸ managed by the European Affairs Unit of the Senate. These documents are automatically forwarded to the House of Representatives and all regional and community parliaments. Within the Senate, the European Affairs Unit proposes to the Chair of the Federal Advisory Committee for European Affairs⁵⁹ a list of documents to be sent to the competent committee(s). The Chair approves or modifies this list. These documents are sent to the members of the relevant committee(s) together with advice from the Legal Department of the Senate that indicates whether the European draft legislation falls within an area of the Senate's competence.

If the issue is not discussed within the competent committee or if no remarks are made, the document is considered to be in line with the principles of subsidiarity and proportionality. The procedure then stops and the Senate is presumed not to have any subsidiarity concerns. If remarks are made, however, the committee drafts an opinion on the matter, which, after being adopted by the committee, must be approved by the plenary of the Senate.

The opinion is then sent to the other Belgian parliaments and to the secretariat of the Conference of the Presidents of the Belgian parliamentary bodies. This secretariat collects any other opinions from other Belgian parliaments on the matter and sends them to the relevant EU institutions.⁶⁰

⁵⁷ CoR 2013 subsidiarity study, at p. 32; CoR 2010 subsidiarity study, at p. 28.

⁵⁸ eurodoc@belgoparl.be.

⁵⁹ For further information on this Committee, see the next section on the cooperation between Chambers.

⁶⁰ For further information, see IPEX, National Parliaments, Belgian Senate, 'Scrutiny of documents coming from the European Union and compliance with the principle of subsidiarity - Belgian Senate', available at <http://www.ipex.eu/IPEXL-WEB/dossier/files/download/082dbcc53833144701384bf923330a67.do> (EN).

4.3 Czech Republic: Senate (*Senát*)

General

The bicameral National Parliament (*Parlament České republiky*) is composed of the Chamber of Deputies (*Poslanecká sněmovna*), which has 200 members elected for a term of four years, and the Senate (*Senát*), which has 81 members elected for a term of six years.⁶¹ Each Senator is elected by majority in one of the 81 single mandate constituencies, which favours the election of specific personalities. To be eligible as Senator, a Czech citizen has to be eligible to vote and to have reached the age of 40.

The Senate is a permanent institution that is renewed every second year by one third. Given that it cannot be dissolved, the Senate may adopt statutory measures in urgent matters if the Chamber of Deputies is dissolved.

Territorial representation

Each Senator is elected by majority in one of the 81 single mandate constituencies, which favours the election of specific personalities.

Legislative power

It may introduce proposals of bills to the Chamber of Deputies and approve, reject or amend bills proposed by the Chamber of Deputies. Unless the Senate adopts a motion, the elapse of a thirty-day deadline is deemed to indicate the approval of the bill. If the Senate amends the bill, the Chamber of Deputies may adopt the amended bill by the majority of present deputies or decide to approve the bill in the wording approved by the Chamber of Deputies, for which an absolute majority of all Deputies is needed, namely 101 votes.

Constitutional power

The Senate's express approval is requested in constitutional affairs and some other areas, including electoral legislation, the Senate Rules of Procedure Act and the Act on the Relations between the Chambers of Parliament. These specific areas may

⁶¹ Articles 16 and 18 of the Constitution of the Czech Republic, available at <http://www.psp.cz/cgi-bin/eng/docs/laws/1993/1.html> (EN).

only be modified with an approval of both Chambers, by three-fifths of the votes of all Deputies and three-fifths of the votes of Senators present.

Pursuant to the Act on the Constitutional Court No. 182/1993, the President of the Czech Republic shall seek the approval of the Senate as to the appointment of judges of the Constitutional Court.

Relations with the executive

Pursuant to Article 68 of the Constitution, the Government is accountable to the Chamber of Deputies.⁶² The Senate cannot pass a vote of no confidence in the Government nor force it to resign.

EU affairs and subsidiarity scrutiny⁶³

Each of the Chambers has independently defined the procedures for monitoring EU draft legislation in their rules of procedure.⁶⁴ In the Senate, draft legislation is received by the Senate's EU Affairs Unit, which provides a weekly overview of EU draft legislation that is sent to all senators and interested recipients. The Head of the EU Affairs Unit, the advisor to the Committee on European Affairs and the Chairman of this Committee discuss these proposals, and the Chairman provides the Committee with a recommendation on whether to start the subsidiarity scrutiny or not. The decision to start the procedure has to be made by a majority of the members of the Committee. Opinions regarding potential breaches are debated within the Committee on European Affairs along with the view of the Government (when it is invited to participate). Following this debate, the Committee adopts a recommendation, which is submitted to the plenary session of the Senate. Once it is adopted by the plenary, it stands as the official position of the Senate and is communicated to the Government and EU institutions.⁶⁵

⁶² For further information, see the Chamber of Deputies, 'Parliamentary Control of the Government in the Czech Republic', available at http://www.psp.cz/kps/pi/gi/infocentrum/EN/Parliamentan_control_05_2011.pdf (EN).

⁶³ CoR 2013 subsidiarity study, p. 137.

⁶⁴ Rules of Procedure of the Chamber of Deputies, Part Fifteen A, available at <http://www.psp.cz/cgi-bin/eng/docs/laws/1995/90.html#s15a> (EN); Standing rules of the Senate, Section 119, available at <http://www.senat.cz/informace/zakon106/zakony/zak107-eng.php> (EN).

⁶⁵ For further information, see IPEX, Czech Senate, 'Scrutiny of documents coming from the European Union and monitoring compliance with the principle of subsidiarity', available at <http://www.ipex.eu/IPEXL-WEB/dossier/files/download/082dbcc539edbbe6013a699f56a34540.do> (EN).

Specificities

The meetings of the Senate are public, except cases in which the Senate adopts a motion for a completely or partially closed meeting. Public hearings may be organised upon requests by five Senators or a Senate Committee. Such hearings permit to consider specific subjects with experts.

Moreover, there is a specific petition procedure in the Czech Republic through which ten thousand people may request a specific issue to be considered by the Committee on Education, Science, Culture, Human Rights and Petitions and to be discussed by the plenary session of the Senate. Its purpose is mainly to clarify misunderstandings and to mediate information between petitioners and public authorities.

4.4 France: Senate (*Sénat*)

General

The French Republic is a unitary State in which the legislative power is vested in a bicameral legislature comprised of the National Assembly (*Assemblée Nationale*) and the Senate (*Sénat*). The National Assembly is composed of 577 directly elected Deputies.⁶⁶ Since the 2003 reform⁶⁷ – fully implemented in 2011, the Senate is composed of 348 Senators who are elected by indirect suffrage for six years.⁶⁸ The age to be elected as Senators has been brought down to 24 years (instead of 30 years) in 2011.

As stated in Article 24(4) of the French Constitution, ‘[t]he Senate shall ensure the representation of the territorial communities of the Republic.’ 326 Senators are elected in metropolitan France and overseas departments⁶⁹ by an electoral college,

⁶⁶ Article 24(3) of the French Constitution, available at <http://www.assemblee-nationale.fr/english/8ab.asp> (EN).

⁶⁷ The electoral process and the status of Senators have been reformed by two acts of 30 July 2003 in order to ensure a better representation of local authorities and their population. This reform has notably adapted the number of senatorial seats to the demographic evolution (from 321 Senators before the reform to 348 in 2011) and reduced the term of office from nine to six years. For further information, see http://www.senat.fr/lng/en/senators/the_senatorial_elections.html (EN).

⁶⁸ Article 24(4) of the French Constitution.

⁶⁹ At the intermediary level, France is subdivided into 101 departments (*départements*), five of which are located overseas.

which is mainly composed of delegates from municipal councils.⁷⁰ In addition, 10 Senators represent other overseas territories and 12 Senators represent French citizens living outside of France. Elections are organised every three years in order to renew half of the Senate.

Territorial representation

Given that Senators are indirectly elected by representatives of the three levels of decentralised authorities – regions, departments and municipalities – they are presumed to represent and uphold the corresponding local and regional interests at the national level. Furthermore, it is noted that the Senate regularly holds meetings with officials from regions, departments and municipalities.⁷¹ This provides an informal forum for local officials to express their concerns.

Legislative power

Senators are empowered to take initiative in tabling bills and to amend bills. Any bill is discussed in turn by each of the two Houses in order to agree on the clauses to be examined. This procedure is named ‘the Shuttle’ (*la navette*) and is organised by Article 45 of the Constitution. The Government may stop this procedure after two readings in each House and establish a Joint Mediation Committee, which draws up a compromise on the clauses left out of the agreement. If no compromise may be found, both Houses may proceed to a final reading and the National Assembly may be invited by the Government to vote on the text as it is presented in its final reading.⁷²

Constitutional power

This procedure is not applicable to amendments to the Constitution and to certain organic laws. In such cases, the Government cannot override the Senate’s opposition and the Shuttle continues until the two Houses agree upon an identical text. Any amendment to the Constitution may only be adopted by referendum or by a majority of three-fifths of votes cast by the membership of both the National Assembly and the Senate in a joint session named the Congress.

⁷⁰ These delegates from municipal councils represent 95 per cent of the members of the electoral colleges. The remaining five per cent are composed by members of the National Assembly for the department, members of the department’s General Council and members of the Regional Council.

⁷¹ See http://www.senat.fr/lng/en/the_senates_role/a_special_role_in_parliament.html (EN).

⁷² For further information, see http://www.senat.fr/lng/en/the_senates_role/the_legislative_process.html (EN).

Relations with the executive

The Senate scrutinises the Government's exercise of powers and may question its members or request for any information. However, unlike the National Assembly, it may not force the Government to resign.

EU affairs and subsidiarity scrutiny⁷³

Within the Senate, all EU draft legislation is scrutinised by the Subsidiarity Working Group of the Senate's European Affairs Committee (SEAC) within a period of approximately 14 days. If it is thought that the EU draft legislation may infringe upon the subsidiarity principle, a rapporteur is nominated to further analyse the text. The rapporteur subsequently presents the results of the examination within a period of one or two weeks and may - if he/she concludes that there is a breach of the subsidiarity principle - present a draft reasoned opinion that is subject to a vote within the SEAC. Any Senator may also propose a draft reasoned opinion to the SEAC, which is similarly subject to a vote within the SEAC. If the SEAC adopts the draft, it transmits the full report to the relevant standing committee. The standing committee has approximately one month to review the opinion issued by the SEAC. If it adopts the opinion, it is forwarded by the President of the Senate to the EU institutions. If the standing committee fails to act within one month, the draft opinion becomes the definitive opinion of the Senate and is similarly sent on to the European institutions.⁷⁴

4.5 Germany: Federal Council (*Bundesrat*)

General

The legislative functions at the German federal level are vested into two institutions, the Federal Assembly (*Bundestag*) composed of 613 members, and the Federal Council (*Bundesrat*) composed of 69 members. Their rights and institutional obligations are mainly spelled out in the Federal Constitution or the

⁷³ CoR 2013 subsidiarity study, p. 149.

⁷⁴ Article 73 octies of the Rules of Procedure of the French Senate, available at http://www.senat.fr/reglement/reglement_mono.html#toc188 (FR) and IPEX, National Parliaments, French Senate, 'Monitoring compliance with the principle of subsidiarity. Senate of the French Republic', available at <http://www.ipex.eu/IPEXL-WEB/dossier/files/download/082dbcc539edbbe6013a91c7c44e5bdc.do> (EN).

‘Basic Law’ (*Grundgesetz*).⁷⁵

Territorial representation

The 69 members of the *Bundesrat* are not directly elected. Instead, the *Bundesrat* is composed of representatives of the state governments. Every *Land* is represented by at least three and not more than six representatives of its Government – the number depends on the size of the population of the *Land*⁷⁶ – which can only exercise their votes *en bloc* (per *Land*). Each of the 16 *Länder* of Germany has its own state parliament and state government. There is no direct link between the state parliaments and the *Bundestag* or the *Bundesrat*. Yet, there is a direct link between every state parliament and the relevant state government, which is part of the *Bundesrat*. In Germany, the 16 state governments participate through the *Bundesrat* in the legislation and administration of the Federal State. The position of the state parliament is forwarded to the state government, which considers it in its voting in the *Bundesrat*.

Legislative power

Pursuant to Article 77 (1) of the Basic Law, the *Bundestag* is the legislative organ responsible for adopting primary legislation. The *Bundesrat* is conceived as an institution guaranteeing that the rights and interests of *Länder* are respected and it has a threefold role in the federal legislative process: it may initiate primary legislation,⁷⁷ it may force another vote of the *Bundestag* on bills in areas that do not explicitly require the consent of the *Bundesrat* (*Einspruchsgesetze*) and it may veto bills that require its consent (*Zustimmungsgesetze*). The latter category mainly concerns areas involving legislative competences and administrative responsibilities of *Länder*. Hence, the *Bundesrat* has the constitutional power of issuing suspensive veto over all federal legislation and absolute veto over all federal legislation involving competences of the *Länder*. Given that this area corresponds to fifty per cent of all federal legislation,⁷⁸ the *Bundesrat* has a strong political leverage. ‘It is worth noting the logic of the role of the German *Bundesrat* which is related to the form of its distribution of legislative and administrative

⁷⁵ The German Basic Law is available at <http://www.bundestag.de/bundestag/aufgaben/rechtsgrundlagen/grundgesetz/gg.html> (DE) and in English at <https://www.btg-bestellservice.de/pdf/80201000.pdf> (the English version does not reflect the amendments of Article 93 adopted on 11 July 2012).

⁷⁶ Article 51(2) of the German Basic Law.

⁷⁷ Article 76(1) and (3) of the German Basic Law.

⁷⁸ D.P. Conradt and E. Langenbacher, *The German Polity*, 10th edn., Lanham, Rowman & Littlefield, 2013, p. 231.

powers. Because most federal laws are administered by the *Länder*, the *Bundesrat* gives to the executives of the *Länder* a role in shaping the federal laws they will have to administer.⁷⁹

Constitutional power

The approval of two-thirds of the members of the *Bundesrat* is required for any modification to the Basic Law.

Relations with the executive

The *Bundestag* is responsible for the parliamentary scrutiny of the Federal Government.

EU affairs and subsidiarity scrutiny⁸⁰

At the federal level, the subsidiarity checks have been integrated into the regular decision-making process. Since the entry into force of the Lisbon Treaty, all EU draft legislation submitted for debate in the *Bundestag* and the *Bundesrat* have two headings: Part A and Part B. Part A corresponds to subsidiarity scrutiny and Part B is subject to regular political scrutiny.⁸¹

EU legislative proposals are distributed by the Presidium to all members. They can be the subject of subsidiarity scrutiny at the initiative of the *Bundesrat* President, at the request of a *Bundesrat* member, or at the request of a *Land*. The *Bundesrat* President will determine the responsible sectorial committees depending on the subject. Several committees can discuss the same issue simultaneously. It is noted, however, that the EU Committee is always the leading committee for EU draft legislation and delivers its opinion last. All members of the *Bundesrat* have the right to access information and debates of any *Bundesrat* committee (without the right to vote).⁸²

⁷⁹ R.L. Watts, 'Federal Second Chambers Compared', Presentation at Conference on "Federalizing Process in Italy. Comparative Perspectives". An international conference organised by the Department for Institutional Reforms, Italy, and the Forum of Federations, Rome, February 17-19, 2010, p. 10. *Emphasis added*.

⁸⁰ CoR 2013 subsidiarity study, at p. 47; CoR 2010 subsidiarity study, pp. 45-46.

⁸¹ For decisions taken under heading B, the objective is for each Chamber to establish a position on the content of the legislative proposal, which the Federal Government should consider in its negotiations at EU level.

⁸² The EU Committee usually meets on Fridays, after all sectorial committees have had the chance to discuss the EU legislative proposals and have assessed whether they should be subject to the subsidiarity scrutiny process.

The EU Committee presents its report to the plenary together with a recommendation for a resolution. The report can be adopted by tacit assent, or in a formal vote, by simple majority. The members can only exercise their votes (between three and six) *en bloc* (per *Land*). The presidium of the *Bundesrat* is responsible for the administrative tasks of communicating the decision to stakeholders in the different institutions.

In case of emergency, the President of the *Bundesrat* may decide that a special EU Chamber (*Europakammer*), comprising one member of the *Bundesrat* from every *Land*, can take decisions on behalf of the *Bundesrat* and issue a reasoned opinion.⁸³

Through their participation in the *Bundesrat*, the state governments also take part in the Early Warning System. The position of the state parliament is forwarded to the state government, which considers it in its voting in the *Bundesrat*. In specific cases, it may be bound in its voting by the position of the state parliament. Moreover, every *Land* may request the *Bundesrat* via its (state government) representatives within the *Bundesrat* to conduct a subsidiarity scrutiny on EU draft legislation.

4.6 Ireland: Senate (*Seanad Éireann*)

General

The legislative power is exclusively vested in the National Parliament (*Oireachtas*), which consists of two Houses: the House of Representatives (*Dáil Éireann*) and the Senate (*Seanad Éireann*).⁸⁴ The Senate is composed of 60 members, 11 of which are nominated by the Prime Minister (the *Taoiseach*), with six elected by two universities⁸⁵ and 43 nominated by five panels representing vocational interests.⁸⁶ Despite this predominant vocational aspect, most Senators take a party whip since the electorate for the panel seats is composed by councillors and members who are close to political parties. Candidates to the Senate must be over 30 years of age to be eligible.

⁸³ For further information, see

<http://www.ipex.eu/IPEXL-WEB/dossier/files/download/082dbcc539edbbe6013a91c74dc75bdb.do> (EN).

⁸⁴ Article 15 of the Constitution of Ireland, available at <http://www.irishstatutebook.ie/en/constitution/index.html> (EN).

⁸⁵ Three members are elected by the National University of Ireland and three are elected by the University of Dublin (Trinity College).

⁸⁶ For further information, see <http://www.oireachtas.ie/parliament/about/seanad/> (EN).

The quality of debate in the Senate is considered as high. According to Meg Russell, the main reasons explaining this quality – which are often common to second chambers generally – are its small size conferring an intimate and informal character to its discussions, the fact that it is out of the public eye and can consequently work more in detail and avoid public controversies and the average age of the Senators, which tends to be higher and brings more experienced politicians in the Senate.⁸⁷

University Senators

The six university Senators appear to be the only Senators who sit as independents.⁸⁸ ‘These seats provide an opportunity for individuals who might not otherwise be elected to parliament to influence policy making. They often have a high profile.’⁸⁹ Furthermore, these university seats ‘arguably come closest to fulfilling the original ideal of the Senate as a forum for experts who are largely independent of the political parties.’⁹⁰

Legislative power

The Senate can initiate and revise legislation, except for financial legislation – for which it can merely issue recommendations.⁹¹ While in theory every bill of the House of Representatives must receive the Senate’s assent, the latter can merely delay rather than veto bills of the House of Representatives.⁹²

Constitutional power

The legislative procedure described above also applies to constitutional amendments, except for the fact that the Senate may not initiate them.⁹³

⁸⁷ M. Russell, ‘A Vocationally Based Upper House? Lessons from Ireland?’, in *Reforming the House of Lords, Lessons from Overseas*, February 1999, available at <http://www.ucl.ac.uk/constitution-unit/research/research-archive/tabs/archive-projects/reforming-lords-lessons-from-overseas> (EN).

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ B. Doherty, ‘Seanad Éireann’, *Constitution Review Group Report 4: The National Parliament*, Dublin, Government of Ireland, 1996, p. 19.

⁹¹ Article 20 of the Constitution of Ireland.

⁹² Articles 23 and 24 of the Constitution of Ireland establish a detailed procedure with specific deadlines, following which measures are ‘deemed’ to have been approved by the Senate.

⁹³ Article 46(2) of the Constitution of Ireland.

Relations with the executive

The Irish Government is constitutionally responsible only *vis-à-vis* the House of Representatives and not the Senate, which can debate ‘with greater freedom because the fate of the Government will not be at stake.’⁹⁴

EU affairs and subsidiarity scrutiny⁹⁵

The Senate and the House of Representatives have set up a Joint Committee on European Scrutiny (JCES) to perform subsidiarity checks on EU draft legislation.⁹⁶ Pursuant to the European Union (Scrutiny) Act, 2002,⁹⁷ the Government Departments must submit EU draft legislation to the National Parliament together with an information note within four weeks of receiving draft legislation from the EU.⁹⁸

Once it has examined these documents, the JCES has three options with regard to the subsidiarity scrutiny: it can examine the EU draft legislation itself, it can request the relevant sectoral committee to provide its observations (on the basis of which the JCES will subsequently prepare the scrutiny report), or it can ask the relevant sectoral committee to undertake the scrutiny and to prepare the report.

If the JCES chooses to examine the draft itself, it can use desk research to examine subsidiarity compliance. More often than not, however, it will decide to hold public hearings with the Government and with relevant stakeholders.⁹⁹

If the subsidiarity principle is deemed to have been violated, the JCES sends a reasoned opinion to the two Houses of the National Parliament. Each Chamber will then consider the opinion, and, if at least one of them agrees with the JCES, a

⁹⁴ See <http://www.oireachtas.ie/parliament/about/seanad/> (EN).

⁹⁵ CoR 2013 subsidiarity study, p. 158.

⁹⁶ The National Parliament, Joint Committee on European Scrutiny, Orders of Reference, available at http://www.oireachtas.ie/viewdoc.asp?fn=/documents/Committees30thDail/J-EUScrutiny/Orders_of_Reference/document1.htm (EN).

⁹⁷ European Scrutiny Act of 2002, available at <http://www.irishstatutebook.ie/pdf/2002/en.act.2002.0025.pdf> (EN).

