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**INSTITUTIONAL DESIGN OF THE MEMBER STATES
FOR THE EX POST SUBSIDIARITY SCRUTINY**

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Katarzyna Granat

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LUISS School of Government

Via di Villa Emiliani, 14

00197 Rome ITALY

email: sog@luiss.it

web: www.sog.luiss.it



ABSTRACT

This paper analyses subsidiarity action introduced by the Treaty of Lisbon and the adjustment of national provisions to accommodate this new competence of national Parliaments. According to Article 8 of Protocol No. 2 to the Treaty of Lisbon, Member States may notify an infringement of the principle of subsidiarity on behalf of national Parliament according to their legal order. As this paper claims, however, the procedures for lodging the subsidiarity action vary at the national level, depending on the parliament – government relations in EU affairs. The paper begins by outlining the adjustments of national Parliaments for effective participation in European integration. Further, the paper explores the subsidiarity action of national Parliaments under the Subsidiarity Protocol and advances the argument that subsidiarity action is not very innovative from the perspective of Article 263 TFEU, yet the core issue is the reference to the national legal order regulation of the notification process by the Member States. The paper then examines and compares national level arrangements for subsidiarity action, depending on the strength of a national Parliament in EU affairs in relation to its government. The paper concludes by maintaining that there is a divergence in national regulations of subsidiarity action, but evidently the design of ex post subsidiarity review at the national level does not enhance the role of weak national Parliaments.

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Keywords: national Parliaments, principle of subsidiarity, subsidiarity action, subsidiarity review, Protocol no.2

AUTHOR INFORMATION

Katarzyna Granat is a Ph.D. candidate at the Law Department of the European University Institute (EUI) in Florence. Her thesis concentrates on the role of national parliaments in the policing of subsidiarity principle. Katarzyna holds a Master degree from the Warsaw University and LL.M. degree from the EUI.

Contact Information:

LUISS School of Government,
Via di Villa Emiliani, 14, 00197 Rome - Italy
Tel. +39-06-85225051
Fax +39-06-85225056
Email: sog@luiss.it
Website: www.sog.luiss.it

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1. Introduction

Research on ex post subsidiarity scrutiny concentrates on the judicial safeguard of subsidiarity: some scholars blame the Court of Justice of the European Union (CJEU) for the lack of in-depth subsidiarity jurisprudence (Martinico, 2011; Biondi, 2012). However, this paper will attempt to establish how Member States provisions could affect the new subsidiarity action and increase the role of national Parliaments in the European Union (EU). It will be argued that whilst the EU level leaves much leeway to enable a connection between national Parliaments and the CJEU, some national regulations tend to limit access to the Court and therefore diminish the role that national Parliament might have played. Indeed, in general terms, the accessibility of a national Parliament to the CJEU seems to depend on parliament - government relations in EU affairs at the national level.

This paper is structured as follows: first, I review institutional changes of national Parliaments related to the process of European integration. It is important to understand that the structures of national Parliaments have undergone an “active institutional Europeanization” (Auel, Benz, 2005, p. 373). Second, I analyse the possibilities for national Parliaments anchored in Article 8 of Protocol No. 2 in connection with Article 263 TFEU, claiming that national Parliaments might be described as “indirect semi-privileged applicants.” Nonetheless, subsidiarity action should not be perceived as a new type of action, as national Parliaments did not receive an independent standing and the grounds for subsidiarity action can be sufficiently covered by one of the standard grounds for the action of annulment. Moreover, past examples show that national Parliaments used this procedure in an informal way. Yet, the new part is the legal order of Member States referred to by Article 8, Protocol No.2. In consequence, as EU level provisions do not cause a revolution in the position of national Parliaments in the CJEU proceedings, nonetheless leaving it partially open, the position of national Parliaments might be improved by national provisions. Hence, in the fourth section, I explore the internal reforms for ex post subsidiarity review. I reconstruct in detail, the scrutiny procedures in Denmark, Finland, Germany, France, the UK, Spain, Luxembourg and Italy in order to capture how differences, even seemingly inconsequential at first sight, are actually crucial for the effectiveness of procedure. Assessed variables include the right to initiate the action, the transmission of the action and representation before the CJEU. It seems that on the one hand, access to the CJEU is open at the EU level, but on the other hand, national level provisions, depending on the type of parliament - government relations, may limit it. Whereas the national Parliaments usually categorised as weak, definitely have tougher access to the CJEU, the strong and modest EU affairs scrutinisers show differentiated attitudes towards subsidiarity action. The chapter

concludes with an assessment of prospects and a short summary of national Parliament adjustments for ex post review.