⁹⁸ *Ibid.* A description of the process of scrutiny is available at the website of the National Parliament, available at http://www.oireachtas.ie/viewdoc.asp?fn=/documents/Committees30thDail/J-EUScrutiny/Process_EUScrutiny.htm (EN).

⁹⁹ *Ibid.*

reasoned opinion is issued to the Presidents of the European Commission, the Council and the European Parliament.¹⁰⁰

Reform

A proposal to amend the Constitution of Ireland to abolish the Senate was submitted by the House of Representatives.¹⁰¹ The bill was rejected in a referendum on 4 October 2013 by 51,7 per cent of the electorate voting against to 48,3 per cent voting in favour. Discussions to reform the Senate are on-going.¹⁰²

4.7 Italy: Senate (*Senato*)

General

In accordance with the Constitution of the Italian Republic, the Italian Parliament is bicameral, made up of two Assemblies: the Chamber of Deputies and the Senate of the Republic, each with equal powers. None of the two Assemblies officially represent local and regional authorities. Members of the Parliament are elected every five years by all citizens, aged 18 or older, for election to the Chamber, and by those aged 25 or older, for election to the Senate, respectively. The Senate is currently composed by 315 elected Senators and five Senators for life (former Presidents of the Republic are Senators by right and for life and the President may appoint maximum five deserving citizens ‘for outstanding merits in the social, scientific, artistic or literary field’ as life members). Candidates to the Senate must be over 40 years of age to be eligible to the Senate.

Territorial representation

Senators are elected on a regional basis. Each of Italy’s 20 regions elects Senators on a proportional basis (except for Valle d’Aosta, which has only one member, and Trento-Alto Adige, which uses the previous electoral system to elect its six senators).

¹⁰⁰ *Ibid.* See also IPEX, National Parliaments, Irish House of Oireachtas, ‘Scrutiny of documents coming from the European Union and monitoring compliance with the principle of subsidiarity. Houses of the Oireachtas, Ireland’, available at <http://www.ipex.eu/IPEXL-WEB/dossier/files/download/082dbcc539edbbe6013ada9e7f1100a0.do> (EN).

¹⁰¹ See <http://www.oireachtas.ie/viewdoc.asp?DocID=23654> (EN).

¹⁰² See <http://www.irishtimes.com/news/politics/oireachtas/seanad-reform-plan-to-be-unveiled-1.1652961> (EN).

Legislative power and relations with the executive

The Senate may initiate legislation and must approve any legislation in the same form as the House of Representatives. Moreover, the Government must have the consent of both Houses to remain in office. Hence, the Italian legislature is an example of ‘perfect bilateralism’.

This system has been criticised for slowing down the decision-making process. Hence, a constitutional reform is currently under discussion in Italy in order to reduce the powers of the Senate – *inter alia* by depriving it from its equal law-making status with the lower house and from the power to approve budgets or hold votes of non-confidence *vis-à-vis* the Government – and to transform it into a non-elected chamber. The new Assembly would be named ‘Senate of Autonomies’ and its legislative competences would be limited to local and regional affairs. Nevertheless, the new Assembly would keep an equal status with the House of Representatives on constitutional amendments. Moreover, it would still be allowed to amend bills but final approval would be reserved to the House of Representatives. The constitutional reform draft bill was approved by the Italian cabinet on 31 March 2014.¹⁰³

EU affairs and subsidiarity scrutiny¹⁰⁴

Instead of introducing a specific procedure related to the Early Warning system in its Rules of Procedure, the Senate has chosen to integrate the subsidiarity scrutiny within the broader scrutiny of EU initiatives.

The subsidiarity scrutiny is not carried out by Committee 14a (on EU affairs) but by the relevant Committee that is competent in the area affected by the EU draft legislation. However, in case of inactivity of the relevant Committee, Committee 14a is allowed to take over the subsidiarity scrutiny. It has in fact established a sub-committee to this end, whose role is to examine EU draft legislative acts as well as the other EU non-legislative acts, especially with regard to the EWS.¹⁰⁵ Moreover, the matter may be referred to the Plenary when one-third of the members of the relevant Committee so request.

¹⁰³ See <http://www.neurope.eu/article/italys-cabinet-approves-draft-bill-crucial-senate-reform> (EN).

¹⁰⁴ CoR 2013 subsidiarity study, p. 62; Information and data collected for the CoR in 2011 by the European Institute of Public Administration (EIPA) under the framework contract CDR/ETU/106/2009 ‘Constitutional Affairs and European Governance’.

¹⁰⁵ For further information, see Italian Senate, ‘L’attività della 14a Commissione permanente Politiche dell’Unione europea’, available at http://www.senato.it/3708?testo_generico=842 (IT).

Since 2012,¹⁰⁶ the participation of the regions and the autonomous provinces in EU decision-making has been reinforced. The Chambers may consult the parliaments of the regions and autonomous provinces. Yet, there is no obligation for the Chambers to consult these parliaments. Furthermore, the Presidents of the regional Parliaments and of the autonomous provincial Parliaments of Trento and Bolzano may present their observations related to the principle of subsidiarity. Regional parliaments' comments are forwarded to the committees in the Italian Parliament that are responsible for the subject-matter concerned and to the European Affairs committees. These committees draft an opinion, which may or may not, make reference to the position adopted by the regions.

As a matter of principle, however, the National Parliament is not obliged to consider the different positions of the regional assemblies or to promote the search for a common position, as there is no legal obligation to this end.¹⁰⁷ The follow-up of regional observations is detailed in the Protocol of 21 July 2009 on the agreement between the Senate, the Chamber of Deputies and the Conference of Presidents.¹⁰⁸ The National Parliament usually informs regional parliaments on the final position/decision. Yet, it has no legal obligation to do so, even in the event of the regional assemblies' positions not being considered.¹⁰⁹

4.8 The Netherlands: Upper Chamber or Senate (*Eerste Kamer*)¹¹⁰

General

The Kingdom of the Netherlands is a decentralised, unitary State. The legislative power is vested in a bicameral Parliament called the 'States General' (*Staten*

¹⁰⁶ Act 234/2012, available at <http://www.lexitalia.it/leggi/2012-234.htm> (IT).

¹⁰⁷ CoR 2010 subsidiarity study, p. 72.

¹⁰⁸ 'Protocollo d'intesa fra il Senato della Repubblica, la Camera dei deputati e la Conferenza dei Presidenti delle Assemblee legislative delle Regioni e delle Province autonome', available at <http://www.parlamentiregionali.it/dbdata/documenti/%5b4a9f983446967%5dPROTOCOLLO DI INTESA luglio 2009.pdf> (IT).

¹⁰⁹ CoR 2010 subsidiarity study, p. 72.

¹¹⁰ In the Netherlands, the denomination '*Tweede Kamer*' (in English: Second Chamber) designates the Lower Chamber or House of Representatives. Despite its name, the Lower Chamber functions as the main Chamber of Parliament, where proposed legislation is discussed and voted and where the actions of the Government are reviewed. Within the specific context of this study focusing on second chambers, it is consequently the '*Eerste Kamer*' (in English: Upper Chamber or Senate) that has to be examined. For further information, see http://www.eerstekamer.nl/begrip/english_2 (EN).

Generaal), which is composed of the Upper Chamber¹¹¹ or Senate (*Eerste Kamer*) and the Lower Chamber¹¹² or House of Representatives (*Tweede Kamer*). The Upper Chamber is composed of 75 members who are indirectly elected through appointment by Provincial Councils.¹¹³ The Lower Chamber is composed of 150 members who are directly elected.¹¹⁴ Members in both Chambers serve four-year terms.¹¹⁵ Both Chambers may be dissolved by Royal Decree.

Territorial representation

The members of the Senate are appointed by the Dutch Provincial Councils.¹¹⁶

Legislative power

The Dutch Senate has no power of amendment over legislation, it may only adopt or reject bills in their entirety.¹¹⁷

Constitutional power

The adoption of an amendment to the Constitution requires the adoption by simple majority of a bill by the two Chambers, followed by a dissolution of these Chambers and the adoption by a two-thirds majority of votes in the two Chambers.

Relations with the executive

The Government is responsible *vis-à-vis* both Chambers of the Parliament.

EU affairs and subsidiarity scrutiny¹¹⁸

Until 2009, subsidiarity checks were conducted by the Joint Subsidiarity Committee of both Chambers of Parliament. In 2009, this Committee stopped

¹¹¹ For further information, see http://www.eerstekamer.nl/begrip/english_2 (EN).

¹¹² For further information, see <http://www.houseofrepresentatives.nl/> (EN).

¹¹³ Articles 51(3) and 55 of the Constitution of the Netherlands, available at <http://www.rijksoverheid.nl/documenten-en-publicaties/brochures/2008/10/20/the-constitution-of-the-kingdom-of-the-netherlands-2008.html> (EN).

¹¹⁴ Articles 51(2) and 54 of the Constitution of the Netherlands.

¹¹⁵ Article 52(1) of the Constitution of the Netherlands.

¹¹⁶ Articles 51(3) and 55 of the Constitution of the Netherlands, available at <http://www.rijksoverheid.nl/documenten-en-publicaties/brochures/2008/10/20/the-constitution-of-the-kingdom-of-the-netherlands-2008.html> (EN).

¹¹⁷ Article 85 of the Constitution of the Netherlands.

¹¹⁸ CoR 2013 subsidiarity study, pp. 173-174.

operating when the Upper Chamber adopted a new EU procedure.¹¹⁹ The Lower Chamber subsequently established its own procedure for detecting breaches of the subsidiarity principle in EU draft legislation.

Within the Upper Chamber, subsidiarity checks are conducted by the different standing committees depending on the subject matter of the draft EU legislation. Each committee¹²⁰ selects the EU draft legislation that will be scrutinised on the basis of the Annual Work Programme of the European Commission and on the basis of a weekly overview of EU draft legislation sent by the EU institutions, which is conducted by the staff of the Upper Chamber.¹²¹ If a breach is determined to have occurred, the competent standing committee will attempt to coordinate with the competent standing committee of the Lower Chamber to determine if a joint letter may be sent.¹²² When a reasoned opinion is drafted, it must be approved by the plenary prior to being sent to the Presidents of the European Commission, the Council and the European Parliament.¹²³

4.9 Poland: Senate (*Senat*)

General

The Republic of Poland is a unitary State¹²⁴ in which the legislative power is vested in a bicameral Parliament, which consists of a Lower House (*Sejm*), composed of 460 Deputies and a Senate (*Senat*) composed of 100 Senators. Members of both Houses are directly elected to four-year terms.¹²⁵

¹¹⁹ See http://www.eerstekamer.nl/eu/begrip/english_3 (EN).

¹²⁰ 'The procedure for dealing with European proposals in the Senate is organised as far as possible in keeping with the procedure for dealing with draft national legislation.' *Ibid.* The standing committee on European Affairs consequently lost its 'gatekeeper' function, and relevant sectoral committees are responsible for the subsidiarity scrutiny of EU draft legislation in their subject matter.

¹²¹ EU draft legislation that has been prioritised by the Upper Chamber among the European Commission working programme is automatically placed on the agenda of the standing committees for discussion. For the proposals selected by a standing committee, the staff prepares a summary of the EU draft legislation and puts the item on the agenda of the committee that selected the proposal.

¹²² Note: when a joint letter is sent to the EU institutions, this counts as two votes in the context of the EWS.

¹²³ IPEX, National Parliaments, Dutch Senate, 'Scrutiny of documents coming from the European Union and monitoring compliance with the principle of subsidiarity', available at http://www.eerstekamer.nl/eu/brief2/20121019/table_setting_out_the_stages_in/document (EN).

¹²⁴ Article 3 of the Constitution of Poland, available at <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm> (EN).

¹²⁵ Articles 95-97 of the Constitution of Poland.

Territorial representation

The 100 Senators are elected in single-member constituencies.

Legislative power

The Senate has the right to introduce bills and to amend bills proposed by the Lower House. If the Senate fails to adopt its position within 30 days following the submission of a bill, it shall be considered adopted according to the wording submitted by the Lower House. A resolution of the Senate rejecting the bill or proposing an amendment shall be considered accepted unless the Lower House rejects it by an absolute majority in the presence of at least half of the Deputies.¹²⁶ The Senate's basic role in the legislative decision-making process is to correct errors committed by the Lower House.¹²⁷

Constitutional power

The Senate may submit a bill to amend the Constitution. Such bill shall be adopted by a majority of at least two-thirds of votes in the Lower House and by an absolute majority of the votes of the Senate with at a presence of at least half of the Deputies and Senators.¹²⁸

Relations with the executive

Unlike the Lower House, the Senate does not oversee the executive.

EU affairs and subsidiarity scrutiny¹²⁹

Cooperation of the Government with the two Chambers of Parliament in EU matters is governed by the Act of 8 October 2010 (the Cooperation Act).¹³⁰ The Government provides both the Lower House and the Senate with its opinion on EU

¹²⁶ Article 121 of the Constitution of Poland.

¹²⁷ Council of Europe, European Commission on Democracy Through Law (Venice Commission), Report on Second Chambers in Europe, Contributions by Venice Commission Members, 1 March 2006, 'The Role Of The Second Chamber (Senate) In Poland's Political System' by Hanna Suchocka, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL\(2006\)011-bil](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2006)011-bil), at p. 40.

¹²⁸ Article 235 of the Constitution of Poland.

¹²⁹ CoR 2013 subsidiarity study, pp. 177-178.

¹³⁰ This Act is available at

<http://isap.sejm.gov.pl/Download.jsessionid=926C899E2FC4D66659664DA8AE4F158B?id=WDU20102131395&type=2> (PL). A summary of the Cooperation Act as well as the document itself are available at http://www.parl2011.pl/prezydencja.nsf/lexi/en_Sejm_Senate_EU (EN).

draft legislation within two weeks of receiving EU draft legislation. Both the Lower House and the Senate have appointed their respective European Union Affairs Committees (EUAC) as the body competent to act on their behalf in all EU matters. In the Senate, the Marshal (Presiding Officer) refers EU draft legislation to the EUAC. The Presidium of the EUAC - composed of the chair of the Committee and two deputies - determines whether the EUAC or the relevant sectoral committee will review the draft legislation. If the EUAC or the sectoral committee determines that a breach has occurred, it establishes a draft Senate resolution, which is subsequently put to vote in the plenary. If adopted, the reasoned opinion is forwarded to the European Commission, the Council and the European Parliament.¹³¹

4.10 Romania: Senate (*Senatul*)

General

The Republic of Romania is a unitary State¹³² in which the legislative power is vested in a bicameral legislature consisting of the Chamber of Deputies (*Camera Deputațiilor*) and the Senate (*Senatul*).¹³³ The Chamber of Deputies is made up of 412 deputies elected to four-year terms. The Senate is composed of 176 Senators who are elected to four-year terms.¹³⁴ Both the Chamber of Deputies and the Senate are elected by universal, equal and direct vote for a mandate of four years. The Romanian bicameralism constitutes a unique example in Europe of a symmetric bicameralism in which both Chambers represent the same population.¹³⁵

In 2009, a referendum was held in Romania on the modification of the size and the structure of the Parliament from a bicameral one to a unicameral Parliament with a maximum of 300 seats. With a majority of 77,78 per cent (50,95 per cent turnout)

¹³¹ For further information, see IPEX, National Parliaments, Polish Senate, 'Scrutiny of documents coming from the European Union and monitoring compliance with the principle of subsidiarity. Senate of the Republic of Poland', available at

<http://www.ipex.eu/IPEXL-WEB/dossier/files/download/082dbcc539edbbe6013a646ceafc4244.do> (EN).

¹³² Article 1(1) of the Constitution of Romania, available at <http://www.cdep.ro/pls/dic/site.page?id=371> (EN).

¹³³ Article 61(2) of the Constitution of Romania.

¹³⁴ Inter-Parliamentary Union, Chamber of Deputies, available at http://www.ipu.org/parline-e/reports/2261_B.htm (EN) and Senate, available at http://www.ipu.org/parline-e/reports/2262_A.htm (EN).

¹³⁵ L.-S. Stănescu and D. Belțic, 'The structure of the Romanian Parliament from the perspective of its optimizing and of the cooperation mechanism with the European Parliament', 12 *The USV Annals of Economics and Public Administration* 1(1), 2012, available at

<http://www.seap.usv.ro/annals/ojs/index.php/annals/article/viewFile/478/477> (EN), pp. 244-255.

the electors approved the abolition of the Senate. However, the necessary constitutional changes to achieve this have not been put into effect so far.

Territorial representation

The electoral system for the Senate is based on a mixed member proportional system. 137 Senators are elected in single-member constituencies. Candidates that obtain over 50 per cent of the votes win the election. Seats are first distributed at the county level and then the national level. 39 additional ‘overhang seats’ are generated if one party obtains more seats than available in the county.

Legislative power

The Romanian Parliament is based on a symmetric bicameralism in which the two chambers have equal positions and powers. Once a chamber issues a draft legislation, the other chamber may confirm the vote, modify the draft or reject the draft. In all three cases the final decision belongs to the chamber that is seized in a second position. Hence, the Senate has the power to initiate bills and to amend and vote upon bills proposed by the Chamber of Deputies. The ordinary legislative process requires the adoption by majority vote of the members present in each Chamber to pass legislation.

Constitutional power

The approval by two-thirds of the Senators is required for constitutional amendments.

Relations with the executive

The Government is politically responsible before both Chambers of the Parliament. They may, in joint sitting, withdraw the confidence granted to the Government by carrying a motion of censure by a majority vote in both Chambers.¹³⁶

EU affairs and subsidiarity scrutiny¹³⁷

The Senate has its own EAC and Standing Bureau, and follows a path similar to that of the Chamber of Deputies in scrutinising draft EU legislation.¹³⁸ Upon

¹³⁶ Article 113 of the Constitution of Romania.

¹³⁷ CoR 2013 subsidiarity study, p. 181.

¹³⁸ See the Romanian Senate’s website, available at <http://www.senat.ro/Start.aspx> (RO).

recommendation of the European Affairs Division, the Standing Bureau decides which committee will carry out the scrutiny process. The President of the Senate informs the competent committee in order to start the subsidiarity scrutiny. During the scrutiny process, the EAC provides the relevant committees with its opinion regarding draft legislation. Draft opinions are debated and voted on by the Senate at a plenary meeting. Approved reasoned opinions are forwarded by the President of the Senate to the European Commission, the Council and the European Parliament.¹³⁹

4.11 Slovenia: National Council (*Državni Svet*)

General

The Republic of Slovenia is a unitary State. It has a bicameral legislature composed of the National Assembly (*Državni Zbor*) and the National Council (*Državni Svet*). The National Assembly comprises 90 deputies who are directly elected to four-year terms.¹⁴⁰ The National Council has 40 members who are elected to five-year terms by indirect suffrage by interest organisations and local communities.¹⁴¹ Among these members, there are four representatives of employers, four representatives of employees, four representatives of farmers, crafts, trade and independent professions, six representatives of non-commercial fields and twenty-two representatives of local interests.

Territorial representation

Territorial representation is guaranteed by the twenty-two representatives of local interests within the National Council.

¹³⁹ IPEX, National Parliaments, Romanian Senate, ‘Scrutiny of documents coming from the European Union and monitoring compliance with the principle of subsidiarity’, available at <http://www.ipex.eu/IPEXL-WEB/dossier/files/download/082dbcc539edbbe6013ab7241e6b70b9.do> (EN).

¹⁴⁰ Articles 80-81 of the Constitution of Slovenia, available at <http://www.us-rs.si/media/constitution-en.pdf> (EN).

¹⁴¹ Articles 96 and 98 of the Constitution of Slovenia. The electoral colleges represent either economic and social sectors or municipalities, in which case the college is made up of members of the local assembly if the constituency coincides with the community or of representatives elected by the community assemblies if the constituency groups several communities.

Legislative power

Legislative power is mainly vested in the National Assembly,¹⁴² which is the ‘supreme representative and legislative institution, exercising legislative and electoral powers as well as control over the Executive and the Judiciary.’¹⁴³ However, the National Council has the right to initiate bills and to amend bills proposed by the National Assembly. It also has a suspensive veto right through which it may ask the National Assembly to reconsider legislation within seven days of its adoption and prior to its promulgation.

In addition to its limited advisory and control powers, the National Council mainly acts as a consultative assembly, which advises the National Assembly on the content of legislation and acts as the representative body for social, economic, professional and local interests.¹⁴⁴ It may give its opinion to the National Assembly on all matters falling within its area of competence and is obliged to give such opinion at the National Assembly’s request. Any proposal, initiative or question to be transferred to the National Assembly in social, economic, professional or local matters are tabled by a Councillor and sent to the competent committee, which adopts a report on the issue. This report is sent to the President of the National Assembly, who forwards it to all Deputies and to the Government. The President of the National Council is informed of the position adopted by the National Assembly on the particular issue. Hence, local authorities, whose representatives are dominant in the National Council, have a certain impact on national policy through this channel.¹⁴⁵

Constitutional power

The National Assembly enacts constitutional amendments in Slovenia.

However, the National Council may launch proceedings for the review of constitutionality and legality of legislation before the Constitutional Court.

¹⁴² Article 87 of the Constitution of Slovenia.

¹⁴³ IPEX, National Parliaments, Slovenian National Assembly, available at <http://www.ipex.eu/IPEXL-WEB/parliaments/institution/sizbo.do> (EN).

¹⁴⁴ Article 96 of the Constitution of Slovenia.

¹⁴⁵ F. Grad, ‘Local government in Slovenia’, in A.-M. Moreno, *Local Government in the Member States of the European Union: A Comparative Legal Perspective* (Madrid, National Institute of Public Administration 2012) pp. 577-597, at p. 596.

Relations with the executive

The Government is accountable to the National Assembly.

EU affairs and subsidiarity scrutiny¹⁴⁶

The Act on Cooperation between the National Assembly and the Government in EU affairs does not refer to the role of the National Council in EU affairs. Pursuant to paragraph 3 of Article 154(č) of the Rules of Procedure of the National Assembly, however, the President of the National Assembly transfers ‘EU affairs’ (sic) to the National Council.¹⁴⁷ Moreover, paragraph 1 of Article 154(e) of the Rules of Procedure of the National Assembly states that a representative of the National Council is invited to attend meetings on EU affairs of the CEA/CFP of the National Assembly. The National Council itself has not (yet) established any specific rules with regard to subsidiarity monitoring.¹⁴⁸ EU affairs are accordingly dealt with using the ordinary procedure.¹⁴⁹

4.12 Spain: Senate (*Senado*)

General

At the national level, the Spanish Parliament (*Cortes Generales*) comprises two Chambers: the Congress of Deputies (*Congreso de los Diputados*) and the Senate (*Senado*). The Senate – currently composed of 226 Senators – relies on an election system that has been unchanged since 1977.

¹⁴⁶ CoR 2013 subsidiarity study, pp. 187-188.

¹⁴⁷ The Rules of Procedure are available at

<http://www.dz-rs.si/wps/portal/en/Home/ODrzavnemZboru/PristojnostiInFunkcije/RulesoftheProcedureText> (EN).

¹⁴⁸ Information and data collected for the CoR in 2011 by the European Institute of Public Administration (EIPA) under the framework contract CDR/ETU/106/2009 ‘Constitutional Affairs and European Governance’.

¹⁴⁹ Pursuant to the responses of the National Council to the questionnaire for the 13th Bi-annual Report of COSAC (May 2010) published in COSAC, Subsidiarity Control in National Parliaments, Slovenia, available at <http://www.cosac.eu/subs-slovenia/> (EN), ‘[t]he EU matters are regarded as standard/ordinary work of the working bodies and the National Council; therefore no new provisions are needed. (...) Leaders of the interest groups and Presidents of the Commissions decide which document should be put on the agenda of the Commissions. After deliberating, Commissions propose to the College of the President which topics should be put on the agenda of the plenary session.’

Territorial representation

Senators are partly directly elected (four Senators per province as a general rule) and partly appointed by the legislative assemblies of the Self-Governing Communities (one for each Community and an additional Senator for every million inhabitants).¹⁵⁰ The Senators are linked to parliamentary groups according to their political preferences.

According to Section 69 (1) of the Constitution, the Senate is ‘the House of territorial representation.’

Legislative and constitutional power

Pursuant to Article 66 (1) of the Constitution, the Senate represents the Spanish people. It may initiate bills and veto by absolute majority or amend by simple majority bills emanating from the Congress of Deputies. In the two last cases, the text is sent back to the Congress of Deputies, which can reject the veto by ratifying the text presented to the Senate by an absolute majority or by a simple majority after a period of two months since its interposition. The Congress may accept or reject amendments of the Senate by simple majority.

Given that the Senate is also ‘the House of territorial representation’, it conforms to a dual definition. ‘On the one hand, just like the Congress of Deputies, it represents the Spanish people. In this regard, it performs a duty of reflection or reconsideration, offering the possibility of examining and, if required, opposing or modifying the decisions made by the Lower House by means of vetoes or amendments. On the other hand, it is the House of territorial representation. This second aspect is a direct consequence of the configuration of the State as a State of Self-Governing Communities, in other words, organised into Self-Governing Communities with significant powers.’¹⁵¹

The Senate represents territorial entities ‘in order to achieve greater integration and coordination between the central and regional powers. This feature clearly differentiates the Senate from the first House or Congress of Deputies.’¹⁵² An

¹⁵⁰ The Spanish Constitution is available at http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf (EN).

¹⁵¹ See <http://www.senado.es/web/conocersenado/temasclave/sistemabicameral/index.html> (EN).

¹⁵² *Ibid.*

interesting illustration of this specific role of the Senate may be found in the existence within the Senate of a General Committee on Self-Governing Communities, which can be called by the Councils of the Self-Governing Communities and to which these Councils can take part.¹⁵³ Furthermore, the Senate initiates the parliamentary procedures for approval of agreements among Self-Governing Communities according to Article 145 (2) of the Constitution and for the distribution of the ‘Inter-territorial Compensation Fund’ among Self-Governing Communities pursuant to Article 158 (2) of the Constitution.

Finally, the Senate has a specific power which may be conceived as an ultimate resource to be used only in exceptional circumstances – and which the Senate did never use so far: Article 155 of the Constitution states that ‘[i]f a Self-governing Community does not fulfil the obligations imposed upon it by the Constitution or other laws, or acts in a way that is seriously prejudicial to the general interest of Spain, the Government, after having lodged a complaint with the President of the Self-governing Community and failed to receive satisfaction therefore, may, following approval granted by the overall majority of the Senate, take all measures necessary to compel the Community to meet said obligations, or to protect the abovementioned general interest.’

Relations with the executive

The Senate may address questions to the Government but it may not force it to resign, unlike the Congress of Deputies.

EU affairs and subsidiarity scrutiny¹⁵⁴

EU draft legislation received from the European Commission, the Council of the EU or the European Parliament is sent to the Secretariat of the Joint Committee for the European Union. Pursuant to Article 3j of Act 8/1994, as amended by Act 24/2009, the Joint Committee is in charge of scrutinising subsidiarity on behalf of the two Chambers of the National Parliament.

For each EU draft legislative act, the bureau of the Joint Committee¹⁵⁵ and the spokespersons of the political groups may decide either to acknowledge the

¹⁵³ *Ibid.*

¹⁵⁴ CoR 2013 subsidiarity study, pp. 79-80; CoR 2010 subsidiarity study, pp. 175-176.

¹⁵⁵ The Bureau is composed of the Chair, two Vice-Chairs and two Secretaries.

proposal or to appoint a rapporteur to prepare a report on it.¹⁵⁶ In case of acknowledgment of the proposal, the subsidiarity check is considered to be provisionally finalised. In any event however, within four weeks, two parliamentary groups or one-fifth of the Members of the Committee may request a subsidiarity check to be conducted. Moreover, the Bureau and the spokespersons may change their decision for other reasons, such as the submission of negative reports by regional parliaments.

Each Chamber of the National Parliament can launch the debate on a given initiative before the four-week period, during which two parliamentary groups or one-fifth of the Members of the Committee may request a subsidiarity check to be conducted. However, in line with parliamentary practice, the Bureau and the spokespersons are always aware of the four-week deadline for including the necessary debate in the Joint Committee discussions. If the Bureau and the spokespersons decide to start the subsidiarity check, a rapporteur is appointed and charged with scrutinising the proposal. The rapporteur prepares a report on the compliance of the EU draft legislation with the subsidiarity principle which is submitted to the Joint Committee. Members of the Joint Committee then have five days to submit alternative proposals, amendments or requests for the plenary to vote on the issue.¹⁵⁷ Following a debate within the Joint Committee, the decision on the reasoned opinion is taken by the Joint Committee with a simple majority. Pursuant to Article 149 of the Rules of Procedure of the Congress of Deputies¹⁵⁸ and Article 130 of the Rules of Procedure of the Senate,¹⁵⁹ the plenary of either Chamber may reserve the final decision to itself. In such case, both Chambers will take the decision separately in their respective plenary. After the Joint Committee has approved the reasoned opinion (and if requested by the plenary of the Chambers), it is sent to the relevant EU institutions and to the National Government for information.

¹⁵⁶ Article 7 of the Resolution approved by the Bureaux of the Congress of Deputies and of the Senate on 27 May 2010, developing Law 8/1994 (Official Parliamentary Bulletin of the Cortes Generales, A Series, no. 312, 8 June 2010), available at http://www.congreso.es/public_oficiales/L9/CORT/BOCG/A/CG_A312.PDF (ES).

¹⁵⁷ Article 8.4 of the Resolution approved by the Bureaux of the Congress of Deputies and of the Senate on 27 May 2010 (see link above).

¹⁵⁸ The Rules of Procedure of the Congress are available at http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/standing_orders_02.pdf (EN).

¹⁵⁹ The Rules of Procedure of the Senate are available at <http://www.senado.es/web/conocersenado/normas/reglamentootrasnormassenado/detallesreglamentosenado/index.html#t4c2s2> (ES).

4.13 The United Kingdom: House of Lords

General

The National Parliament in the United Kingdom is composed of the House of Commons (the Lower House) and the House of Lords (the Upper House). The House of Lords currently consists of 782 members,¹⁶⁰ yet the number of members is not fixed. With Kazakhstan and Burkina Faso, the United Kingdom is one of the three countries in the world where the second chamber is larger than the first chamber (the House of Commons is composed of 650 members).¹⁶¹

Selection of members of the House of Lords

Unlike the Members of the House of Commons, the members of the House of Lords are not elected by the population; most are appointed by the Queen (Life Peers) or by virtue of their ecclesiastical role (Archbishops and Bishops). Since the 1999 reform of the House of Lords put an end to the right of hereditary Peers to sit and vote, the remaining traditional hereditary Peers are elected internally (Elected hereditary Peers).¹⁶² In May 2000, the Government established an independent Appointments Commission in order to vet for propriety all nominations to the House of Lords including those from political parties and to make recommendations for non-political peers (People's Peers) to create a more representative chamber.¹⁶³

The absence of any elections and the expertise of members of the House of Lords has permitted the reduction of the impact of party considerations.¹⁶⁴ The members of the House of Lords do not have to fight against opposing parties nor to face re-election. They sit for lifetime and cannot be expelled, which increases their independence.

Nobody may sit in the House of Lords if under the age of 21 years old.

¹⁶⁰ As of 31 October 2013.

¹⁶¹ On average, second chambers have 60 per cent of the members of first chambers. See M. Russell, 'A directly elected Upper House: Lessons from Italy and Australia' in *Reforming the House of Lords, Lessons from Overseas*, February 1999, available at <http://www.ucl.ac.uk/constitution-unit/research/research-archive/tabs/archive-projects/reforming-lords-lessons-from-overseas> (EN).

¹⁶² See <http://www.parliament.uk/about/mps-and-lords/about-lords/lords-types/> (EN).

¹⁶³ For further information, including an overview of the criteria guiding the assessment of nominations for non-party political life Peers, see <http://lordsappointments.independent.gov.uk/> (EN).

¹⁶⁴ See Lord Norton of Louth, *House of Lords: Official Report (Hansard)*, 13 March 2007, Vol. 690, col 707.

Legislative power

The House of Commons was originally far less powerful than the House of Lords, but today its legislative powers exceed those of the Lords. The House of Lords has the power to initiate bills and to amend bills issued by the House of Commons. However, given its absence of democratic legitimacy, the House of Lords refrains from challenging the principle of measures adopted by the House of Commons and voting against measures promised in the governing party's manifesto. It rather concentrates on details of bills and ways to improve them. 'Its composition is intrinsically beneficial to this activity. Those with an expertise or some experience in the field covered by a bill will tend to contribute to debate. Operating in a less partisan environment than the Commons and one largely neglected by the mass media (interested more in the partisan clashes in the Commons), it is possible for members to engage in a constructive dialogue with government ministers.'¹⁶⁵

Opponents to the House of Lords consider that it is not a representative body and that it should consequently not intervene in the legislative process. Yet, accountability is guaranteed in the British system through the elected chamber, the House of Commons. Its elections determine which party forms the Government and implements its political programme. Nevertheless, there are currently intense debates in the United Kingdom as to the necessity/opportunity to reform the House of Lords.¹⁶⁶

Relations with the executive

The House of Lords holds the Government to account through oral/written questions and debates in the House of Lords.

EU affairs and subsidiarity scrutiny¹⁶⁷

Following in-depth reflection on how to adapt its procedures to the Lisbon Treaty provisions and especially the EWS,¹⁶⁸ the House of Lords decided to modify the

¹⁶⁵ P. Norton, 'Adding Value? The Role of Second Chambers', *Asia Pacific Law Review*, Vol. 15 No. 1, 2007, pp. 3-18.

¹⁶⁶ See <http://www.parliament.uk/business/lords/lords-history/lords-reform/> (EN).

¹⁶⁷ CoR 2013 subsidiarity study, pp. 92-93; CoR 2010 subsidiarity study, pp. 118-120.

¹⁶⁸ In March 2003, the House of Lords European Union Committee published a report (House of Lords, Select Committee on the European Union, Session 2002-02, 11th report, 'The future of Europe: National parliaments and subsidiarity – The proposed protocols')

existing parliamentary sifting and scrutiny procedures - applying generally to all types of EU documents.¹⁶⁹ Those procedures will continue to apply unless and until a subsidiarity concern is raised.

Within the House of Lords, the subsidiarity check is conducted by the EU Committee or one of its sub-committees (e.g. the Sub-Committee on Law and Institutions). On the basis of the advice from the Committee's clerk(s) and legal advisers, the Chairman of the EU Committee sifts through the Government Explanatory Memoranda and associated documents. The purpose of this sifting is to determine whether each document should be cleared or considered further by one of the Committee's sub-committees. The sub-committees usually meet on a weekly basis when the House is in session and consider the merits of proposals in detail.¹⁷⁰ The responsible sub-committee then scrutinises the proposed EU legislation. This scrutiny includes an assessment of whether the principle of subsidiarity (and proportionality) is complied with. Within this context, a subsidiarity concern may be raised in various ways:

- in advance, through examination of the Commission's Annual Policy Strategy, Annual Legislative and Work Programme, etc.;
- during the sifting;
- in the course of the scrutiny;
- by alert from a devolved body, another national parliament or some other external quarter.

(<http://www.publications.parliament.uk/pa/ld200203/ldselect/ldcom/70/70.pdf>) on the draft Protocols on national parliaments and subsidiarity prepared by working groups in the Convention on the Future of Europe. The report explained the concept of subsidiarity and examined the role that national parliaments could play in monitoring its application. In April 2005, the EU Committee moreover published a report on 'Strengthening national parliamentary scrutiny of the EU - The Constitution's subsidiarity early warning mechanism', focusing on how the EWS could work in practice in the House of Lords (available at <http://www.publications.parliament.uk/pa/ld200405/ldselect/ldcom/101/101.pdf>). The UK Government gave a written response to the report in July 2005. That response was published as an annex to a follow-up report on subsidiarity that the Committee published in November 2005.

¹⁶⁹ See the following document: 'How will the Lords EU Committee operate these new powers?' <http://www.parliament.uk/documents/lords-committees/eu-select/subsidiarity/use-new-powers.pdf> (EN).

¹⁷⁰ Parliamentary Scrutiny of European Union Documents, Guidance for Departments, 20 April 2009: <http://europeanmemorandum.cabinetoffice.gov.uk/files/content/parliamentary-scrutiny-departments.pdf> (EN).

If such a subsidiarity concern is raised:

- the document could be fast-tracked through the sifting procedure, if necessary in advance of the Explanatory Memorandum;
- the Government could be asked for a prompt (full or partial) Explanatory Memorandum on the proposal at stake, including comments on compliance with the subsidiarity principle;
- appropriate members and staff could be stood by to act in recess if necessary.

A committee/sub-committee which finds a breach of subsidiarity presents a draft report, incorporating a reasoned opinion.¹⁷¹ Depending on the procedures adopted by the House, such reports might have to be agreed and published in haste. In accordance with the procedure described in the Companion to the Standing Orders 10.51 '*[t]he chairman of the committee is authorised in urgent cases to present the report of a sub-committee to the House on behalf of the committee.*'¹⁷²

¹⁷¹ Such report is confined to the issue of subsidiarity. It indicates whether or not the document is retained under scrutiny in respect of other issues. It has a distinctive title and a succinct and formulaic opening, easily recognisable to the EU institutions, followed by explanatory text. It is likely to be shorter than usual, and based on less evidence - possibly just the Commission's and the Government's Explanatory Memorandum. It is neither 'for debate' nor 'for information'.

¹⁷² <http://www.publications.parliament.uk/pa/ld/ldcomp/ldctso40.htm#note471> (EN). For further information, see IPEX, National Parliaments, UK House of Lords, 'Scrutiny of documents coming from the European Union and monitoring compliance with the principle of subsidiarity - House of Lords, United Kingdom', available at <http://www.ipex.eu/IPEXL-WEB/dossier/files/download/082dbcc539edbbe6013a8ccdd6c65765.do> (EN).

5 Selection of detailed case studies on consultative practices in second chambers

On the basis of the literature review in section 3 and the initial screening conducted under section 4, the following selection of detailed case studies is suggested. This selection covers both cases of consultative practices in second chambers and cases relating to consultative and expert functions of their members, including their possible political affiliation and groupings within the second chamber members. These cases have been selected for various reasons.

The first case study on the German *Bundesrat*'s veto power opens the discussion on the extent of legislative competences of second chambers and introduces the distinction among legislative competences of second chambers pursuant to the subject-area of draft legislation, namely whether or not it involves legislative competences and administrative responsibilities of the German *Länder*. Hence, this example is particularly relevant for the discussion on a future CoR acting as a second chamber representing regional and local interests at the European level, as demonstrated in point 7.4 of this study.

The second case study on the specific petition procedure in the Czech Senate permits to discuss the relevance and the opportunity of such petition procedure for a future CoR, given that a petition procedure already exists at the level of the European Parliament and that such procedure proves to be very costly.

The third case study on the opinions of the National Council in Slovenia provides for an interesting comparison with the opinions emitted by the CoR and with the possibility to launch proceedings before the Constitutional Court for the former and the European Court of Justice for the latter.

The fourth case study on the absence of any election in the United Kingdom's House of Lords examines the mode of selection of House of Lords and assesses the impact of this mode on the legitimacy of the House of Lords, its relations with the House of Commons and with the Government. Moreover, this case study raises the issue of the personal expertise of members of second chambers, which is crucial to enhance the political weight of debates and decisions taken by such chambers. Hence, it is particularly relevant for any discussion on a future CoR.

The fifth case study further scrutinises the qualification of individual members of second chambers with examples taken from the University Senators in the Irish Senate and Senators elected in single mandate constituencies in the Czech Republic. As mentioned above, the expertise and personal quality of members of second chambers is a dominant factor in the determination of the legitimacy of second chambers. It should consequently be taken into consideration as a possible source of inspiration for a future CoR based on the model of a second chamber.

Finally, the sixth case study gauges the ideal size of a second chamber in comparing the small Irish Senate to the huge House of Lords. As demonstrated in this point, the size of the second chamber has an impact on the quality of its work and on its effective functioning, which is why it may be pertinent to determine the ideal size of a future CoR in order to facilitate its daily work and ensure a high quality of its debates.

5.1 The German *Bundesrat*'s suspensive veto over all federal legislation and the absolute veto over all federal legislation involving the legislative competences and administrative responsibilities of *Länder*

The *Bundesrat* links the German *Länder* to the central decision-making process.¹⁷³ Pursuant to Article 50 of the Basic Law, 'the *Länder* shall participate through the *Bundesrat* in the legislation and administration of the Federation and in matters concerning the European Union.'¹⁷⁴ 'It is worth noting the logic of the role of the German *Bundesrat* which is related to the form of its distribution of legislative and administrative powers. Because most federal laws are administered by the *Länder*, the *Bundesrat* gives to the executives of the *Länder* a role in shaping the federal laws they will have to administer.'¹⁷⁵

¹⁷³ D.W. Urwin, 'Modern Democratic Experiences of Territorial Management: Single Houses, But Many Mansions', in M. Keating (ed.), *Regions and Regionalism in Europe*, Cheltenham, Elgar, 2004, at p. 113.

¹⁷⁴ The German Basic Law is available at

<http://www.bundestag.de/bundestag/aufgaben/rechtsgrundlagen/grundgesetz/gg.html> (DE) and in English at <https://www.btg-bestellservice.de/pdf/80201000.pdf> (the English version does not reflect the amendments of Article 93 adopted on 11 July 2012). *Emphasis added.*

¹⁷⁵ R.L. Watts, 'Federal Second Chambers Compared', Presentation at Conference on "Federalizing Process in Italy. Comparative Perspectives". An international conference organised by the Department for Institutional Reforms, Italy, and the Forum of Federations, Rome, February 17-19, 2010, p. 10. *Emphasis added.*

As a matter of principle, the *Bundesrat* intervenes in the legislative decision-making process for every law adopted by the *Bundestag*. Yet, the extent of its participation depends on whether the bill concerns a matter one to which the *Bundesrat* may lodge an objection or one requiring its consent.

‘In keeping with the Basic Law, it is more usual for bills not to require the consent of the *Bundesrat* in order to become law.’¹⁷⁶ In these cases, the *Bundestag* adopts a bill and the *Bundesrat* may lodge an objection, after having asked the Mediation Committee¹⁷⁷ to convene. The objection may be overturned by the *Bundestag* by an absolute majority – a majority of its statutory members.¹⁷⁸ Through this ‘suspensive veto power’,¹⁷⁹ the *Bundesrat* may force another vote of the *Bundestag* on bills in areas that do not explicitly require the consent of the *Bundesrat* (*Einspruchsgesetze*).

In matters for which the consent of the *Bundesrat* is requested by the Basic Law (*Zustimmungsgesetze*), the *Bundesrat* may exercise an ‘absolute veto’. If it refuses to grant its consent, the bill does not become law. There is no possibility for the *Bundestag* to override the absolute veto, even by unanimity. The matters concerned by this procedure are mainly areas involving legislative competences and administrative responsibilities of *Länder*.