2. Institutional Evolution of National Parliaments

Under the treaties establishing the European Communities, most legislative bodies of the original six Member States did not alter their internal structure in response to the process of European integration. National parliaments neither had nor were in search of a formally subscribed function in EU affairs (Norton, 1996, p. 23). At the time, governments were in a strong position at the EU level, and although some national Parliaments (German, Belgian, Italian and Dutch) had established European Committees (Maurer, Wessels, 2001, p. 437), such committees had marginal influence. Afterwards, the parliaments in the United Kingdom (UK) and Denmark established EU Affairs Committees, in order to safeguard the strong constitutional position of such parliaments after accession to the EC (Norton, 1996, p. 24).

The institutional design of national Parliaments underwent changes during the process of treaty reforms, as many national competences shifted to the EU level. The Commission White Paper on the Single Market and the Single European Act mark an important stage in this process, because some of the more essential competences moved from the national to the EU level (Norton, 1996, p. 24). Subsequently, three major changes in the attitude of national Parliaments towards European integration can be identified. Both Norton and Maurer and Wessels observe (Norton, 1996, p. 25; Maurer, Wessels, p. 435), first, the greater specialisation of parliamentarians concerning policy areas and functions of parliaments, especially due to the establishment of EC Committees. Second, committees became more involved in the management of European affairs, as indicated by the increase in time dedicated to the analysis of documents for Council meetings and the implementation of directives. Third, parliamentary bodies underwent segmentation and fragmentation (developments connected to the greater involvement of specialised committees on European affairs) and Members of the European Parliament became involved in the work of advisory committees. Later, the Maastricht Treaty brought about a need for adjustments at the national level, strengthening the participation rights of parliaments, especially their information rights. For example, in 1992, France and Germany regulated the position of the national parliament in EU affairs at the constitutional level.¹ Concomitantly, specialised committees became more

¹ Art. 4 La loi constitutionnelle n° 92-554 du 25 juin 1992; Art. 1 Gesetz zur Änderung des Grundgesetzes v. 21.12.1992 BGBl. I 92, 2086.

involved in EU affairs, especially due to the workload of EU Affairs Committees (O'Brennan Raunio, 2007, p. 12).

Many of the remaining treaties, although mentioning national Parliaments, did not have the same effects as earlier EU reforms. For example, the Amsterdam Treaty, even though it contained a Protocol on the role of national Parliaments, did not affect national institutional design to the same extent as the Maastricht Treaty (Maurer, Wessels, 2001, p. 462). Likewise, Declaration No. 23 attached to the Nice Treaty did not have a substantial impact, albeit it placed national Parliaments on the agenda for the Intergovernmental Conference in 2004. With the Constitutional Treaty, some parliaments saw an incentive to reform their internal organisation to accommodate new powers, but the treaty did not come into force.²

National Parliaments finally gained new powers through the introduction of changes to national institutional design after the ratification of the Treaty of Lisbon. Adjustments especially allowed for the participation of national legislative bodies in future treaty changes and subsidiarity review. In 2008, Germany and France amended their constitutions to accommodate the participation rights of national Parliaments in subsidiarity scrutiny.³ This level of reform reflected the importance of national Parliament participation in the EU legislative process for national constitutional systems. In addition to the amendment of constitutions, most Member States have introduced reforms of infra-constitutional law, especially to the rules of procedure, to accommodate subsidiarity review.

With the new powers of the national Parliaments granted by the Treaty of Lisbon, in this paper I will explore ex post subsidiarity review, a scrutiny type less researched than its ex ante counterpart (Cf. Kiiver, 2012). Yet, national provisions differ in the design of subsidiarity action, sometimes enabling easy access to the CJEU, whereas in other cases, almost blocking it. To explore this differentiated regulation of subsidiarity action, I will examine how the ex post detection of subsidiarity breaches depends on parliament - government relations in EU affairs.