These matters receive a large interpretation, since bills affecting the finances of *Länder* or affecting the implementation of legislation by *Länder* are included. The distinction between these two categories of bills pursuant to the matters involved is not always easy to determine. Disagreements are frequent and the Federal Constitutional Court is competent to decide whether or not the consent of the *Bundesrat* is required on a specific bill.

The framers of the Basic Law anticipated that the areas in which the *Bundesrat* would be required to issue its consent would merely cover 10 per cent of all legislation.¹⁸⁰ Following negotiations in legal committees in the two Houses of the Parliament and judicial interpretations, this number progressively increased to

¹⁷⁶ See http://www.bundestag.de/htdocs_e/bundestag/function/legislation/legislat/14legrat.html (EN). *Emphasis added.*

¹⁷⁷ This body acts as an intermediary between the *Bundestag* and the *Bundesrat*. For further information, see http://www.bundestag.de/htdocs_e/bundestag/committees/mediation/ (EN).

¹⁷⁸ In specific cases, a double qualified majority is required pursuant to Article 77 (4) of the Basic Law.

¹⁷⁹ J. Zekoll and M. Reimann, *Introduction to German Law*, 2nd edn., The Hague, Kluwer Law International, 2005, p. 70.

¹⁸⁰ D.P. Conradt and E. Langenbacher, *The German Polity*, 10th edn., Lanham, Rowman & Littlefield, 2013, p. 231.

attain sixty per cent of all federal legislation in the 1970s.¹⁸¹ This evolution may be explained by the fact that large parts of federal legislation refer to the way they have to be administered and implemented by the *Länder*, even if these bills did not concern competences of the *Länder* as such. The *Länder* argued that such bills instructing them on the way they had to be implemented and administered had to be included in the bills requiring the consent of the *Bundesrat* pursuant to Article 84 (1) of the Basic Law.¹⁸² This interpretation was generally followed by Constitutional Court, which contributed to the expansion of the veto power of the *Bundesrat*.

In 2006, a reform took place in order to modernise the federal system and to reduce the number of bills requiring the consent of the *Bundesrat*. As noted in an analysis of the motives underlying this reform, '[t]he reason so-called consent legislation was targeted was that it was a procedure that had increased the influence of the [*Länder*] on federal legislation, opening opportunities for partisanship to play itself out between the *Bundestag* and *Bundesrat*. The intended consequence of any effort to reduce the need for consent legislation was, in effect, to reduce the power of any opposition, which once in control of the *Bundesrat* could influence or even block, legislation.'¹⁸³ Moreover, the reduction of bills requiring the *Bundesrat*'s consent was intended to accelerate the legislative decision-making process.

Hence, Article 84 (1) of the Basic Law – criticised for being a *blanc chèque* for expansion of the consent requirement¹⁸⁴ – was modified.¹⁸⁵ Currently, Article 84 provides three different options for drafting legislation: (1) the Government may

¹⁸¹ P. Schindler, 'Der Bundesrat in parteipolitischer Auseinandersetzung', *Zeitschrift für Parlamentsfragen*, 1972, pp. 148-149.

¹⁸² In its 1949 version, Article 84 (1) of the Basic Law stated: 'Where the Länder execute federal laws in their own right, they shall regulate the establishment of the authorities and their administrative procedure insofar as federal laws enacted with the consent of the Bundesrat do not otherwise provide.'

¹⁸³ S. Burkhart, P. Manow and D. Ziblatt, 'A More Efficient and Accountable Federalism? An Analysis of the Consequences of Germany's 2006 Constitutional Reform', *German Politics*, Vol. 17(4), 2008, pp. 522-540.

¹⁸⁴ C. Dästner, 'Zur Entwicklung der Zustimmungsbefähigung von Bundesgesetzen seit 1949', *Zeitschrift für Parlamentsfragen*, 2001, 32/2, pp.290-309.

¹⁸⁵ In its new version, Article 84 (1) states: 'Where the Länder execute federal laws in their own right, they shall provide for the establishment of the requisite authorities and regulate their administrative procedures. If federal laws provide otherwise, the Länder may enact deviating regulations. If a *Land* has enacted a law pursuant to the second sentence, subsequent federal laws regulating the organisation of authorities and their administrative procedure shall not be enacted until at least six months after their promulgation, provided that no other determination has been made with the consent of the Bundesrat. The third sentence of paragraph (2) of Article 72 shall apply accordingly. In exceptional cases, owing to a special need for uniform federal legislation, the Federation may regulate the administrative procedure with no possibility of separate *Land* legislation. Such laws shall require the consent of the Bundesrat. Federal laws may not entrust municipalities and associations of municipalities with any tasks.' Other provisions of the Basic Law also trigger consent-requirement, as Article 105 (3) governing taxation law and Article 104a (4).

draft a bill in which it abstains from specifying details concerning the implementation – these are so-called ‘consent-free bills’ for which the Government eliminates the *Bundesrat*’s right of veto; (2) the Government guides implementation coupled with the option for *Länder* to adopt their own administrative regulations, which threatens the homogeneity among *Länder* but avoids the veto power of the *Bundesrat* since these bills will also be ‘consent-free bills’; (3) the Government may stipulate the administrative proceedings to be applied by *Länder* without any discretion, in which case the *Bundesrat* may issue its veto. These bills are called the ‘consent bills’. The novelty introduced by the 2006 reform consists in the second option.¹⁸⁶ In exchange, the *Länder*’s powers to administer federal legislation were extended, as well as their competencies in establishing educational and regulatory policies.

However, the reform did not produce its expected effects and bills requiring the *Bundesrat*’s consent still correspond to fifty per cent of bills promulgated nowadays.¹⁸⁷ This may be explained by a limited use of the second option described above, notably because the Federal Government and the ‘*Bundestag* had a substantial political interest in the formulation of the implementation-related stipulations and has not made use of the possibility of dispensing with a stipulation of procedural rules, although this option was theoretically present. Why should this change fundamentally in the future [...]?’¹⁸⁸ At most, the reform led to a marginal increase of the autonomy of the Government. Consequently, the *Bundesrat* still has a strong political leverage. Moreover, the reform has not accelerated the legislative decision-making process. Scholars have noted that such acceleration would have required the elimination of the mediation process between the two Houses in cases of so-called ‘objection legislation’ (under Article 77 (2) Clause 1), which did not occur.¹⁸⁹

Following this description of the suspensive and absolute veto power of the *Bundesrat*, the question is raised whether such system of veto over draft legislation involving regional competences and administrative responsibilities of regions could be transposed – at least partially – at the level of the CoR.

¹⁸⁶ S. Burkhart, P. Manow and D. Ziblatt, ‘A More Efficient and Accountable Federalism? An Analysis of the Consequences of Germany’s 2006 Constitutional Reform’, *German Politics*, Vol. 17(4), 2008, pp. 522-540, at p. 525.

¹⁸⁷ D.P. Conradt and E. Langenbacher, *The German Polity*, 10th edn., Lanham, Rowman & Littlefield, 2013, p. 231.

¹⁸⁸ S. Burkhart, P. Manow and D. Ziblatt, ‘A More Efficient and Accountable Federalism? An Analysis of the Consequences of Germany’s 2006 Constitutional Reform’, *German Politics*, Vol. 17(4), 2008, pp. 522-540, at p. 532.

¹⁸⁹ *Ibid.*, at p. 537.

In a recent study on the CoR's Future Role and Institutional Positioning¹⁹⁰, a scenario (the fifth scenario in the study) was envisaged in which the CoR would act as a third legislative chamber representing the local and regional authorities. In an asymmetric tricameralism – which seems to be the more realistic scenario, as opposed to a symmetric and egalitarian tricameralism – the CoR would not fulfill the role of a full co-legislator, but rather act as a *chambre de réflexion et de dialogue* enjoying only limited legislative power. In such case, the CoR would not initiate legislation but act as a chamber of revision passing legislation approved by the European Parliament and EU Council with eventual veto powers in an up-or-down vote. Its main role would be to revise legislation in its core policy domains that are tabled in the European Parliament and the Council.

In such scenario, the express consent of the CoR could be required on all European draft legislation involving regional and local interests. However, it seems more realistic to advise a more flexible and soft mechanism by which the CoR would be granted a suspensive veto power upon European draft legislation involving regional and local interests. When needed, it would delay legislation in order to ask the European Parliament and the EU Council to reconsider their draft legislation. Such procedure could be compared to the 'orange card' procedure of the Early Warning System but in this case the CoR itself would intervene in the legislative decision-making process instead of national parliaments. Moreover, this power of the CoR should not be limited to subsidiarity issues.

5.2 The specific petition procedure for the Senate in the Czech Republic as a means to mediate information between petitioners and public authorities

There is a specific petition procedure in the Czech Republic through which ten thousand people may request a specific issue to be considered by the Committee on Education, Science, Culture, Human Rights and Petitions and to be discussed by the plenary session of the Senate. As a chamber of Parliament, the Senate receives numerous petitions.¹⁹¹ Its purpose is mainly to clarify misunderstandings and to mediate information between petitioners and public authorities.

¹⁹⁰ CoR 2014 study on CoR's future role and institutional positioning.

¹⁹¹ See http://www.senat.cz/informace/pro_verejnost/infocentrum/infocentrum_informace_o_senatu-eng.php?ke_dni=5.3.2014&O=9 (EN).

Pursuant to Act No. 85/1990¹⁹² on the petitionary right, everyone has the right to address state authorities with requests, proposals and complaints on public matters. The Committee on Education, Science, Culture, Human Rights and Petitions examines whether the petition fulfils the legal requirements set out in the Act No. 85/1990. It assesses the petition and decides whether its authors have to be heard and whether it has to be reported to the Government or a representative of another administrative authority or a representative of territorial self-government. Unless otherwise stated by the Senate, the Committee on Education, Science, Culture, Human Rights and Petitions issues a report once a year and at the latest on February 15 for petitions launched the preceding year, in which it summarises the accepted petitions and suggests the manner of handling with the petitions.

If such petition is signed by 10,000 people, it is put on the agenda of next available plenary session of the Senate.

The Czech Senate yearly received between 21 and 26 petitions on average from 2006-2009.

On 31 March 2014, a petition was launched by the Czech opposition Civic Democratic Party (ODS) against the Czech adoption of the euro as part of the political campaign in view of the May elections to the European Parliament. The aim of this petition was to provoke a parliamentary discussion on the euro. The political parties forming the Government wanted to adopt the euro as soon as this would become advantageous for the Czech Republic. ODS opposed that it would never be advantageous since it would force the country to contribute to the financial subsidies to the indebted EU Member States. Given that the ODS only counted 16 out of 200 Deputies in the Lower House of the Parliament, they decided to launch this petition. Petition stands have appeared in all regional centers of the Czech Republic. The ODS used the petition procedure in order to oblige the Senate to discuss the matter.¹⁹³ On 30 May 2014, the petition had been signed by approximately 40,000 people.¹⁹⁴

Through this example, one notices that this procedure may be an interesting mechanism to force the discussion on a specific subject within the Czech Senate. In

¹⁹² This Act is available at http://www.senat.cz/cinnost/slyseni_petice/zakon_peticni.php?ke_dni=5.3.2014&O=9 (CZ).

¹⁹³ For further information, see <http://www.praguepost.com/eu-news/38031-ods-launches-petition-to-fight-the-euro#ixzz34EzEssex> (EN).

¹⁹⁴ <http://cise.luiss.it/cise/2014/05/30/the-czech-republic-where-have-all-the-voters-gone/> (EN).

a similar vein, such procedure could be followed by regional and/or local authorities – under the condition of collecting a sufficient number of signatures – in order to bring certain issues within the legislative debate. This could ultimately enhance the Senate’s political weight through a mediator/facilitator role of the Senate which could emit a consensus on territorial questions including regional and local interests.

In such perspective, the mechanism could be of interest to the CoR. One could imagine a specific threshold of votes by all of the regional and local authorities supporting petitions defending regional and local interests within the European legislative process. However, the opportunity and feasibility of such procedure would be subject to debate. Indeed, the petition mechanism at the European level is a competence of the European Parliament. Moreover, it entails costs and intricate procedures for the institution/body in charge.

Although such procedure could offer an arena to regional and local authorities to defend their interests, it seems that its establishment would face obstructions both in terms of feasibility with regard to the procedures involved and in terms of opportunity since the petition procedure belongs to the European Parliament prerogatives.

5.3 The opinions of the National Council in Slovenia to the National Assembly on all matters falling within its area of competence

The Slovenian National Council mainly acts a consultative assembly, which advises the National Assembly on the content of legislation and acts as the representative body for social, economic, professional and local interests.¹⁹⁵ Its composition is unusual since it reflects the principle of corporate representation.¹⁹⁶ It may give its opinion to the National Assembly on all matters falling within its areas of competence and is obliged to give such opinion at the National Assembly’s request. Any proposal, initiative or question to be transferred to the National Assembly in social, economic, professional or local matters are tabled by a Councillor and sent to the competent committee, which adopts a report on the issue. This report is sent to the President of the National Assembly, who forwards it to all

¹⁹⁵ Article 96 of the Constitution of Slovenia.

¹⁹⁶ See <http://www.slovenia.si/slovenia/state/parliament-the-national-assembly/> (EN).

Deputies and to the Government. The President of the National Council is informed of the position adopted by the National Assembly on the particular issue.

These opinions are non-binding. However, the National Council may launch proceedings for the review of constitutionality and legality of legislation before the Constitutional Court.¹⁹⁷

A similar mechanism exists for the CoR. According to Article 307, first para., TFEU, the CoR must ‘be consulted by the European Parliament, by the Council and by the Commission where the Treaties so provide and in all other cases, in particular those which concern cross-border cooperation, in which one of these institutions considers it appropriate’. Moreover, the CoR ‘may issue an opinion on its own initiative in cases in which it considers such action appropriate’ (Article 307, fourth para., TFEU).

Although its opinions are also non-binding, the CoR has the right to bring actions before the European Court of Justice against legislative acts for the adoption of which the TFEU provides that it be consulted, on grounds of infringement of the principle of subsidiarity¹⁹⁸, and against legislative and certain other acts ‘for the purpose of protecting [its] prerogatives’.¹⁹⁹

One notices that in both systems the opinions are non-binding, but both institutions have the power to launch jurisdictional proceedings. In a paper published in 2010, Koen Lenaerts and Nathan Cambien examined the power of the CoR to challenge legislative acts for which it has to be consulted before the European Court of Justice on grounds of infringement of the principle of subsidiarity. They notably concluded that this power would increase the legal weight of CoR opinions on subsidiarity. Indeed, they considered that the consultation of the CoR constitutes an essential procedural requirement²⁰⁰ on the basis that the case law relating to

¹⁹⁷ See for instance <http://www.associacaodeinvestidores.com/index.php/comunicados/press-release/286-constitutional-court-acknowledged-the-legal-interest-of-290-initiators-united-by-vzmd-> (EN).

¹⁹⁸ Article 8 of the Protocol on the application of the principles of subsidiarity and proportionality. See also K. Lenaerts and N. Cambien, ‘Regions and the European Court: giving shape to the regional dimension of the Member States’, 35(5) *European Law Review*, 2010, pp. 609-635; S. Piattoni, ‘The Committee of the Regions and the Upgrading of Subnational Territorial Representation’, in S. Kröger and F. Dawid (eds.), *The Challenge of Democratic Representation in the European Union*, New York, Palgrave MacMillan, 2012, pp. 59-73; O. Porchia, ‘I ricorsi davanti alla Corte di giustizia dell’Unione europea: le modifiche previste dal Trattato di Lisbona’, in P. Bilancia and M. D’Amico (eds.), *La nuova Europa dopo il Trattato di Lisbona*, Milan, Giuffrè, 2009, pp. 223-232.

¹⁹⁹ Article 263, para. 3, TFEU.

²⁰⁰ K. Lenaerts and N. Cambien, ‘Regions and the European Court: giving shape to the regional dimension of the Member States’, 35(5) *European Law Review*, 2010, pp. 609-635, p. 626.

compulsory consultation of the European Parliament may be ‘perfectly transposable to opinions of the Committee in cases of compulsory jurisdiction.’ According to this case law, the European Parliament must not only have been asked for its opinion, but the act in question may in principle not be adopted before the communication of this opinion.²⁰¹ Moreover, the Council must once again consult the European Parliament in cases where it makes important changes in the proposal of the Commission which were not requested by the European Parliament itself.²⁰² In the views of these authors, if the institution fails to obtain the CoR opinion, there is a ground for judicial review.²⁰³

In addition, CoR opinions must be referred to in the preamble of the act (Article 296, para. 2, TFEU) and, according to Koen Lenaerts and Nathan Cambien, ‘there are good arguments to go further, and argue that EU institutions are also under a duty to explain in the preamble to a measure how they took account of the opinions obtained from the Committee.’ If the CoR has issued a negative opinion on grounds of subsidiarity infringement, but the measure is nevertheless adopted, the CoR may challenge the act before the European Court of Justice. Yet, such action could only be effective if there is a clear indication within the preamble of the disputed measure of how the CoR opinion has been taken into consideration.²⁰⁴

The CoR could threaten in its opinions to bring an action for annulment if the proposal should be adopted without the opinion being duly taken into account. ‘In this way the CoR’s (...) *ex post* control powers could boost the “legal weight” of its opinions in areas where consultation is obligatory.’²⁰⁵ As noted by Koen Lenaerts and Nathan Cambien, ‘[f]or the moment it remains unclear, however, just how far the duty of the institutions reaches to take such an opinion of the Committee into account.’²⁰⁶

So far, Andrea Biondi notes that the European Court of Justice has adopted a minimalist approach to the subsidiarity principle. He acknowledges that ‘the majority of commentators see the involvement of the Court of Justice in monitoring

²⁰¹ The authors cite as example *SA Roquette Frères v Council* (138/79) [1980] E.C.R. 3333, para. 34.

²⁰² The authors cite as example *European Parliament v Council* (C-65/91) [1992] E.C.R. I-4593, para. 16.

²⁰³ K. Lenaerts and N. Cambien, ‘Regions and the European Court: giving shape to the regional dimension of the Member States’, 35(5) *European Law Review*, 2010, pp. 609-635, p. 626.

²⁰⁴ The authors cite as example *Société française des Biscuits Delacre e.a. v Commission* (C-350/88) [1990] E.C.R. I-395, para. 15.

²⁰⁵ T. Christiansen and P. Lintner, ‘The Committee of the Regions after 10 years: lessons from the past and challenges for the future’, 1 *Eipascope*, 2005, pp. 7-13, p. 10.

²⁰⁶ K. Lenaerts and N. Cambien, ‘Regions and the European Court: giving shape to the regional dimension of the Member States’, 35(5) *European Law Review*, 2010, pp. 609-635, p. 625.

subsidiarity not as a positive development as it drags the supreme judicial body into the political arena' but he argues that 'the Court is in fact the more appropriate forum. It is a body independent from all other institutions and has been operating virtually as a supreme court for the EU now for more than 50 years.'²⁰⁷ As stated by Advocate General Maduro, 'the intent of the Community legislator is not sufficient to demonstrate compliance with the principle of subsidiarity. The latter requires that there be a reasonable justification for the proposition that there is a need for Community action. This must be supported by more than simply highlighting the possible benefits accruing from Community action. It also involves a determination of the possible problems or costs involved in leaving the matter to be addressed by the Member States. In requiring this, the Court is not substituting its judgment for that of the Community legislator but simply compelling it to take subsidiarity seriously.'²⁰⁸

5.4 The absence of any election in the United Kingdom's House of Lords

The fourth case study opens interesting debates on the questions whether a second chamber composed by non-elected members and the consequent reduction of the impact of political party considerations in the debates of the second chamber increases its political weight and whether such conception complies with the original role of second chambers. Does this specific composition guarantee the high profile of the members of the second chamber and does this entail an increase of the quality of the debates within this chamber? Is there a direct correlation between the composition of the House of Lords and the political consequences of its activities/decisions? Does this composition have an effect on the scrutiny over government policy?²⁰⁹ Moreover, the question is raised whether such second chamber has legitimacy to intervene in the legislative process.

²⁰⁷ A. Biondi, 'Subsidiarity in the Courtroom', in A. Biondi, P. Eeckhout and S. Ripley (eds.), *EU Law After Lisbon*, Oxford, Oxford University Press, 2012, pp. 213-227, at pp. 226-227.

²⁰⁸ Opinion of Advocate General Poiares Maduro delivered on 1 October 2009 in Case C-58/08, *Vodafone Ltd and others v. Secretary of State for Business, Enterprise and Regulatory Reform*, paragraph 30.

²⁰⁹ As mentioned in section 3, it has been noted in literature that the less stricter party discipline in second chambers enables them to counter-balance the 'executive-dominated' first chamber. Consequently, although second chambers have no confidence vote over governments, they may be more inclined to discuss and reject aspects of government bills than the first chambers. Hence, the parliament's overall control over government may be furthered through this bicameral oversight.

The high profile of members of second chambers may have a direct influence upon the quality of the debates and consultations within these chambers, which increases the political weight of such second chambers. An interesting example from this perspective is the case of United Kingdom's House of Lords.

As mentioned above, most Lords (about 700) are appointed by the Queen on the advice of the Prime Minister (Life Peers) or by virtue of their ecclesiastical role (Archbishops and Bishops). Since the 1999 reform of the House of Lords put an end to the right of hereditary Peers to sit and vote. The number of hereditary Peers has been reduced to 92 and these Peers are elected internally (elected hereditary Peers).²¹⁰

In May 2000, the Government established an independent Appointments Commission in order to vet for propriety all nominations to the House of Lords including those from political parties and to make recommendations for non-political peers (People's Peers) to create a more representative chamber.²¹¹ 'The Appointments Commission recommends individuals for appointment as non-party-political life peers' and 'vets nominations for life peers, including those nominated by the UK political parties, to ensure the highest standards of propriety. Members can be nominated by the public and political parties. Once approved by the prime minister, appointments are formalised by the Queen.'²¹²

The absence of any elections of the members of the House of Commons has permitted the reduction of the impact of political party considerations. Hence, the members of the House of Lords do not have to fight against opposing parties nor to face re-election. They sit for lifetime and cannot be expelled, which increases their independence. Moreover, this independence gives them more leverage in scrutinising the Government's policies. This composition has been judged as 'intrinsically beneficial to this activity. Those with an expertise or some experience in the field covered by a bill will tend to contribute to debate. Operating in a less partisan environment than the Commons and one largely neglected by the mass media (interested more in the partisan clashes in the Commons), it is possible for

²¹⁰ See: <http://www.parliament.uk/about/mps-and-lords/about-lords/lords-types/> (EN) and <http://www.parliament.uk/business/lords/whos-in-the-house-of-lords/members-and-their-roles/diverse-experience/> (EN).

²¹¹ For further information, including an overview of the criteria guiding the assessment of nominations for non-party political life Peers, see <http://lordsappointments.independent.gov.uk/> (EN).

²¹² For further information, see <http://www.parliament.uk/business/lords/whos-in-the-house-of-lords/members-and-their-roles/how-members-are-appointed/> (EN).

members to engage in a constructive dialogue with government ministers.’²¹³ Many members of the House of Lords are appointed because of their experience, which has strengthened the reputation of the House of Lords as an intellectual powerhouse.²¹⁴

In practice, the House of Lords refrains from challenging the principle of measures adopted by the House of Commons and voting against measures promised in the governing party’s manifesto. It rather concentrates on details of bills and ways to improve them. It is commonly referred to as the ‘revising chamber’ in Parliament as its main task is to serve as a check on the Government by amending drafted bills.²¹⁵

However, opponents to the House of Lords consider that it is not a representative body and that it should consequently not intervene in the legislative process. The House of Lords’ composition is too homogenous and does not represent the British society. Constitutional experts, such as Rodney Brazier, argue that it continues to be ‘unelected, unrepresentative and unaccountable.’²¹⁶

For this reason, the Government is working on another reform bill to convert the House of Lords into a wholly or largely elected second chamber. Such reform would probably lead to a composition of the second chamber of more politically active people rather than people selected for their expertise or personal distinction. However, nothing guarantees that such composition would provide for a better representation of the British society, since electors may be willing to vote for high-calibre politicians for positions in the House of Lords, who are generally white, middle-aged men having received an above-average education.²¹⁷ In addition, the election of the House of Lords could lead to a similar composition in both Chambers of the Parliament – which would impede the oversight of the Government’s activity by the House of Lords – or different compositions – which could lead to blockage situations with two Houses having an equivalent electoral legitimacy and each claiming for a superior mandate.

²¹³ P. Norton, ‘Adding Value? The Role of Second Chambers’, *Asia Pacific Law Review*, Vol. 15 No. 1, 2007, pp. 3-18.

²¹⁴ M. Russell, *Reforming the House of Lords: Lessons from Overseas*, 1st edn., Oxford, Oxford University Press, 2004, p. 306.

²¹⁵ C. Taylor, *Constitutional and Administrative Law*, 2nd edn., Pearson Longman, Harlow, 2010, p. 63.

²¹⁶ R. Brazier, *Constitutional Reform – Reshaping the British Political System*, 3rd edn., Oxford, Oxford University Press, 2008, p. 66.

²¹⁷ D. Shell, *The House of Lords*, 1st edn., Manchester, Manchester University Press, 2007, p. 132.

Another possible reform of the House of Lords would consist in the abolishment of the patronage of the Prime Minister and of the remaining hereditary members. In addition, the Appointment Commission's role could be strengthened so as to ensure a better societal representativeness in selecting members of the House of Lords pursuant to open criteria. Indeed, 'a system of appointment that brings in members that are recognised as having relevant expertise and experience and perhaps personal distinction may generate legitimacy.'²¹⁸

One may wonder whether such system would be transposable at the EU level. In such perspective, the CoR would be composed of members selected by an independent Appointment Commission according to open criteria including territorial factors in order to ensure a proper representation of local and regional authorities within the EU but also factors relating to the expertise and the high profile of the individuals so as to guarantee the quality of the debates and consultations within the CoR. Such system could probably enhance the independence of the members of the CoR *vis-à-vis* political parties and differentiate the CoR *vis-à-vis* the European Parliament. Moreover, it would increase its political weight *vis-à-vis* the European Commission, by analogy with second chambers exercising a political oversight over governments' actions.

However, this mode of selection would entail two major complications: first, the composition of the independent Appointment Commission would have to be determined. In the United Kingdom, this Commission has both members that are independent from political parties and representatives from the three largest political parties of the House of Lords. The transposition of such system at the European level seems questionable since it would lead to intricate political debates on the composition of such Commission. This would in turn weaken the CoR as an institution composed by members selected by such Commission. Hence, it seems that the current system of members selected by associations of regional and local authorities should be maintained.

The second major obstacle would be that such selection on the basis of territorial factors and factors relating to the expertise would deprive the future CoR of its democratic membership. Currently, the CoR is composed by representatives of sub-national, regional and local bodies who either held a regional or local authority electoral mandate or are politically accountable to an elected local or regional

²¹⁸ Ibid., p. 164.

assembly.²¹⁹ For each national delegation the respective associations of regional and local authorities play a key role in the selection procedure. They draw up a list of candidates on the basis of political party association/representation, gender and territorial balance that is subsequently submitted to the national government for final decision. The national governments accept the list of candidates and usually approve it before forwarding it to the Council. The Council then officially appoints the members.²²⁰

The two main criteria currently taken into consideration by all countries in the selection procedure are the political balance and the geographical and territorial balance. ‘These two criteria are essential for the proper representation of local and regional authorities in the Committee of the Regions. Gender balance is also a priority for increasing numbers of CoR delegations.’²²¹

The fact that the CoR is composed by members enjoying a political legitimacy linked to regional and local authorities strengthens the political influence of the CoR since it establishes the CoR as a pillar of democratic legitimacy in the European Union.²²²

Moreover, the political groupings have a positive impact on the relation between the CoR on the European Parliament and consequently enhance the CoR’s political weight. The CoR Members are organised in 28 national delegations crossing five political groupings (EPP, PES, ALDE, EA and ECR). These political groups tie the European Parliament and CoR together via political group meetings, contacts between presidents and the bureau, parliamentary invitations to outside meetings of the CoR, conferences and seminars organised by the CoR, and contacts between committee rapporteurs and shadow rapporteurs. These contacts are beneficial to the legislative work and the influence of the CoR.²²³

Hence, one may summarise this debate on the political character of CoR membership in concluding that there are competing arguments in favour of

²¹⁹ This rule was inserted into the TEC by the Treaty of Nice. The Treaty of Nice was signed on 26 February 2001 and entered into force on 1 February 2003. Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, *Official Journal* C 80/1, 10 March 2001. Currently, the provision governing this issue is Article 300, paragraph 3, TFEU.

²²⁰ CoR 2009 study on ‘The selection process for Committee of the Regions members. Procedures in the Member States’ drafted by the Studies’ service of the Committee of the Regions, ISBN 978-92-895-0468-3 (hereafter CoR 2009 study on the selection process for Committee of the Regions members. Procedures in the Member States).

²²¹ *Ibid.*, p. 4.

²²² *Ibid.*, p. 77.

²²³ CoR 2014 study on CoR’s future role and institutional positioning, p. 24.

maintaining the political link with regional and local authorities in order to maintain the democratic legitimacy, to express the political preferences of citizens represented by these authorities and to strengthen the contacts with the European Parliament; and there are arguments against this political supporting the idea that independence from political parties permits to enhance the leverage in scrutinising the executive's policies, to select individuals on the basis of their expertise or quality instead of their political appurtenance, to avoid continuous fight against opposing parties and to permit to the members to express their own views.

Beyond this antagonism, it seems that the determination of the membership of the future CoR should strive to find a balance between these interests. *A priori*, a conversion of the CoR in a third chamber would imply that the political function and composition of the CoR is maintained. It would indeed seem difficult to justify such extension of the CoR's role and powers whilst simultaneously depriving it from its political legitimacy.

However, the political factor should not become preponderant so as to undermine the effects of the factor based on the expertise and personal quality of candidates. Hence, one could imagine a partial composition of the future CoR of members selected on the basis of political and territorial considerations, while a another part of the membership would consist in experts.

5.5 The individual qualification of Senators: the case of University Senators in the Irish Senate and the case of Senators elected in single mandate constituencies in the Czech Republic

The fifth case study follows up on the previous case study and further examines the ideal qualification of members of second chambers in order to increase their political importance. A detailed analysis of these two cases of Irish university seats and Czech Senators elected in single mandate constituencies should permit their evaluation and the examination whether such systems could be transposed – at least partially – at the level of the CoR.

In the Irish Senate, three members are elected by the National University of Ireland and three are elected by the University of Dublin (Trinity College). The procedure for the election of the members from the universities is laid down in the *Seanad Electoral (University Members) Act 1936*. The constituencies are the National

University of Ireland and the University of Dublin (Trinity College) which both elect three members. Other universities and third-level education institutions are not represented. The electorate consists of every Irish citizen who has reached the age of 18 years and who has a degree – other than an honorary degree – from one of the two universities concerned. Candidates, who do not need to be graduates of the universities nor to be connected to the universities in any way – must be nominated by two registered electors for the university and their nomination must be assented by eight other registered electors. The election is conducted according to the proportional representation.

Candidates to positions of University Senators must be nominated by two registered electors for the university, while eight additional registered electors for the university must assent to the nomination. Yet, candidates do not have to be graduates of the university concerned nor connected with it in any way. Each candidate at the Senate University election may send one election letter to each elector in the constituency, free of postal charge.

As mentioned in the previous section, the six university Senators appear to be the only Senators who sit as independents in the Irish Senate. Hence, ‘these seats provide an opportunity for individuals who might not otherwise be elected to parliament to influence policy making. They often have a high profile.’²²⁴ Furthermore, these university seats ‘arguably come closest to fulfilling the original ideal of the Senate as a forum for experts who are largely independent of the political parties.’²²⁵

However, the system has been criticised because it excludes the graduates of the vast majority of third-level institutions in Ireland since it is limited to two universities solely. Moreover, the current system confers the right to vote to a group of people solely on the basis of educational attainment, which may be considered as elitist. The Sub-committee on *Seanad* reform of the *Seanad Éireann* Committee on Procedure and Privileges conducted a number of public hearings in view of a *Seanad* reform. In its report of 19 April 2004, it noted that there was no consensus on whether these university seats should be retained. Yet, the report further notes that ‘[a]mong those supporting the continuation of university seats,

²²⁴ M. Russell, ‘A Vocationally Based Upper House? Lessons from Ireland?’ in *Reforming the House of Lords, Lessons from Overseas*, February 1999, available at <http://www.ucl.ac.uk/constitution-unit/research/research-archive/tabs/archive-projects/reforming-lords-lessons-from-overseas> (EN).

²²⁵ B. Doherty, ‘Seanad Éireann’, *Constitution Review Group Report 4: The National Parliament*, Dublin, Government of Ireland, 1996, p. 19.

there was a near complete consensus that the franchise should be extended to everyone with a degree level qualification from a recognised third-level institution in the State. There was effectively no support whatsoever for retaining the current system that confines university representation to [National University of Ireland and the University of Dublin (Trinity College)].²²⁶ Arguments in favour of the system were either vocational – universities need a voice in the system – or pragmatic – such Senators ‘tend to be the only ones outside the party system and have made a distinguished contribution’.²²⁷

Moreover, to respond to the argument following which the current system would be elitist, ‘[t]he alternative view, however, is that representation for graduates can no longer be considered to be elitist because of the substantial number of young people progressing to higher education. It can also be argued that higher education representation provides a mechanism by which genuinely distinctive voices can be heard in the Seanad. In this regard, university senators have down through the years been mainly non-party and genuinely independent in their political outlook. They have also made distinguished contributions to the business of the Seanad, often on subjects far removed from their immediate interests.’²²⁸ The report also notes that the system provides a means for people from Northern Ireland and emigrants to participate in the Senate elections. Indeed, a significant number of voters in the current constituencies are residents in Northern Ireland.²²⁹

As a conclusion, ‘[t]he Sub-Committee believes that the arguments in favour of graduate representation outweigh those against it. The Sub-Committee also believes that, in the context of a reformed Seanad with a substantial number of directly elected Senators, a new higher education constituency could be an important source of independent expertise. Accordingly, the Sub-Committee recommends that representation for graduates should continue, but that it should be radically reformed.’ All graduates of institutions of higher education in Ireland holding a primary degree (or an equivalent award at level 7 in the National Framework of Qualifications) should have a vote to the Seanad election within a separate higher education constituency of six seats. Consequently, graduates would have the option to exercise their vote for the Seanad in the higher education

²²⁶ Report on Seanad reform, Sub-committee on Seanad reform of the Seanad Éireann Committee on Procedure and Privileges, 19 April 2004, available at http://www.oireachtas.ie/documents/committees29thdail/subcomonseanadreform/Report_on_Reform_of_the_Seanad.pdf, p. 9.

²²⁷ *Ibid.*, p. 33.

²²⁸ *Ibid.*, p. 44.

²²⁹ *Ibid.*, p. 44.

constituency or within the national list constituency – which is another suggestion for reform formulated in the report according to which part of the reformed Senate would be directly elected by the Irish population.

It seems indeed that if the system was to be maintained, the representation should be extended to include all third-level institutions involved in higher education provided that the number of university seats was increased to accommodate this evolution.

In a related vein, Senators in the Czech Republic are elected by majority in one of the 81 single mandate constituencies of roughly 100,000 people each. This system permits the election of personalities independent from political parties. In addition to candidates proposed by political parties, independent candidates can also run for the election. As opposed to the party-list system with proportional representation used for the Chamber, the election system for the Senate is a simple majority mandate.

In a 2007 study analysing the functioning of the Czech Parliament, two authors noted that ‘[a]lthough individuals and not political parties run for the Senate, it is difficult to be a successful candidate without the backing of a political party or other influential organisation.’ Consequently – and despite its original intention – the Senate is mainly comprised of representatives of political parties.²³⁰

Nevertheless, these authors observe that the Senate ‘tends to concentrate more on legislative and legal details of bills than on party and political clashes. This Senate role is accepted by the stronger Chamber of Deputies because it does not infringe upon its monopoly in the legislative process even when the party composition in the two chambers differs. The Chamber of Deputies has preserved its dominant position in legislative activity and in supervision over the government. The dominant position of the Chamber is guaranteed not only by the constitution but also by the political prominence of the lower chamber.’

These two examples illustrate various election mechanisms seeking to determine the composition of second chambers less from a political party perspective than from a more personal profile of candidates or a territorial criterion in the case of

²³⁰ L. Linket and Z. Mansfeldova, ‘II. The Parliaments: Democratic Post-Communist Parliaments. The Parliament of the Czech Republic, 1993-2004’, *The Journal of Legislative Studies*, Vol.13, No.1, March 2007, pp.12–37, available at http://moduly.outly.cz/posycze1/Linek,%20Lukas_and_Mansfeldova_Zdenka_2007_Czech%20Parliament_1993-2004.pdf (EN).

single-mandate constituencies. While the independence from political parties seems to be achieved within the Irish example of university senators, this is not the case in the practice of the Czech Senate. Consequently, nothing guarantees that candidates are selected for their high profile or expertise rather than for their belonging to a political party. Hence, the Irish example could be taken into consideration as a source of inspiration for a future CoR. Indeed, this system may guarantee a selection of candidates having a high profile and expertise, which in turn generates legitimacy of the decisions and discussions of second chambers.

5.6 The small size of the Irish Senate *versus* the huge size of the House of Lords

This case study concentrates on the question of the ideal size of a second chamber to fulfil its role. The examples of the Irish Senate and the House of Lords are examined in order to examine whether there would be an ideal size of assembly and if yes, whether it could be transposed at the level of the CoR.

The quality of debate in the Irish Senate is generally considered as high as that of its correlative first chamber, namely the House of Representatives. According to Meg Russell, one of the main reasons explaining this quality is its small size conferring an intimate and informal character to its discussions.²³¹ Moreover, such small size may imbue Senators with a greater sense for personal responsibility over the Senate's decisions.

Generally speaking, second chambers tend to represent 60 per cent of the size of their correlative first chamber.²³² By contrast, however, the House of Lords (together with Kazakhstan and Burkina Faso) represents one of the few examples in the world of second chambers being larger than the first chamber.²³³ The House of Lords currently consists of 782 members.²³⁴ (The House of Commons is composed

²³¹ M. Russell, 'A Vocationally Based Upper House? Lessons from Ireland?', in *Reforming the House of Lords, Lessons from Overseas*, February 1999, available at <http://www.ucl.ac.uk/constitution-unit/research/research-archive/tabs/archive-projects/reforming-lords-lessons-from-overseas> (EN).

²³² J. Coakley and M. Laver, 'Options for the Future of Seanad Éireann', in *The All-Party Oireachtas Committee on the Constitution, Second Progress Report: Seanad Éireann*, government of Ireland, 1997.

²³³ M. Russell, 'A directly elected Upper House: Lessons from Italy and Australia' in *Reforming the House of Lords, Lessons from Overseas*, February 1999, available at <http://www.ucl.ac.uk/constitution-unit/research/research-archive/tabs/archive-projects/reforming-lords-lessons-from-overseas> (EN).

²³⁴ As of 31 October 2013.

of 650 members).²³⁵ There are no statutory limits on House numbers. The Prime Minister decides on the number of new peerages and on the balance of political parties in the House of Lords. As stated by the former Minister for Political and Constitutional Reform Mark Harper in February 2012, '[i]f we have one more change of government, it's going to have over 1,000 members.'²³⁶ This may be explained by the fact that typically new peers are created in the early stages of new governments in the dissolution honours list and in the resignation honours lists in case of changes of Prime Minister.

Not all members of the House of Lords attend all sessions regularly. As noted in a 2008 report on an elected second chamber by Lord Chancellor and Secretary of State for Justice, '[i]f members would normally be expected to attend when the second chamber was sitting, a membership of 400-450 would provide broadly the same number of people to undertake the work of the second chamber as at present. A membership of 400-450 members would also be commensurate with international comparisons in terms of its size relative to the House of Commons.'²³⁷ Hence, the UK Government proposed to reduce the size of the House of Lords so that it should be smaller than the House of Commons.

These examples demonstrate that an ideal second chamber should not be oversized to exercise its role as a reflection chamber. Similarly, a CoR constructed on a model of a second chamber should keep a relatively small size to function efficiently. This issue is further debated in point 9.2 of this study.

²³⁵ On average, second chambers have 60 per cent of the members of first chambers. See M. Russell, 'A directly elected Upper House: Lessons from Italy and Australia' in *Reforming the House of Lords, Lessons from Overseas*, February 1999, available at <http://www.ucl.ac.uk/constitution-unit/research/research-archive/tabs/archive-projects/reforming-lords-lessons-from-overseas> (EN).

²³⁶ 'Bloated' House of Lords will soon have 1,000 members, Minister warns Daily Mail, 24 February 2012.

²³⁷ See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228706/7438.pdf (EN).

6 Comparative overview of useful consultative practices within the second chambers of national legislatures

6.1 The composition of second chambers representing a different set of interests than those represented in first chambers

The examination of the thirteen second chambers in European Member States demonstrates that all second chambers except for the Romanian Senate,²³⁸ represent a different set of interests than those represented in first chambers. This different composition is a predominant factor permitting the justification of the action of second chambers and consequently strengthening their legitimacy.

6.1.1 Territorial representation

Except for the Irish Senate and the United Kingdom House of Lords – and to a lesser extent the Italian Senate²³⁹ – the second chambers in European Member States all represent subnational territorial entities. For certain second chambers, as in France and in Spain, this territorial representation is specifically entrenched in the Constitution.

The territorial representation is the most common form of representation in second chambers. Subnational entities – as provinces, regions, departments, municipalities, electoral constituencies – are represented in the second chamber. As stated in a 2006 report of the Venice Commission, second chambers ‘are necessary, and will become increasingly so, in federal states and ones that are constitutionally regionalised or heavily decentralised, where second chambers represent geographical areas whereas first chambers represent peoples.’²⁴⁰

²³⁸ As noted above, the Romanian population has decided per referendum in 2009 to abolish the Senate but this has not yet been put into practice. The abolition of the Senate requires a modification of the Constitution.

²³⁹ In Italy, the Senate does not officially represent local and regional authorities, but Senators are elected on a regional basis.

²⁴⁰ Council of Europe, European Commission for Democracy Through Law (Venice Commission), Report on Second Chambers in Europe, ‘Parliamentary complexity or democratic necessity?’ by P. Gélard, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL\(2006\)059-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2006)059-e) (EN), at p. 11.