3. Ex post review at the EU level

In the following part, I will analyse Treaty of Lisbon provisions on ex post subsidiarity review. Accordingly, national Parliaments may lodge an action notified by Member States in accordance with their legal order on behalf of their national parliament or a chamber thereof

² See for example the UK House of Commons Modernisation Committee Second Report, Session 2004- 2005, para. 113-118.

³ Art. 1 *Gesetz zur Änderung des Grundgesetzes Artikel 23, 45 und 93* v. 08.10.2008 BGBl. I 2009, 1926; Art. 43 and 47 *Loi constitutionnelle n° 2008-724 du 23 juillet 2008 de modernisation des institutions de la Ve République*.

(Article 8, Protocol No. 2). This new avenue of bringing a subsidiarity action applies the “ordinary” procedure of the action for annulment. Starting with the analysis of Article 263 TFEU, to which Article 8 of Protocol No. 2 refers, I discuss the standing and grounds for subsidiarity action in the light of the action of annulment. Additionally, I explain the use of this procedure informally by national Parliaments in the past.

Regarding the standing in Article 263 TFEU, three types of applicants may lodge an action for annulment. The literature refers to these applicants as “privileged” (Member States, European Parliament, Council or Commission), “semi-privileged” (Court of Auditors, European Central Bank and Committee of the Regions) and “non-privileged” (natural or legal persons) (Wyatt Dashwood, 2011, p. 155). “Privileged applicants” represent public interest that requires judicial protection, “semi-privileged” protect their own institutional competences, whereas, as stated in Article 263 (4) TFEU, “non-privileged applicants” have to prove that an act is addressed to them or is a direct and individual concern or is a regulatory act, which is of direct concern to them and does not entail implementing measures. For the purpose of clarity, national Parliaments could be considered “indirect semi-privileged applicants”;⁴ “indirect” as they are not bringing the action themselves but through their governments, and “semi-privileged”, as the violation touches upon only one of their institutional prerogatives, namely the supervision of the observance of the principle of subsidiarity by EU institutions. Yet, it must be underlined that national Parliaments do not have an independent standing in the CJEU, thus the Treaty of Lisbon did not introduce any legally significant change in respect of standing.

Member States can, according to Article 8 (1) of Protocol No. 2, bring an action in response to an infringement of the principle of subsidiarity on behalf of their national Parliament or its chamber in accordance with national rules. The issue is, if the subsidiarity violation should be perceived as a new ground for an action of annulment. For all the applicants Article 263 (2) TFEU lists four general grounds of annulment: lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law related to their application, or misuse of powers. Subsidiarity breach easily falls within the scope of the infringement of an essential procedural requirement understood as the requirement of “EU legal acts to provide an adequate statement of the reasons on which they are based” or of the infringement of the Treaty, meaning that “an act contravenes a provision of the Treaty or is inconsistent with a parent measure” (Wyatt, Dashwood, 2011, p. 180). In the first case, the ground includes breaches of subsidiarity in the procedural sense, whilst the second one incorporates material breaches of subsidiarity (Cf. Estella, 2002, p. 106-114). Hence, subsidiarity violations do not present an additional ground in annulment

⁴ Thanks to Robert Schütze for pointing this to me.

proceedings. Moreover, national parliaments cannot invoke grounds other than subsidiarity in their actions. Namely, cases where national Parliaments would like to broaden the scope of their subsidiarity action and include, for example, a competence violation by the Commission seem to be excluded by the wording of Article 8 of Protocol No. 2. This provision clearly states that national Parliaments should base their actions “on grounds of infringement of the principle of subsidiarity by a legislative act”. However, the explicit indication of the scope of subsidiarity action may not satisfy national Parliaments. Albeit Article 6 (1) of Protocol No. 2 mentions only violations of the principle of subsidiarity in the ex ante form of subsidiarity scrutiny, national Parliaments tend to go beyond this limitation (Cf. Fabbrini, Granat, 2013). In sum, subsidiarity violation as a ground for an action is already included in the grounds listed in Article 263 (2) TFEU and national Parliaments should not extend their actions beyond subsidiarity infringements, relying on a simple reference to Article 263 TFEU by Protocol No.2.