Some of these second chambers are directly elected by the population:

- In the Czech Republic, Senators are elected by majority in one of the 81 single mandate constituencies;
- In Italy, Senators are elected on a regional basis. Each of Italy's 20 regions elects Senators on a proportional basis (except for Valle d'Aosta, which has only one member, and Trento-Alto Adige, which uses the previous electoral system to elect its six senators);
- In Poland, the 100 Senators are elected in single-member constituencies;
- In Romania, the 137 Senators are elected in single-member constituencies;
- In Spain, Senators are partly directly elected (four Senators per province as a general rule) and partly appointed by the legislative assemblies of the Self-Governing Communities (one for each Community and an additional Senator for every million inhabitants).²⁴¹

In other European Member States, members of second chambers are selected *via* other procedures:

- In Austria, the members of the *Bundesrat* are elected by the state parliaments (*Landtage*) on the basis of proportional representation;
- In Belgium, 29 Senators are designated by the Flemish Parliament, ten designated by the Parliament of the Federation Wallonia-Brussels, eight designated by the Walloon Parliament, two designated by the francophone group of the Brussels-Capital Region Parliament and one designated the Parliament of the German-speaking Community. In addition, there are ten co-opted Senators (based on the electoral results of the House of Representatives);
- In France, 326 Senators are elected in metropolitan France and overseas departments²⁴² by an electoral college, which is mainly composed of delegates from municipal councils.²⁴³ In addition, 10 Senators represent other overseas territories and 12 Senators represent French citizens living outside

²⁴¹ The Spanish Constitution is available at http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf (EN).

²⁴² At the intermediary level, France is subdivided into 101 departments (*départements*), five of which are located overseas.

²⁴³ These delegates from municipal councils represent 95 per cent of the members of the electoral colleges. The remaining five per cent are composed by members of the National Assembly for the department, members of the department's General Council and members of the Regional Council.

of France. Elections are organised every three years in order to renew half of the Senate;

- In Germany, the 69 members of the *Bundesrat* are not directly elected. Instead, the *Bundesrat* is composed of representatives of the state governments. Every *Land* is represented by at least three and not more than six representatives of its Government – the number depends on the size of the population of the *Land*;²⁴⁴
- In the Netherlands, the Upper Chamber is composed of 75 members who are indirectly elected through appointment by Provincial Councils.²⁴⁵

6.1.2 Personal expertise

In general, ‘second chambers are often characterised as embodying a particular measure of wisdom, balance and expertise.’²⁴⁶ The high profile of the members of Senates has indeed a direct influence upon the quality of the debates and consultations within second chambers, which increases the political weight of such second chambers.

In certain European Member States, the designation procedures for members of second chambers seek to ensure that candidates are selected for their high profile rather than their belonging to political parties. This is the case – in theory at least – for the Irish Senate and the House of Lords in the United Kingdom. In the United Kingdom, the members of the House of Lords are not elected by the population; most are appointed by the Queen (Life Peers) – an independent Appointments Commission vets for propriety all nominations to the House of Lords – or by virtue of their ecclesiastical role (Archbishops and Bishops). It has been suggested in the discussions for possible reform that the patronage of the Prime Minister should be abolished, as well as the remaining hereditary members, while the Appointment Commission’s role could be strengthened so as to ensure a better societal representation of, and greater equality of access to, membership of the House of Lords. The underlying idea of this reform is that ‘a system of appointment that brings in members that are recognised as having relevant expertise and experience

²⁴⁴ Article 51(2) of the German Basic Law.

²⁴⁵ Articles 51(3) and 55 of the Constitution of the Netherlands, available at <http://www.rijksoverheid.nl/documenten-en-publicaties/brochures/2008/10/20/the-constitution-of-the-kingdom-of-the-netherlands-2008.html> (EN).

²⁴⁶ Council of Europe, European Commission for Democracy Through Law (Venice Commission), Report on Second Chambers in Europe, ‘Parliamentary complexity or democratic necessity?’ by P. Gélard, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL\(2006\)059-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2006)059-e) (EN), at p. 11.

and perhaps personal distinction may generate legitimacy.’²⁴⁷ Furthermore, this composition increases its political weight, since its members having expertise in specific fields are able to contribute to high level discussions and debates in order to engage in a constructive dialogue with the Government.

In Ireland, the six university Senators sit as independents and often have a high profile. As mentioned above, these university seats ‘arguably come closest to fulfilling the original ideal of the Senate as a forum for experts who are largely independent of the political parties.’²⁴⁸ Although these seats have been subject to criticism within the discussions on a reform of the Irish *Seanad*, the Sub-Committee considered that, in the context of a reformed *Seanad* with a substantial number of directly elected Senators, ‘a new higher education constituency could be an important source of independent expertise. Accordingly, the Sub-Committee recommends that representation for graduates should continue, but that it should be radically reformed.’

One may also mention the example of the Czech Republic, when the election of Senators in single-mandate constituencies seeks to favour the election of specific personalities. Yet, practice has revealed the difficulties for candidates to be successful without the backing of a political party or other influential organisation.

6.1.3 Representation of other interests

Specific selection procedures exist for the second chambers in Slovenia and Ireland.

- In Slovenia, the National Council has 40 members who are elected to five-year terms by indirect suffrage by interest organisations and local communities.²⁴⁹ Among these members, there are four representatives of employers, four representatives of employees, four representatives of farmers, crafts, trade and independent professions, six representatives of non-commercial fields and twenty-two representatives of local interests.

²⁴⁷ Ibid., p. 164.

²⁴⁸ B. Doherty, ‘Seanad Éireann’, *Constitution Review Group Report 4: The National Parliament*, Dublin, Government of Ireland, 1996, p. 19.

²⁴⁹ Articles 96 and 98 of the Constitution of Slovenia. The electoral colleges represent either economic and social sectors or municipalities, in which case the college is made up of members of the local assembly if the constituency coincides with the community or of representatives elected by the community assemblies if the constituency groups several communities.

- In the Irish Senate, 11 Senators are nominated by the Prime Minister (the *Taoiseach*), six are elected by two universities²⁵⁰ and 43 are nominated by five panels representing vocational interests.²⁵¹ The Sub-committee on *Seanad* reform of the *Seanad Éireann* Committee on Procedure and Privileges noted in its report of 19 April 2004 that ‘the arcane and outdated system of nomination and election diminishes senators’ public legitimacy’.²⁵² In addition, the Sub-committee notes that ‘[t]he electorate for most *Seanad* seats currently numbers around 1,000 people and comprises county councillors, county borough councillors, outgoing Senators, and incoming Deputies. As long as the majority of citizens are excluded from the *Seanad*’s electorate, it will lack the essential ingredient of public legitimacy and the gap between it and the [...] citizen will remain.’²⁵³ Consequently, the Sub-committee suggests introducing a ‘substantial element of direct popular election’ to the Senate to increase its legitimacy.

6.1.4 The political balance within second chambers

Owing to their position as assemblies that are less frequently placed under the political spotlight or subject to governmental pressure and party influence, Senates frequently have an independence which makes it easier for them to criticise government policy. The fact that members of second chambers do not have to face re-election as frequently as members of first chambers increases their independence from political parties and their ability to express their own views.²⁵⁴

An interesting illustration may be found with the House of Lords. The Lords sit for lifetime and cannot be expelled, which increases their independence. Moreover, this independence gives them more leverage in scrutinising the Government’s policies. This composition has been judged as ‘intrinsically beneficial to this activity [...] Operating in a less partisan environment than the Commons and one largely neglected by the mass media (interested more in the partisan clashes in the Commons), it is possible for members to engage in a constructive dialogue with

²⁵⁰ Three members are elected by the National University of Ireland and three are elected by the University of Dublin (Trinity College).

²⁵¹ For further information, see <http://www.oireachtas.ie/parliament/about/seanad/> (EN).

²⁵² Report on *Seanad* reform, Sub-committee on *Seanad* reform of the *Seanad Éireann* Committee on Procedure and Privileges, 19 April 2004, available at http://www.oireachtas.ie/documents/committees29thdail/subcomonseanadreform/Report_on_Reform_of_the_Seanaad.pdf, p. 8.

²⁵³ *Ibid.*, p. 26.

²⁵⁴ Yet, in certain countries, members of second chambers are elected simultaneously with the members of the first chambers, as in Italy.

government ministers.’²⁵⁵ Many members of the House of Lords are appointed because of their experience, which has strengthened the reputation of the House of Lords as an intellectual powerhouse.²⁵⁶

In addition, members of second chambers may be required to vote in territorial blocks, rather than by political parties. This is the case in the German *Bundesrat*, where members have to vote *en bloc* and per *Land*. Such vote in territorial blocks aims also to avoid the influence of party discipline.

Yet, one notices that the attempts to circumvent political parties’ omnipresence are sometimes undermined in practice. For instance, the Czech electoral system of single-mandate constituencies for senatorial elections was intended to permit the election of high-level personalities independent from political parties. Yet, in a 2007 study analysing the functioning of the Czech Parliament, two authors noted that ‘[a]lthough individuals and not political parties run for the Senate, it is difficult to be a successful candidate without the backing of a political party or other influential organisation.’ Consequently – and despite its original intention – the Senate is mainly comprised of representatives of political parties.²⁵⁷ Similarly, in Ireland, it has been noted that despite the predominant vocational aspect, most Senators take a party whip since the electorate for the panel seats is composed by councillors and members who are close to political parties.

6.2 The fields of competences of second chambers

Most second chambers have a general field of competence. In certain cases, their role is mainly one of a reflection chamber – such as in Belgium – but their field of competence is not specified to certain matters.

However, certain second chambers have different powers according to the fields of competences. For instance, the German *Bundesrat* is conceived as an institution

²⁵⁵ P. Norton, ‘Adding Value? The Role of Second Chambers’, *Asia Pacific Law Review*, Vol. 15 No. 1, 2007, pp. 3-18.

²⁵⁶ M. Russell, *Reforming the House of Lords: Lessons from Overseas*, 1st edn., Oxford, Oxford University Press, 2004, p. 306.

²⁵⁷ L. Linket and Z. Mansfeldova, ‘II. The Parliaments: Democratic Post-Communist Parliaments. The Parliament of the Czech Republic, 1993-2004’, *The Journal of Legislative Studies*, Vol.13, No.1, March 2007, pp.12–37, available at http://moduly.outly.cz/posycze1/Linket,%20Lukas_and_Mansfeldova_Zdenka_2007_Czech%20Parliament_1993-2004.pdf (EN).

guaranteeing that the rights and interests of *Länder* are respected and it has a threefold role in the federal legislative process: it may initiate primary legislation,²⁵⁸ it may force another vote of the *Bundestag* on bills in areas that do not explicitly require the consent of the *Bundesrat* (*Einspruchsgesetze*) and it may veto bills that require its consent (*Zustimmungsgesetze*). The latter category mainly concerns areas involving legislative competences and administrative responsibilities of *Länder*. Hence, the *Bundesrat* has the constitutional power of issuing suspensive veto over all federal legislation and absolute veto over all federal legislation involving competences of the *Länder*. Given that this area corresponds to fifty per cent of all federal legislation,²⁵⁹ the *Bundesrat* has a strong political leverage.

As noted in Section 5.3, the Slovenian National Council may, in addition to its limited advisory and control powers, act as a consultative assembly, which advises the National Assembly on the content of legislation and acts as the representative body for social, economic, professional and local interests.²⁶⁰ It may give its opinion to the National Assembly on all matters falling within its area of competence and is obliged to give such opinion at the National Assembly's request. Any proposal, initiative or question to be transferred to the National Assembly in social, economic, professional or local matters are tabled by a Councillor and sent to the competent committee, which adopts a report on the issue. This report is sent to the President of the National Assembly, who forwards it to all Deputies and to the Government. The President of the National Council is informed of the position adopted by the National Assembly on the particular issue. Hence, local authorities, whose representatives are dominant in the National Council, have a certain impact on national policy through this channel.²⁶¹

6.3 The legislative powers of second chambers

Certain second chambers mainly work as reflection chambers seeking to persuade or to force the first chamber to take a decision, notably through the veto-power of certain second chambers. The example *par excellence* is the Belgian Senate, which

²⁵⁸ Article 76(1) and (3) of the German Basic Law.

²⁵⁹ D.P. Conradt and E. Langenbacher, *The German Polity*, 10th edn., Lanham, Rowman & Littlefield, 2013, p. 231.

²⁶⁰ Article 96 of the Constitution of Slovenia.

²⁶¹ F. Grad, 'Local government in Slovenia', in A.-M. Moreno, *Local Government in the Member States of the European Union: A Comparative Legal Perspective*, Madrid, National Institute of Public Administration, 2012, pp. 577-597, at p. 596.

is an assembly for long-term ‘reflection’ which represents the Belgian federated entities.

Other second chambers, as the Spanish Senate and the United Kingdom’s House of Lords similarly perform this role, in addition to other functions. For instance, the Spanish Senate conducts its reflection and reconsideration upon bills issued by the Congress and consequently opposes or modifies the bills of the Congress by means of vetoes or amendments.²⁶²

In the ordinary legislative decision-making process, many second chambers have the power to initiate legislation and to amend bills proposed by the first chamber. In some countries, as in the Netherlands, the second chamber has no power of amendment over legislation, it may only adopt or reject bills in their entirety. Similarly, the Austrian *Bundesrat* has no right of amendment.

Yet, there are a number of exceptions to this general observation. Certain second chambers as the National Council in Slovenia only have consultative powers. They do not vote on legislation but advise on its content. In Belgium, the Senate does not intervene in the ordinary legislative process either. Its competences are mostly limited to State reforms, constitutional affairs, special legislations involving federated entities and the association of these entities to certain appointments (Constitutional Court, Council of State and Superior Council of Justice. Moreover, second chambers face a number of restrictions of their financial powers. The Austrian *Bundesrat*, the British House of Lords, the Czech Senate and the Irish Senate have no budgetary powers, while the Spanish Senate has no power to amend the budget unless the Government authorises this. Finally, in certain countries, first chambers have the power to decide in the last resort. Such system is applicable in the Czech Republic, France, Ireland, Poland and Spain.

There again, some other second chambers intervene in the legislative decision-making process in the same form as the first chamber, as in Italy and Romania. The Italian Senate may initiate legislation and must approve any legislation in the same form as the House of Representatives. Moreover, the Government must have the consent of both Houses to remain in office. Hence, the Italian legislature is an example of ‘perfect bilateralism’. In Romania, the ordinary legislative process similarly requires the adoption by majority vote of the members present in each Chamber to pass legislation.

²⁶² See <http://www.senado.es/web/conocersenado/temasclave/sistemabicameral/index.html> (EN).

In Germany, the *Bundestag* is the legislative organ responsible for adopting primary legislation but the *Bundesrat* has a threefold role in the federal legislative process: it may initiate primary legislation, it may force another vote of the *Bundestag* on bills in areas that do not explicitly require the consent of the *Bundesrat* and it may veto bills that require its consent.

6.4 The relations of second chambers with the executive

Generally, second chambers have reduced powers of scrutiny over political executives. Except for the Italian Senate and the Romanian Senate, second chambers have no confidence vote on the governments' actions, as opposed to first chambers. As mentioned in point 4.7, the Italian Senate is currently subject to intense debates in order to reform the system. One of the points that has already been agreed upon concerns the abolition of this possibility to issue votes of no confidence with regard to the Italian Government.²⁶³ As to the Romanian Senate, a referendum held in 2009 has concluded to its abolition but this decision has not yet been put into practice.

The confidence vote makes party discipline in the first chamber essential to the stability of the government. Hence, the discipline may in turn threaten the efficient exercise of this scrutiny role by the first chamber. Given that party discipline tends to be less rigorous within second chambers, they are able to counter-balance the 'executive-dominated' first chamber. In addition, second chambers with little confidence in their governments may leverage the potential to raise a vote of no confidence in order to amend or reflect aspects of government bills than the first chambers. Thus, parliament's overall control over government may be furthered through this bicameral oversight.

6.5 The constitutional powers of second chambers

Second chambers are frequently endowed with powers to intervene in constitutional matters. For instance, the French Senate has a veto in the case of constitutional amendments, as opposed to its delaying power over ordinary

²⁶³ Reuters, 'Italian parties reach deal on Senate reform', 21 June 2014, available at <http://www.reuters.com/article/2014/06/21/us-italy-politics-idUSKBN0EW0DT20140621> (EN).

legislation. In Belgium and the Netherlands, both Houses approve constitutional amendments by a two-thirds majority.²⁶⁴ In addition, numerous second chambers have the power to initiate proceedings before constitutional courts.

²⁶⁴ Senators also intervene in the appointment of constitutional judges. All bicameral Member States in Western Europe having a Constitutional Court use this method: in France, 3 of the 9 members of the Constitutional Council are appointed by the President of the Senate; in Germany, 8 out of 16 members are appointed by the *Bundesrat*, 3 out of 14 judges in Austria are appointed by the Federal Council; in Spain the proportion is of 4 out of 12; in Italy the two chambers appoint 5 constitutional judges out of 15 together; in Belgium, judges of the Constitutional Court are appointed by the King from a dual list presented by the Senate and the Chamber of Representatives in turn. In certain countries, Senates may also submit cases to the Constitutional Court. This is particularly widespread in the Czech Republic, Poland, Romania and Slovenia.

7 Typology of second chambers based on the key features of second chambers in the European Member States

This section suggests possible models of second chambers based on the key features of second chambers' identified in the previous sections. The two first models oppose symmetric to asymmetric bicameralism in relation to the composition of the chambers, while the two following models oppose these two types of bicameralism with regard to the legislative competences of the chambers. These four models are followed by three additional models based on recurrent roles of second chambers in European Member States, namely the oversight of the executive power, the conciliator or mediator function and the role of constitutional watchdog.

7.1 Symmetric bicameralism in the composition of the chambers

The only example of symmetric bicameralism in the composition of chambers in Europe is the Romanian Parliament. This has led to intense criticisms, as put by two scholars in a 2012 paper: 'One of the errors of the constitutional engineering since 1991, kept in 2003, is to have refused the Senate for the constitution of its own individuality at the recruiting level. Since its origins, the Senate has been created as a Chamber which doubles and parasites a Deputies' Assembly elected by universal vote. One cannot determine in the present Senate the rudiments of representation of the local communities or of the professional elite: the institutional doubling makes the hostility towards bicameralism to seem rationally and constitutionally intelligible up to a point.'²⁶⁵

As noted above, the Romanian population has decided per referendum in 2009 to abolish the Senate but this has not yet been put into practice. The abolition of the Senate requires a modification of the Constitution.

²⁶⁵ L.-S. Stănescu and D. Belțic, 'The structure of the Romanian Parliament from the perspective of its optimizing and of the cooperation mechanism with the European Parliament', 12 *The USV Annals of Economics and Public Administration* 1(1), 2012, available at <http://www.seap.usv.ro/annals/ojs/index.php/annals/article/viewFile/478/477> (EN), pp. 244-255.

This type of symmetric bicameralism in the composition of the chambers does not constitute an interesting model for the CoR because it runs counter one of the key features of the CoR, namely the territorial representation of regional and local actors at the European level. Moreover, the critics mentioned above in relation to the institutional doubling of the Romanian Parliament remain valid for any type of symmetric bicameralism in the composition of chambers.

7.2 Asymmetric bicameralism in the composition of the chambers: representation of a different set of interests in second chambers as a yardstick for the legitimacy of these chambers

One of the strongest justifications for the establishment and the maintenance of second chambers lies within the fact that they offer a tribune within the legislative decision-making process for minorities, territorial regional and local views or other sets of interests than those defended in the first chambers. In federal systems, first chambers generally focus on national issues while second chambers concentrate on regional interests. In addition, this study has demonstrated that legitimacy of second chambers also rests upon the expertise and the high profile of the members of these second chambers.

Transposed at the European level, this view implies to further the differentiation between the CoR and the European Parliament, notably in their composition. This may be ensured through the representation of different set of interests by both bodies or different modalities of selection of members.

This study presents the various models of representation in European second chambers divided in three areas: territorial representation, expertise of members of second chambers and representation of other sets of interests.

7.2.1 Territorial representation

Most second chambers in European Member States represent subnational entities, as provinces, regions, departments, municipalities, etc. This territorial representation constitutes a common feature between those second chambers and the CoR at the European level.

In 2001, EU Member States agreed that members of the CoR should be representatives of sub-national, regional and local bodies who either held a regional or local authority electoral mandate or were politically accountable to an elected local or regional assembly. This rule was inserted into the TEC by the Treaty of Nice.²⁶⁶

This territorial representation constitutes one of the principal *raison d'être* of the CoR and should consequently be maintained. However, the choice of whether the representatives are directly elected by the population or whether they are composed of members designated through other means (i.e. Senators designated by the federated entities as is the case in Belgium and also partially in Spain) seems to play a smaller role in determining the legitimacy of the second chamber. Although there would need to be a link between the citizen and the second chamber, this could be expressed by a variety of mechanisms.

7.2.2 Personal expertise of members of second chambers

As stated above, 'second chambers are often characterised as embodying a particular measure of wisdom, balance and expertise.'²⁶⁷ Different mechanisms may be identified in the European second chambers to enhance the level of expertise of members of second chambers.

For instance, in the Czech Republic, the election of Senators in single-mandate constituencies seeks to favour the election of specific personalities. Yet, practice has revealed the difficulties for candidates to be successful without the backing of a political party or other influential organisation.

Another example consists in the designation of University Senators in Ireland. This system permits indeed to ensure the designation of candidates by reason of their profile and expertise. However, the current system – based on two Irish Universities – is subject to discussions on a reform to extend the representation and include all third-level institutions involved in higher education provided that the number of University seats is increased to accommodate this evolution.

²⁶⁶ The Treaty of Nice was signed on 26 February 2001 and entered into force on 1 February 2003. Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, *Official Journal C 80/1*, 10 March 2001. Currently, the provision governing this issue is Article 300, paragraph 3, TFEU.

²⁶⁷ Council of Europe, European Commission for Democracy Through Law (Venice Commission), Report on Second Chambers in Europe, 'Parliamentary complexity or democratic necessity?' by P. Gélard, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL\(2006\)059-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2006)059-e) (EN), at p. 11.

Finally, one should mention that many members of the House of Lords are appointed because of their expertise, which has strengthened the reputation of the House of Lords as an intellectual powerhouse.²⁶⁸ Yet, the representative feature of the House of Lords is clearly lacking, which undermines its legitimacy to intervene in the legislative process. Hence, the case of the House of Lords offers an interesting example of a second chamber composed *inter alia* of experts but which would need to be reformed to enhance its legitimacy.

Transposed at the European level, one could imagine a system partially inspired by the United Kingdom's House of Lords with a CoR composed of members selected – not by an independent Appointment Commission as in the United Kingdom but rather by associations of regional and local authorities – according to open criteria. Such criteria could include territorial factors – to ensure a proper representation of local and regional authorities within the EU – but also factors relating to the expertise and the high profile of the individuals so as to guarantee the quality of the debates and consultations within the CoR. However, as opposed to the model of the United Kingdom's House of Lords, the political factor should be maintained in the selection of CoR members in order to maintain the political legitimacy of the CoR. Alternatively, the CoR could be partially composed of University Senators based on the Irish example.

7.2.3 Representation of other interests

Certain second chambers represent other interests than territorial representation and their members are not expressly selected on the basis of their expertise. For instance, in Slovenia, the National Council has 40 members who are elected to five-year terms by indirect suffrage by interest organisations and local communities.²⁶⁹ Among these members, there are four representatives of employers, four representatives of employees, four representatives of farmers, crafts, trade and independent professions, six representatives of non-commercial fields and twenty-two representatives of local interests. The last category of – which represents more than half of the members of the second chamber – demonstrates the link with the territorial representation. Another example of second chamber representing other

²⁶⁸ M. Russell, *Reforming the House of Lords: Lessons from Overseas*, 1st edn., Oxford, Oxford University Press, 2004, p. 306.

²⁶⁹ Articles 96 and 98 of the Constitution of Slovenia. The electoral colleges represent either economic and social sectors or municipalities, in which case the college is made up of members of the local assembly if the constituency coincides with the community or of representatives elected by the community assemblies if the constituency groups several communities.

interests is to be found – at least partially – in the Irish Senate where 43 members are nominated by five panels representing vocational interests.²⁷⁰

The transposition of such system at the level of the CoR does not seem to fit into the mandate of the CoR as representing local and regional interests at the EU level. Moreover, the representation of economic and social interests *via* specific selection procedures including representatives of employers, employees, trade and independent professions, non-commercial fields, etc. would encroach on the European Economic and Social Committee's field.

7.3 Symmetric and egalitarian bicameralism in terms of legislative competences

Certain second chambers intervene in the legislative decision-making process in the same form as the first chamber. Such system prevails in Italy and Romania. In Italy, this system has been intensely criticised for slowing down the decision-making process and a constitutional reform is currently under discussion in Italy in order to reduce the powers of the Senate – *inter alia* by depriving it from its equal law-making status with the lower house. Similar criticisms have led Romanian citizens to vote for the abolition of the Senate in a referendum held in 2009, which has not yet been implemented.

Transposed to the European level, the ordinary legislative procedure would involve the European Parliament, the Council and the CoR as co-legislators. Hence, the traditional bicameralism in national parliaments would in the case of the European Union be replaced by a tricameralism. The strength of tricameralism would lie in the capacity of the CoR acting as a European Senate – or third legislative chamber – to check the actions of the elected European Parliament and the Member States in the Council. The modalities of the ordinary legislative procedure would place the European Parliament, the Council and the CoR on an equal footing. The three institutions would adopt draft legislative acts at first or second reading. One could imagine a progressive intervention of the CoR in the legislative process, first limited to the domains for which the Treaties provide for CoR obligatory consultation. For other policy domains currently under the ordinary legislative procedure, the European Parliament and the Council would continue to be the sole co-legislators. As the CoR gains additional expertise these policy domains could be

²⁷⁰ For further information, see <http://www.oireachtas.ie/parliament/about/seanad/> (EN).

expanded over time. In case of inter-cameral disagreement, a Conciliation Committee could be convened with the European Parliament, the Council and the CoR appointing some of their members to serve on a joint committee and hammer out a compromise law for each house to adopt.²⁷¹ During the conciliation phase, the Commission would act as a facilitator between the three chambers.

Such system would certainly enhance the representation of regional and local interests in the European decision-making process. However, it would simultaneously slow down the legislative decision-making process. It flows from the experience of national second chambers having similar powers to those of the first chambers, as in Italy or Romania, that these systems are heavily criticised and that intense discussions are ongoing to reform these second chambers. Hence, it seems that a symmetric and egalitarian system should not be advocated as a source of inspiration for the definition of the role of the CoR in the (future) EU decision-making process, not to mention the fact that such scenario does not seem particularly realistic in the future development of the European legislative system.

7.4 Asymmetric bicameralism in terms of legislative competences: from consultative legislative powers of second chambers acting as reflection chambers to veto powers of second chambers

The vast majority of second chambers in EU Member States have different legislative competences from those of their corresponding first chambers. For instance, they may be dedicated to policy refinement, to improving draft legislative acts set up by the first chamber or to discuss sensitive areas, which justify their added value in the legislative process.

Certain second chambers only have consultative powers and intervene as reflection chambers, while others enjoy extensive veto powers over draft legislative acts issued by the first chambers. Most second chambers have the power to initiate legislation and certain have powers to amend legislation.

²⁷¹ G. Tsebelis and J. Money, *Bicameralism. Political Economy of Institutions and Decisions*, New York, Cambridge University Press, 1997.

7.4.1 Reflection chambers

Certain second chambers only have consultative powers: they do not vote on legislation but advise on its content. They mainly work as reflection chambers seeking to persuade the first chamber to take a policy initiative. In these cases, second chambers have far less powers than first chambers and only rarely have a final decision-making power. Hence, such role does not require as high a degree of legitimacy of second chambers in order to justify their actions as if they had a strong legislative role. Yet, if the second chamber is entitled to veto the bills issued by the first chamber, it will have to enjoy a high degree of democratic legitimacy.

The examples *par excellence* are the Belgian Senate, which is an assembly for long-term ‘reflection’ which represents the Belgian federated entities, and the National Council in Slovenia. Other second chambers, as the Spanish Senate and the United Kingdom’s House of Lords similarly perform this role, in addition to other functions. For instance, the Spanish Senate conducts its reflection and reconsideration upon bills issued by the Congress and consequently opposes or modifies the bills of the Congress by means of vetoes or amendments.²⁷²

Transposed at the European level, the CoR would be ancillary to the European Parliament and the Council with lower levels of legislative activity, but scrutinising the majority of EU legislation. Instead of fulfilling the role of a full co-legislator, the CoR would act as a reflection chamber enjoying only limited legislative power. It would influence policy by engaging in dialogue with the European Parliament and the Council and suggest amendments that combine argument and revision, intervention and accommodation, pressure and withdrawal. Nevertheless, in the legislative phase the Members of the European Parliament and the Member States would have the last word.

7.4.2 Second chambers having powers to initiate legislation

In the ordinary legislative decision-making process, most second chambers have the power to initiate legislation. As an exception, the Dutch Senate may only approve or reject legislation voted by the other chamber without having the competence to initiate or amend legislation. Moreover, certain second chambers as the Austrian *Bundesrat* and the Irish Senate, do not have the right to initiate legislation in matters of finance.

²⁷² See <http://www.senado.es/web/conocersenado/temasclave/sistemabicameral/index.html> (EN).

Although this competence is widespread among second chambers, it does not seem to be transposable at the European level. Indeed, as the European institution representing the interests of the EU, the Commission should maintain its right of initiative for EU draft legislative acts. However, one could imagine that the European Parliament, the Council and the CoR would be allowed to request the Commission to submit a proposal if they deem it appropriate.

7.4.3 Second chambers having legislative powers to amend legislation

Certain second chambers as the Czech Senate, the French Senate, the Polish Senate and the Spanish Senate, have the power to amend legislation. If the Czech Senate amends a bill of the Chamber of Deputies, the latter may decide to adopt the amended bill by the majority of present deputies or to approve the bill in the wording approved by the Chamber of Deputies, for which an absolute majority of all Deputies is needed, namely 101 votes. The French Senate has a similar power to amend bills of the National Assembly, but in case of disagreement, the final decision rests with the National Assembly. As to the Polish Senate, its resolutions rejecting bills or proposing amendments shall be considered accepted unless the Lower House rejects them by an absolute majority in the presence of at least half of the Deputies. An interesting example is provided by the Spanish Senate which may veto by absolute majority or amend by simple majority bills emanating from the Congress of Deputies. In the two cases, the text is sent back to the Congress of Deputies, which can reject the veto by ratifying the text presented to the Senate by an absolute majority – or by a simple majority after a period of two months since its interposition – and reject amendments with a simple majority. The Congress may accept or reject amendments of the Senate by simple majority.

Transposed at the European level, one could imagine a system in which the CoR would scrutinise and be able to amend Commission proposals before they are submitted, possibly taking account of the CoR's amendments, to the Council and the European Parliament. Alternatively, the CoR could suggest amendments during the first reading only. In this system, the European Parliament and the Council could overrule the CoR's opinions with a persisting majority vote at the end of the second reading. In that event, the CoR could only delay legislation.

7.4.4 Second chambers having legislative powers to adopt or reject legislation without any power of amendment

In some countries, as in the Netherlands, the second chamber has no power of amendment over legislation, it may only adopt or reject bills in their entirety. Similarly, the Austrian *Bundesrat* has no right of amendment of bills proposed by the *Nationalrat* and may merely postpone the publication of legislation for a few weeks – except for certain areas in which it has an absolute veto power.

In Germany, the *Bundesrat* intervenes in the legislative decision-making process for every law adopted by the *Bundestag*. Yet, the extent of its participation depends on whether the bill concerns a matter one to which the *Bundesrat* may lodge an objection or one requiring its consent. In the first case, the objection may be overturned by the *Bundestag* by an absolute majority – a majority of its statutory members. Hence, the *Bundesrat* may force another vote of the *Bundestag* in these areas that do not explicitly require the consent of the *Bundesrat*. Yet, in matters for which the consent of the *Bundesrat* is requested by the Basic Law, the *Bundesrat* may exercise an ‘absolute veto’. If it refuses to grant its consent, the bill does not become law.

Transposed at the European level, the CoR would act as a chamber of revision passing legislation approved by the European Parliament and EU Council with eventual veto powers in an up-or-down vote. Its main role would be to revise legislation in its core policy domains that are tabled in the European Parliament and the Council. In such scenario, the express consent of the CoR could be required on all European draft legislation involving regional and local interests. However, it seems more realistic to advise a more flexible and soft mechanism by which the CoR would be granted a suspensive veto power upon European draft legislation involving regional and local interests. When needed it would delay legislation in order to ask the European Parliament and the EU Council to reconsider their draft legislation. Such procedure could be compared to the ‘orange card’ procedure of the Early Warning System but in this case the CoR itself would intervene in the legislative decision-making process instead of national parliaments. Moreover, this power of the CoR should not be limited to subsidiarity issues.

7.5 Oversight of the executive power

Most second chambers in EU Member States do not have the right to issue a vote of no confidence *vis-à-vis* their Government. Exceptions to this principle are provided by the Dutch Senate, the Italian Senate – which is subject to discussions to reform the Senate and abolish this competence – and the Romanian Senate – which should be abolished as a consequence of a 2009 referendum which has not yet been put in practice though.

Despite this lack of competence, second chambers may find other levers to control the government's actions. Given that party discipline tends to be less strict in second chambers, they are able to counter-balance the 'executive-dominated' first chamber. They may notably be more inclined to discuss and reject aspects of government bills than the first chambers. Hence, the parliament's overall control over government may be furthered through this bicameral oversight.

In addition, the independence of second chambers may be further guaranteed by the terms of office, that are in general longer for second chambers than for first chambers. The fact that members of second chambers do not have to face re-election as frequently as members of first chambers increases their independence from political parties and their ability to express their own views.

Finally, the distance from mass media, more interested in the partisan clashes within the first chambers, permits to engage in constructive dialogue with the government.

Hence, the powers of second chambers as supervisors of the government's actions may be enhanced if the second chamber's members are independent from political parties, enjoy longer terms of office and operate under less media pressure.

These different types of oversight over the executive actions – than a no confidence vote *strictu sensu* – could certainly be taken into consideration as interesting sources of inspiration for the construction of a future CoR on the model of a second chamber. The confidence vote would remain with the European Parliament, while the CoR could discuss and reject European Commission proposals and engage into constructive dialogue with the European Commission. Such system would intensely increase the CoR's political weight *vis-à-vis* the European Commission, taken alongside the model of a second chamber as exercising a political oversight over governments' actions.

7.6 Conciliator or mediator

Depending mainly upon the composition of the second chamber, a specific role of conciliator charged with solving conflicts of interests between the different entities in the country may be envisaged for second chambers. This is for instance the case of the Belgian Senate, which is entitled to issue non-binding reasoned opinions in case of conflicts of interests between the legislative assemblies at the federal, regional and community levels.

If the Senate considers in a resolution voted with three quarters of the votes that its competences may be aggrieved by draft legislation discussed by the federated entities, it designates those of its members that will enter into consultation with the assembly concerned. If no solution is found within sixty days, the litigation is submitted with the Conciliation Committee (*comité de concertation*). Reciprocally, federated entities may suspend the voting procedure for a period of sixty days within the Senate if they consider that draft legislation discussed by the Senate aggrieves their competences. The two institutions will consult each other to find a solution and if no solution is found, the litigation is also submitted with the Conciliation Committee. In both cases, the Senate may be seized by the conflict of interests between one of the two legislative chambers at the federal level and a parliament of a federated entity – or between the parliaments of two federated entities – if no solution has been found within sixty days. The Senate issues a reasoned opinion to the Conciliation Committee within a period of thirty days. Such opinion is not binding. The Conciliation Committee has to take its decision by consensus after thirty days. If no consensus may be found, the expiration of the period of thirty days terminates the procedure and the legislative process may pursue.

Another way to foster the mediation feature of second chambers rests upon the petition procedure, which may be an interesting mechanism to force the discussion on a specific subject within the second chamber. Such procedure could be followed by subnational entities in order to bring certain issues within the legislative debate. This could ultimately enhance the second chamber's political weight, since it could foster a consensus on territorial questions including regional and local interests.

Transposed at the European level, it seems that the first example of conciliator taken from the Belgian Senate could serve as an interesting model for a future CoR. On the opposite the second mechanism of petition procedure should probably not be taken into consideration since a similar petition procedure already exists at the

European Parliament level, which would constitute a non-necessary duplication, and furthermore entail extensive costs for the institution concerned.

The CoR could act as a conciliator and seek to achieve a consensus of territorial considerations. For instance, the CoR could be seized of conflicts of interests between the European level on the one hand and the national, regional and/or local levels on the other hand. It could issue non-binding reasoned opinions suggesting a solution for the conflict between these actors. Such a reasoned opinion could serve as a basis for the discussions between the parties involved in the dispute in order to reach a consensus. If no consensus could be found, the expiration of a specific period of time – in Belgium there are two periods of thirty days – would terminate the conciliation procedure and the legislative process would proceed.

7.7 Constitutional watchdog

Second chambers are frequently endowed with constituent power and intervene in constitutional revisions. For instance, the French Senate has a veto in the case of constitutional amendments, as opposed to its delaying power over ordinary legislation. In Belgium and the Netherlands, both Houses approve constitutional amendments by a two-thirds majority.²⁷³ Moreover, second chambers may generally initiate proceedings before the constitutional courts.²⁷⁴

This feature is linked to the institutional perspective of second chambers being considered as providing institutional stability. Hence, this power is perceived as intrinsically linked to the very nature of second chambers.

There is no reason to reject such model of constitutional watchdog for a future CoR. As further developed in the next section, the CoR could intervene in revisions of the European Treaties and its competence to bring cases to the European Court

²⁷³ Senators also intervene in the appointment of constitutional judges. All bicameral Member States in Western Europe having a Constitutional Court use this method: in France, 3 of the 9 members of the Constitutional Council are appointed by the President of the Senate; in Germany, 8 out of 16 members are appointed by the *Bundesrat*, 3 out of 14 judges in Austria are appointed by the Federal Council; in Spain the proportion is of 4 out of 12; in Italy the two chambers appoint 5 constitutional judges out of 15 together; in Belgium, judges of the Constitutional Court are appointed by the King from a dual list presented by the Senate and the Chamber of Representatives in turn. In certain countries, Senates may also submit cases to the Constitutional Court. This is particularly widespread in the Czech Republic, Poland, Romania and Slovenia.

²⁷⁴ See for instance <http://www.associacaodeinvestidores.com/index.php/comunicados/press-release/286-constitutional-court-acknowledged-the-legal-interest-of-290-initiators-united-by-vzmd-> (EN).

of Justice could be extended to all questions relating to the legality of EU legislation.

8 Table representing the typology of second chambers in EU Member States and their adequacy as sources of inspiration for a future CoR

This table is based on the typology of second chambers identified in the previous section. Hence, it adopts an identical structure opposing symmetric to asymmetric bicameralism in relation first to the composition of the chambers and second to their legislative competences, followed by three additional models, namely the oversight of the executive power, the conciliator or mediator function and the role of constitutional watchdog. Moreover, this table indicates for each model whether it may serve as a source of inspiration for a future CoR or not.

Typology	Sub-divisions within the typology	Examples of second chambers in EU Member States	Transposition at the CoR level
Symmetric bicameralism in the composition of the chambers	No sub-divisionl	Romanian Parliament	This is not an interesting model for the future European legislature. The future CoR should ensure territorial representation of regional and local actors at the European level. Moreover, institutional doubling should be avoided.
Asymmetric bicameralism in the composition of the chambers	Territorial representation	Most second chambers	This feature of territorial representation should be maintained for the future CoR since it constitutes the core of the CoR's mandate.

Typology	Sub-divisions within the typology	Examples of second chambers in EU Member States	Transposition at the CoR level
	Personal expertise	Czech Republic Irish Senate (University Senators) United Kingdom's House of Lords	<p>The future CoR could be composed of members selected by associations of regional and local authorities according to open criteria including territorial factors, political factors, factors relating to the expertise of the individuals and certain gender considerations.</p> <p>Alternatively, the CoR could be partially composed by University Senators based on the Irish example.</p>
	Representation of other interests	Irish Senate (Senators nominated by five panels representing vocational interests) Slovenian National Council	<p>This model should not be transposed at the level of the future CoR because of the mandate of the CoR as representing local and regional interests at the EU level. Moreover, there would be a risk to encroach on the European Economic and Social Committee's field in case of representation of economic and social interests.</p>
Symmetric and egalitarian bicameralism in terms of legislative competences	No sub-division	Italian Senate (under discussions for reform) Romanian Senate (abolished by referendum in 2009 but not yet in practice)	<p>This system has been heavily criticised for slowing down the legislative decision-making process. It should not be advocated as a source of inspiration for the future CoR.</p>

Typology	Sub-divisions within the typology	Examples of second chambers in EU Member States	Transposition at the CoR level
Asymmetric bicameralism in terms of legislative competences	Reflection chamber/consultative powers	<p>Belgian Senate (example <i>par excellence</i>)</p> <p>Spain Senate (one function among others)</p> <p>United Kingdom's House of Lords (one function among others)</p>	Such limited legislative power to influence policy by engaging in dialogue with the European Parliament and the Council and suggest amendments could serve as an interesting model for the future CoR.
	Power to initiate legislation	Most EU Member States except for the Dutch Senate and other second chambers in matters of finance	<p>This competence does not seem to be transposable to the future CoR. The European Commission representing the interests of the EU should maintain its right of initiative.</p> <p>Yet, the CoR could be allowed to request the Commission to submit a proposal.</p>
	Power to amend legislation	Czech Senate French Senate Polish Senate	The CoR could scrutinise and amend Commission proposals before they are submitted to the Council and the European Parliament. Alternatively, the CoR could suggest amendments during the first reading only. In this system, the European Parliament and the Council could overrule the CoR's opinions with a persisting majority vote at the end of the second reading. In that event, the CoR could only delay legislation.

Typology	Sub-divisions within the typology	Examples of second chambers in EU Member States	Transposition at the CoR level
	Power to adopt or reject legislation	Dutch Senate Austrian Bundesrat German Bundesrat	<p>The future CoR could act as a chamber of revision passing legislation approved by the European Parliament and EU Council with eventual veto powers in an up-or-down vote in its core policy domains. In such scenario, the express consent of the CoR could be required on all European draft legislation involving regional and local interests.</p> <p>However, it seems more realistic to advise a more flexible and soft mechanism by which the CoR would be granted a suspensive veto power upon European draft legislation involving regional and local interests. When needed it would delay legislation in order to ask the European Parliament and the EU Council to reconsider their draft legislation.</p>
Oversight of the executive power	No sub-division	Three second chambers (Dutch Senate, Italian Senate and Romanian Senate) have the right to issue a vote of no confidence vis-à-vis the executive. Other second chambers may supervise the executive via other means, as	<p>Different types of oversight over the executive actions – than a no confidence vote <i>strictu sensu</i> – could certainly be taken into consideration as interesting sources of inspiration for the construction of a future CoR. The confidence vote would remain with</p>

Typology	Sub-divisions within the typology	Examples of second chambers in EU Member States	Transposition at the CoR level
		discussions/rejections of government bills or dialogue.	the European Parliament, while the CoR could discuss and reject European Commission proposals and engage into constructive dialogue with the European Commission.
Conciliator or mediator	No sub-division	Belgian Senate	The CoR could seek to reconcile conflicts of interests between the European, national, regional and/or local levels in issuing non-binding reasoned opinions suggesting a solution for the conflict between these actors.
Constitutional watchdog	No sub-division	All second chambers in EU Member States except for the Slovenian National Council	The CoR could intervene in constitutional revisions and its competences to bring cases to the European Court of Justice could be extended to all questions relating to the legality of EU legislation.