As stated above, Article 8 of Protocol No. 2 makes subsidiarity action accessible for national Parliaments, but only indirectly. In fact, there is no separate standing for national Parliaments, yet their position, as I already mentioned before, may be viewed as “indirect semi-privileged applicants”. Additionally, action should be lodged within the two months deadline provided by Article 263 (6) TFEU.

The ex post subsidiarity scrutiny formally introduces national Parliaments into the system of EU judicial review, however an unofficial avenue was already used in the past. Namely, even before the Treaty of Lisbon entered into force, national Parliaments could induce governments into pursuing a subsidiarity violation in the CJEU. For example, in the case C-377/98, the Netherlands brought an action seeking the annulment of Directive 98/44 on the legal protection of biotechnological inventions.⁵ Directive 98/44 based on Article 100a EC Treaty (now Article 114 TFEU) aimed at protecting biological inventions through the patent laws of the Member States. The Dutch government stated clearly that it was acting at the “express request” of the Dutch Parliament, which was against genetic manipulation of animals and plants and issuing patents for the products of biotechnological procedures liable to promote such manipulation.⁶ In fact, one of the pleas invoked in the action was the breach of the principle of subsidiarity. Nonetheless, the Court dismissed the action of the Netherlands, applying the “national insufficiency test” and “comparative efficiency test” (Schütze, 2009, p.250). First, the objective of the Directive “to ensure smooth operation of the internal market by preventing or eliminating differences between the legislation and practice of the various Member States in the area of the protection of biotechnological

⁵ C-377/98, Kingdom of the Netherlands v European Parliament and Council of the European Union, Judgment of the Court of 9 October 2001, [2001] ECR I-07079.

⁶ Id. para.4.

inventions, could not be achieved by action taken by the Member States alone.”⁷ Second, “[a]s the scope of that protection has immediate effects on trade, and, accordingly, on intra-Community trade, it is clear that, given the scale and effects of the proposed action, the objective in question could be better achieved by the Community.”⁸

The example of the Dutch parliament seems to show that national Parliaments utilised their powers to influence the action of annulment already before the Treaty of Lisbon. The question remains: what is novel about Article 8 of Protocol No.2? It seems that the part of Article 8 of Protocol No. 2: “or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber thereof” - demanding establishment of national procedures for subsidiarity action - is the crucial and new issue. Article 8 of Protocol No. 2 does not formally but informally obligates Member States to create a new procedure at the national level. Mentioning the national legal order by Protocol No.2 should be an incentive for Member States to incorporate subsidiarity action with their national provisions and practice. The next part of this paper will take a closer look at national level procedures.

4. Ex post Review at the National Level

EU level provisions have granted national Parliaments some freedom to participate in ex post scrutiny. Yet, the effectiveness of this avenue seems to depend on national level adjustments. In the following part, I will explore how this system works in Member States. My selection of Member States is based on the impact of parliamentary scrutiny on government in EU affairs. Some national Parliaments, depending on available tools to control government, have great influence on the decisions taken by respective governments in the Council, whereas other national Parliaments are weaker scrutinisers. In detail, political science studies on the relationship between parliaments and their governments, when comparing tools available to national Parliaments to constrain governments in EU affairs, indicate three types of parliamentary scrutiny systems (Maurer, Wessels, 2001, p. 462). The strongest national Parliaments, including the Danish Folketing, followed by Finland, Austria and Sweden are able to mandate the government representative before the Council, and can be described as strong policy-makers, while Germany and Netherlands have slightly weaker power. Further, the French and UK parliaments are “modest policy-making

⁷ Id., para. 32.

⁸ Id.

legislatures”, whereas the weakest ones - Ireland, Belgium, Luxembourg, Italy, Portugal and Greece - are “not willing or able” to affect government positions on EU affairs.

For this paper, I will use the “prototypical cases” method and delve into the procedures of strong (Danish, Finish, German), modest (French and British) and weak (Luxembourgish, Italian and Spanish) parliaments (Hirschl, 2005, p. 126). The aim is to determine if and how the relationship between parliament and government on EU affairs has an impact on subsidiarity action. This factor seems to optimally assess subsidiarity action, as the ex post scrutiny relies mainly on submissions to the CJEU by national government according to national legal order.

In the first group of national Parliaments, the Danish Folketing and the Finish Eduskunta have a strong influence on EU affairs in comparison to other Member States (Hegeland, 2007, p. 95). Recent amendments of the Rules of Procedure in Finland state that the Grand Committee decides the Eduskunta position regarding an action before the CJEU by handing in a report and recommendation in the plenary session.⁹ If the Grand Committee finds a breach of subsidiarity, the parliament instructs the government to take action before the CJEU (COSAC Report, p. 136). Similarly, in Denmark, on the recommendation of the European Affairs Committee, a majority in the Folketing may decide to bring an action before the CJEU.¹⁰

Also, the German parliament is a powerful parliament *vis-a-vis* the government (Sprungk, 2007, p. 156, compare its relatively high scores of government scrutiny in the research conducted by Raunio, 2005, p.135). A judgement of the German Federal Constitutional Court in June 2009, confirmed the importance of the role of the Bundestag, or that the new institutional role of national Parliaments introduced by the Treaty of Lisbon does not rectify the legitimacy deficit in the EU,¹¹ as the reduced number of decisions demanding unanimity and supranationalisation of police and judicial cooperation in criminal matters diminishes the role played by national Parliaments’ in the EU decision making process.¹² Still, in the view of the Constitutional Court, only national Parliaments, and not the European Parliament, may safeguard democracy at the European level. In this respect, the Court introduced the new concept of “the responsibility for integration” (*Integrationsverantwortung*), applicable to all state organs, which have to ensure that the political systems of Germany and the EU remain in compliance with the principle of democracy according to the German Basic Law.¹³ It should be understood as a counterbalance to dynamic developments of European integration and the lack of direct legitimacy of secondary legislation (Schorkopf, 2009, p.

⁹ Reforming Law 1023/2009; Section 30 of the Rules of Procedure.

¹⁰ Report on Consideration of EU matters by the Folketing in relation to subsidiarity checks, 9th April 2010, European Affairs Committee 2009-10 EUU alm. del – Bilag 460 (annex 460) Public.

¹¹ Bundesverfassungsgericht, Case 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09, Decision of June 30, 2009 (Treaty of Lisbon), available at <http://www.bverfg.de>.

¹² Id., para. 293.

¹³ Id., para. 238 - 245.

723). In such a situation, the national parliament, as the state organ with the most legitimacy, should take over the responsibility for integration. The responsibility for integration guarantees the participation of the Bundestag and the Bundesrat not only for treaty changes but also compels these parliamentary chambers to “politically accompany” decisions taken by the EU (Nettesheim, 2010, p. 177).

Changes of national provisions had to be introduced to meet the obligation of the responsibility for integration. Even though the Federal Constitutional Court ruled that both the Act Approving the Treaty of Lisbon¹⁴ and the Act Amending the Basic Law (Articles 23, 45 and 93)¹⁵ were compliant with Basic Law, it ruled that the Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat,¹⁶ regulating the participation of the Bundestag and the Bundesrat in EU affairs, contradicts Article 38.1 in connection with Article 23.1 of the Basic Law. This act did not sufficiently safeguard the participation rights of the Bundestag and the Bundesrat. According to the Federal Constitutional Court, a new legal act should “take into account that they [the Bundestag and the Bundesrat] must exercise their responsibility for integration in numerous cases of dynamic development of the treaties”.¹⁷ The Court indicated how to shape the new provisions: to fulfil their role, the Bundestag and the Bundesrat should be equipped with appropriate powers at the national level.¹⁸ Regarding subsidiarity review, the Constitutional Court specifically stated that the effectiveness of the Early Warning Mechanism “depends on the extent to which the national Parliaments will be able to make organisational arrangements that place them in a position to make appropriate use of the mechanism within the short period of eight weeks”.¹⁹ The Court also expressed a concern regarding the scope of the action: if the action of the national Parliaments and of the Committee of the Regions will be extended to “whether the European Union has competence for the specific lawmaking project”.²⁰ During the summer of 2009, after the Federal Constitutional Court issued its judgement, Germany introduced new laws regulating the participation of the Bundestag and the Bundesrat. Nevertheless, these changes, according to some scholars, do not

¹⁴ *Zustimmungsgesetz zum Vertrag von Lissabon, Gesetz v. 8.10.2008 zum Vertrag von Lissabon v. 13.12.2007* BGBl. II 2008, 1038.