9 Recommendations

In a 2014 study on the CoR's Future Role and Institutional Positioning²⁷⁵, five future-based scenarios were envisaged with predictions about the evolution of the CoR's institutional and political role, its associated powers and relations with other EU institutions and stakeholders.

Within the framework of this study, the most interesting scenarios developed in the study on the Future Role and Institutional Positioning are the first one and the fifth. The first one – a *dynamic status quo* – reinforces the CoR's consultative and political powers without a treaty change, by increasing the quality and the impact of its opinions on the legislative process. The fifth scenario describes a situation in which the CoR would act as a *third legislative chamber representing the local and regional authorities*. This scenario would require an extensive EU Treaty revision to build a strong and independent third house – the European Senate which would influence EU policy, guarantee institutional stability and represent a diversity of European collective constituent units that the other two legislative chambers cannot represent.

Except for the first one, the following recommendations have to be encompassed within the fifth scenario of a future European Senate. The first recommendation envisages a short-term situation of dynamic status quo which does not require any treaty change. The subsequent recommendations picture a long-term vision based upon a major revision of the Treaties to streamline the decision-making procedures and re-balance the power between the institutions.

²⁷⁵ CoR 2014 study on CoR's future role and institutional positioning.

9.1 Increase the quality and the impact of CoR opinions in the legislative process *inter alia* by improving the form and content of the opinions, their early delivery, their strong political support, the first rate expertise on local and regional authorities' matters and threatening to bring actions for annulment if the opinions are not duly take into account

The CoR may reinforce its consultative and political powers without a treaty change mainly by increasing the quality and the impact of its opinions on the legislative process. One could be tempted to compare – to a certain extent²⁷⁶ – the current CoR to the Slovenian National Council, which mainly acts as a consultative assembly, advising the National Assembly on the content of legislation and acts as the representative body for social, economic, professional and local interests.²⁷⁷ Local authorities, whose representatives are dominant in the Slovenian National Council, have a certain impact on national policy through this channel.²⁷⁸ These opinions are non-binding. However, the Slovenian National Council may launch proceedings for the review of constitutionality and legality of legislation before the Slovenian Constitutional Court.²⁷⁹

A similar mechanism of opinions exists for the CoR in Article 307 TFEU and the CoR has the right to bring actions before the European Court of Justice against legislative acts for the adoption of which the TFEU provides that it be consulted, on grounds of infringement of the principle of subsidiarity²⁸⁰, and against legislative and certain other acts ‘for the purpose of protecting [its] prerogatives’.²⁸¹

²⁷⁶ As noted above, the model of the Slovenian National Council should be limited to the representation of local interests and not include the representation of economic and social interests, which would encroach on the European Economic and Social Committee’s field.

²⁷⁷ Article 96 of the Constitution of Slovenia.

²⁷⁸ F. Grad, ‘Local government in Slovenia’, in A.-M. Moreno, *Local Government in the Member States of the European Union: A Comparative Legal Perspective*, Madrid, National Institute of Public Administration, 2012, pp. 577-597, at p. 596.

²⁷⁹ See for instance <http://www.associacaodeinvestidores.com/index.php/comunicados/press-release/286-constitutional-court-acknowledged-the-legal-interest-of-290-initiators-united-by-vzmd-> (EN).

²⁸⁰ Article 8 of the Protocol on the application of the principles of subsidiarity and proportionality. See also K. Lenaerts and N. Cambien, ‘Regions and the European Court: giving shape to the regional dimension of the Member States’, 35(5) *European Law Review*, 2010, pp. 609-635; S. Piattoni, ‘The Committee of the Regions and the Upgrading of Subnational Territorial Representation’, in S. Kröger and F. Dawid (eds.), *The Challenge of Democratic Representation in the European Union*, New York, Palgrave MacMillan, 2012, pp. 59-73; O. Porchia, ‘I

The opinions present a procedural requirement in cases of compulsory jurisdiction.²⁸² In addition to the current practice, the CoR should encourage the European Parliament and the Council to establish the practice of referring to the opinions in the preamble of the legal act and to explain whether and how the CoR's opinions were taken into consideration.²⁸³ Moreover, an improvement of the form and the content of the opinions, their early delivery, the strong political support and first rate expertise on local and regional authorities' matters underpin the growing standing and prestige of the CoR as an advisory body.

9.2 Build a third legislative chamber enjoying strong legitimacy

If the CoR was to evolve in a European Senate within a long-term horizon, one of the most crucial features for its efficient functioning would be its legitimacy. As analysed in the previous parts, the most important aspect determining the democratic legitimacy of second chambers rests upon its composition and the representation entailed by this composition. In the case of the CoR, a strong representation of subnational territorial entities should be guaranteed.

However, the choice of whether the representatives are directly elected by the population or whether they are composed of members designated through other means (i.e. Senators designated by the federated entities as is the case in Belgium and also partially in Spain) seems to play a smaller role in determining the legitimacy of the second chamber. Although there would need to be a link between the citizen and the second chamber, this could be expressed by a variety of mechanisms. An interesting example is provided by the Spanish Senate, where Senators are partly directly elected (four Senators per province as a general rule) and partly appointed by the legislative assemblies of the Self-Governing Communities (one for each Community and an additional Senator for every million inhabitants).²⁸⁴ Another example would be countries such as Belgium, which grant

ricorsi davanti alla Corte di giustizia dell'Unione europea: le modifiche previste dal Trattato di Lisbona', in P. Bilancia and M. D'Amico (eds.), *La nuova Europa dopo il Trattato di Lisbona*, Milan, Giuffrè, 2009, pp. 223-232.

²⁸¹ Article 263, para. 3, TFEU.

²⁸² K. Lenaerts and N. Cambien, 'Regions and the European Court: giving shape to the regional dimension of the Member States', 35(5) *European Law Review*, 2010, pp. 609-635.

²⁸³ Article 296 (2) TFEU.

²⁸⁴ The Spanish Constitution is available at

http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf (EN).

the federated entities the power to designate the Senators – in addition to ten co-opted Senators (based upon the electoral results in the Chamber of Representatives), while there is also the French model whereby the French Senators are elected by an electoral college, which is mainly composed of delegates from municipal councils.

Yet, one should avoid the situation of an oversized chamber. Ideally, the CoR should keep a relatively small size to function efficiently. On average, second chambers represent 60 per cent of the size of the first chamber.²⁸⁵ The CoR is currently composed by 353 members,²⁸⁶ while the European Parliament counts 751 members.²⁸⁷ Accordingly, the CoR as a third legislative chamber should keep a similar size to the current one (up to a ‘maximum’ of 450 members).

Another principle traditionally followed by political scientists to determine the right size of a parliament is the cube-root-rule, which calculates the number of representatives adding up to the cubic root of the proportions of the national chambers (+/- 10%).²⁸⁸ According to this rule, the future CoR would have a maximum of 200 members.

Given the principle discussed in point 5.6 that the small size of a second chamber may enhance the quality of its work and imbue its members with a greater sense for personal responsibility over the second chamber’s decisions, it seems that the second mechanism should prevail and that the CoR should consequently be limited to a maximum number of 200 members.

As to the age of members of second chambers, the comparative overview developed in section 6 of this study demonstrates that there are no specific minimum age limits to be eligible to second chambers in most European Member States. Five of them set a minimum age limit: the Czech Republic (40 years), France (24 years), Ireland (30 years), Italy (40 years) and the United Kingdom (21 years). Interestingly, one notices that the age limit has been reduced from 30 to 24 years in France in 2011. Given the inconsistency in the rules governing the age limit of candidates to second chambers in European Member States, it seems

²⁸⁵ J. Coakley and M. Laver, ‘Options for the Future of Seanad Éireann’, in The All-Party Oireachtas Committee on the Constitution, Second Progress Report: Seanad Éireann, Government of Ireland, 1997.

²⁸⁶ <http://cor.europa.eu/en/about/Pages/members.aspx> (EN).

²⁸⁷ <http://www.europarl.europa.eu/meps/en/map.html> (EN).

²⁸⁸ A. Lijphart, *Patterns of democracy: government forms and performance in thirty-six countries*, New Haven, Yale University Press, 1999.

difficult to draw any particular lesson from these illustrations which could serve as a model for a future CoR.

9.3 Include experts in the third legislative chamber

The previous parts of this study have demonstrated that the high profile of the members of second chambers has a direct influence upon the quality of the debates and consultations within second chambers, which increases the political weight of such second chambers.

Diverse mechanisms have been set up in European second chambers to guarantee such high profile. Among the most convincing examples, one may refer to the Irish case of university senators. This system promises to ensure the designation of candidates by reason of their profile and expertise. For instance, a small part of members of the CoR could represent third-level institutions involved in higher education – hence not only universities but also other third-level educational institutions – in Europe.

Other systems refer to the appointment by the Government/the head of State, as – to a certain extent – the patronage of the Prime Minister in the United Kingdom in the appointment procedure of the House of Lords.

To improve the expertise of the CoR membership, the designation procedure would need to be altered at the subnational level. More specifically, in addition to the criteria of political party, gender and territorial balance, the selection procedure would need to take policy expertise into account. Such selection of experts could be made according to the more pressing policy issues that would be brought to the fore in the CoR assembly. Such practice could be achieved through improving the ties between the CoR and the associations of local and regional authorities in the Member States. The CoR as representative of the territorial component at the EU level would be well placed to communicate the European agenda to the local level and bring up policy issues of relevance for associations of local and regional authorities at the EU level, thereby making use of its extensive associations of local and regional authorities' network throughout the EU. Alternatively, the CoR could be partially composed of University Senators based on the Irish example.

On the basis of these criteria the subnational associations would draw up a list of candidates that would be subsequently submitted to the national government for

decision. The national governments would accept the list of candidates and forward it to the Council for adoption with a unanimous decision confirmation.²⁸⁹

9.4 Strive for suspensive veto power for a third legislative chamber upon EU draft legislation involving regional and local interests

In an asymmetric tricameralism – which seems to be the more realistic scenario, as opposed to a symmetric and egalitarian tricameralism – the CoR would not fulfil the role of a full co-legislator, but rather act as a *chambre de réflexion et de dialogue* enjoying only limited legislative power. In such case, the CoR would not initiate legislation but act as a chamber of revision passing legislation approved by the European Parliament and Council with eventual veto powers in an up-or-down vote. Its main role would be to revise legislation in its core policy domains that are tabled in the European Parliament and the Council.

In such scenario, the express consent of the CoR could be required on all European draft legislation involving regional and local interests. However, it seems more realistic to advise a more flexible and soft mechanism by which the CoR would be granted a suspensive veto power upon European draft legislation involving regional and local interests. It would act as a prudent facilitator and when needed delay legislation in order to ask the European Parliament and the EU Council to reconsider their draft legislation. Such procedure could be compared to the ‘orange card’ procedure of the Early Warning System but in this case the CoR itself would intervene in the legislative decision-making process instead of national parliaments. Moreover, this power of the CoR should not be limited to subsidiarity issues.

Although it does not seem realistic, one could also imagine that the CoR would have the right to initiate legislation, as most second chambers in European Member States. Yet, at the European level, it would be preferable to reserve this competence to the European Commission, as the European institution representing the interests of the EU. However, one could imagine that the European Parliament, the Council and the CoR would be allowed to request the Commission to submit a proposal if they deem it appropriate.

²⁸⁹ CoR 2014 study on CoR’s future role and institutional positioning, p. 65; see also the CoR 2009 study on the selection process for Committee of the Regions members. Procedures in the Member States.

9.5 Develop a constructive dialogue between the CoR and the Commission

In terms of the fifth scenario describing a situation in which the CoR would act as a third legislative chamber representing the local and regional authorities, the Commission would increasingly resemble a government held accountable by a three-house legislature, with the CoR acting as an influential upper house.

Although a power of no confidence vote for the CoR on the Commission's actions seems highly hypothetical, a constructive dialogue could be established between the CoR and the Commission. Indeed, it has been noted in literature that the less strict party discipline in second chambers enables them to counter-balance the 'executive-dominated' first chamber. Consequently, although second chambers may be in a position to raise a vote of no confidence over governments, they may be more inclined to discuss and reject aspects of government bills than the first chambers. Hence, the parliament's overall control over government may be furthered through this bicameral oversight.

The party discipline within the CoR should be less strict than in the European Parliament in order to permit discussions and overall oversight over the Commission's policies. In addition, the independence of the CoR could be further guaranteed by the terms of office, that should be longer for the CoR than for the European Parliament. Finally, the distance from mass media, more interested in the partisan clashes within the first chambers, would permit the CoR to engage in constructive dialogue with the Commission.

9.6 Seek to achieve a consensus of territorial considerations

The CoR could act as a conciliator and seek to achieve a consensus of territorial considerations. Inspired by the Belgian Senate's specific role of conciliator charged with solving conflicts of interests between the different entities in Belgium, the CoR could be seized of conflicts of interests between the European level on the one hand and the national, regional and/or local levels on the other hand. It could issue non-binding reasoned opinions suggesting a solution for the conflict between these actors. Such a reasoned opinion could serve as a basis for the discussions between the parties involved in the dispute in order to reach a consensus. If no consensus could be found, the expiration of a specific period of time – in Belgium there are

two periods of thirty days – would terminate the conciliation procedure and the legislative process would proceed.

9.7 Strive to be acknowledged as a ‘constitutional’ watchdog

Deriving from its status of third legislative chamber, the CoR should strive to be endowed with ‘constitutional’ power and intervene in revisions of the European Treaties. For instance, it should have a veto power in the case of amendments to the European Treaties. Indeed, from an institutional perspective, second chambers are generally considered as providing stability. Most second chambers analysed in this study are endowed with constituent power and intervene in constitutional revisions.

In addition, the CoR’s powers to bring cases to the Court of Justice of the European Union could be extended to all questions relating to the legality of EU legislation. Currently, the CoR has the right to bring actions before the Court of Justice of the European Union against legislative acts for the adoption of which the TFEU provides that it be consulted, on grounds of infringement of the principle of subsidiarity²⁹⁰, and against legislative and certain other acts ‘for the purpose of protecting [its] prerogatives’.²⁹¹ Yet, there are no similar limitations to the powers of second chambers analysed in this study to bring cases before their constitutional courts in order to review the constitutionality and the legality of legislation. Hence, the competence of the CoR in this regard should similarly be broadened to encompass any question relating to the legality of EU legislation.

²⁹⁰ Article 8 of the Protocol on the application of the principles of subsidiarity and proportionality. See also K. Lenaerts and N. Cambien, ‘Regions and the European Court: giving shape to the regional dimension of the Member States’, 35(5) *European Law Review*, 2010, pp. 609-635; S. Piattoni, ‘The Committee of the Regions and the Upgrading of Subnational Territorial Representation’, in S. Kröger and F. Dawid (eds.), *The Challenge of Democratic Representation in the European Union*, New York, Palgrave MacMillan, 2012, pp. 59-73; O. Porchia, ‘I ricorsi davanti alla Corte di giustizia dell’Unione europea: le modifiche previste dal Trattato di Lisbona’, in P. Bilancia and M. D’Amico (eds.), *La nuova Europa dopo il Trattato di Lisbona*, Milan, Giuffrè, 2009, pp. 223-232.

²⁹¹ Article 263, para. 3, TFEU.

10 Conclusions

This comparative overview of useful consultative practices within EU Member States' second chambers that could serve as a model for the definition of the role of the CoR in the (future) EU decision-making process demonstrates that the central notion interfering in the examination of all aspects of second chambers is the notion of legitimacy. The second chambers analysed in this study that are the less subject to debates for reform are those enjoying a high legitimacy providing for justification of their action as public authority.

In the case of second chambers, the legitimacy rests upon various factors both in relation to their composition and their competences. As far as their composition is concerned, specific heed has to be paid to the regional/territorial balance, the level of expertise of their members and – more generally – the representation of other sets of interests than those represented in first chambers. Territorial representation constitutes a common feature between most second chambers in European Member States and the CoR at the European level. Yet, the choice of whether the representatives are directly elected by the population or whether they are composed of members designated through other means seems to play a smaller role in determining the legitimacy of the second chamber. Another feature strengthening the legitimacy of second chambers rests upon the personal expertise of their members. Hence, an ideal composition of a future CoR would combine these two features.

In practice, one could imagine a system with a CoR composed of members selected by associations of regional and local authorities according to open criteria including territorial factors – to ensure a proper representation of local and regional authorities within the EU – but also factors relating to the expertise and the high profile of the individuals so as to guarantee the quality of the debates and consultations within the CoR. Moreover, gender balance should also be taken into consideration.

The question whether the political factor should be maintained within the selection procedure raises opposing views. On the one hand, the political link with regional and local authorities ensures the political legitimacy, guarantees that the political preferences of citizens are represented and strengthens the contacts with the European Parliament via the political groupings. On the other hand, the independence from political parties permits to enhance the leverage in scrutinising the executive's policies, to select individuals on the basis of their expertise or

quality instead of their political appurtenance, to avoid continuous fight against opposing parties and to permit to the members to express their own views.

Beyond this antagonism, it seems that the determination of the membership of the future CoR should strive to find a balance between these interests. *A priori*, a conversion of the CoR in a third chamber would imply that the political function and composition of the CoR is maintained. It would indeed seem difficult to justify such extension of the CoR's role and powers whilst simultaneously depriving it from its political legitimacy.

However, the political factor should not become preponderant so as to undermine the effects of the factor based on the expertise and personal quality of candidates. Hence, one could imagine a partial composition of the future CoR of members selected on the basis of political and territorial considerations, while a another part of the membership would consist in experts. Such selection of experts could be made according to the more pressing policy issues that would be brought to the fore in the CoR assembly. Such practice could be achieved through improving the ties between the CoR and the associations of local and regional authorities in the Member States. The CoR as representative of the territorial component at the EU level would be well placed to communicate the European agenda to the local level and bring up policy issues of relevance for associations of local and regional authorities at the EU level, thereby making use of its extensive associations of local and regional authorities' network throughout the EU. Alternatively, the CoR could be partially composed of University Senators based on the Irish example.

As to the size of the future CoR, it seems indeed that a small chamber, as the Irish Senate, guarantees a better functioning and a higher quality of its debates than a larger chamber as the United Kingdom's House of Lords. As discussed in point 9.2, different methods permit to calculate the ideal size of a chamber, which result in the case of the CoR in a maximum number of 200 members according to the cube-root-rule and 450 members according to the principle that the second chamber should count 60 per cent of the members of the first chamber.

Another factor reinforcing the legitimacy of second chambers rests upon their different legislative competences from those of their corresponding first chambers. Examples in national legislatures show that they may *inter alia* be dedicated to policy refinement, to improving draft legislative acts set up by the first chamber or to discuss sensitive areas, which justify their added value in the legislative process. The examination of the competences of the thirteen second chambers provides for a wide array of models that may inspire the definition of the role of the future CoR.

Certain second chambers only have consultative powers and intervene as reflection chambers, while others enjoy extensive veto powers over draft legislative acts issued by the first chambers. At least, the CoR's legislative competences would be limited to consultative powers meaning that it would mainly be able to influence policy by engaging in dialogue with the European Parliament and the Council and suggest amendments. A stronger position in the legislative decision-making process would enable the CoR to scrutinise and amend Commission proposals before they are submitted, possibly taking account of the CoR's amendments, to the Council and the European Parliament or to suggest amendments during the first reading. In this system, the European Parliament and the Council could overrule the CoR's opinions with a persisting majority vote at the end of the second reading. In that event, the CoR could only delay legislation. A further scenario would permit the CoR to act as a chamber of revision passing legislation approved by the European Parliament and EU Council with eventual veto powers in an up-or-down vote. Its main role would be to revise legislation in its core policy domains that are tabled in the European Parliament and the Council. In such scenario, the express consent of the CoR could be required on all European draft legislation involving regional and local interests. However, it seems more realistic to advise a more flexible and soft mechanism by which the CoR would be granted a suspensive veto power upon European draft legislation involving regional and local interests. When needed it would delay legislation in order to ask the European Parliament and the EU Council to reconsider their draft legislation. As mentioned in point 7.4.2 of this study, the power to initiate legislation should be left to the European Commission.

In addition to legislative competences, most second chambers in EU Member States also exercise different types of oversight over the executive actions – other than a no confidence vote *strictu sensu* – that could certainly be taken into consideration as interesting sources of inspiration for the construction of a future CoR. The confidence vote would remain with the European Parliament, while the CoR could discuss and reject European Commission proposals and engage into constructive dialogue with the European Commission.

The specific competence of the Belgian Senate as conciliator could also serve as an interesting model. The future CoR could be seized of conflicts of interests between the European level on the one hand and the national, regional and/or local levels on the other hand. It could issue non-binding reasoned opinions suggesting a solution for the conflict between these actors. Such a reasoned opinion could serve as a basis for the discussions between the parties involved in the dispute in order to reach a consensus. If no consensus could be found, the expiration of a specific

period of time – in Belgium there are two periods of thirty days – would terminate the conciliation procedure and the legislative process would proceed.

Finally, second chambers are generally considered as providing institutional stability. Hence, they are frequently endowed with constituent power and intervene in constitutional revisions. Based on this model, the future CoR could have a veto power in the case of amendments to the European Treaties. In addition, the CoR's power to bring cases to the Court of Justice of the European Union could be extended to all questions relating to the legality of EU legislation.