¹⁵ *Gesetz zur Änderung des Grundgesetzes Artikel 23, 45 und 93 v. 08.10.2008* BGBl. I 2009, 1926.

¹⁶ *Gesetz über die Ausweitung und Stärkung der Rechte des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union*, BT-Dr 16/8489.

¹⁷ Bundesverfassungsgericht, cited *supra* note 11, para. 411.

¹⁸ *Id.*, para. 411-419. However, the failure of the *Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat* was connected with the treaty amendment procedures and not on the subsidiarity review.

¹⁹ *Id.*, para. 305. The Court makes reference to Mellein, “Subsidiaritätskontrolle durch nationale Parlamente”, 2007, pp. 269 et seq.

²⁰ *Id.* The Court makes reference to Wuermeling, “Kalamität Kompetenz: Zur Abgrenzung der Zuständigkeiten in dem Verfassungsentwurf des EU-Konvents”, *EuR* 2004, p. 216-225 and von Danwitz, “Der Mehrwert gemeinsamen Handelns”, *Frankfurter Allgemeine Zeitung* of 23 October 2008, p. 8.

satisfy the core idea of the responsibility for integration and are not sufficiently transparent (Nettesheim, 2010, p. 182-3).²¹

Currently, for ex post subsidiarity review, the Basic Law, the new Responsibility for Integration Act²² and the Rules of Procedure of the Bundestag and the Bundesrat contain the necessary provisions. First, the federal government, according to §13 (7) IntVG, informs both the Bundestag and the Bundesrat as quickly as possible of the finalisation of the EU legislative process. This information includes an assessment of compatibility with the principles of subsidiarity and proportionality. Second, the right to bring an action to the CJEU for both of the chambers is anchored in the Basic Law, Article 23 (1a). For the Bundestag, an initiative requires one-fourth of members,²³ whereas the provisions remain silent on a comparable threshold in the Bundesrat.²⁴ Some authors point out that the one-fourth threshold is highly disputable since it does not express the right of the Bundestag as a chamber but in fact a right of a minority (Minderheitsrecht) (R. Uerpmann-Witzack, A. Edenharter, 2009, p. 313). Thus it entitles a minoritarian opposition to file an action. It is an issue whether the threshold is only an incentive to discuss bringing an action or if it results in bringing an action (the Bundestag would be obliged to take a resolution about bringing an action, Cf. Id, p. 314). Moreover, the idea of the minority initiative in German law is traditionally connected with situations, where the majority does not have an interest to be active (e.g. in the interrogation committee - Art. 44 I S.1 Basic Law). Further, the literature underlines the constitutional issues involved in the minority right (P. Mellin, 2011, p. 672-673). Namely, Art. 42 (2) S.1 and Art. 52 (3) S.1 Basic Law prescribes a general rule of majority vote, whereas Art. 23 (1a) S.3 provides a possibility of minority threshold regulated in details through an infra-constitutional act. Finally, another view stresses that a lower threshold is helpful in cases where the federal government aims at avoiding the national parliament by bringing a proposal to the Commission and deciding on it in the Council (I. Pernice and S. Hindegang, 2010, p. 408).

Third, returning to procedure, there are detailed regulations of the Bundestag initiative. The initiative should encompass essential grounds of an action,²⁵ and, interestingly, also the view of MPs who do not support the action, as long as they represent at least one-quarter of the

²¹ Nettesheim argues that the changes are limited to the direct consequences of the judgment and do not include, e.g. the parliamentary oversight in the application of energy competence by the EU (Article 194 TFEU).

²² *Integrationsverantwortungsgesetz* (BGBl. 2009 I, p. 3022).

²³ Article 23 (1a) Basic Law, §12 (1) IntVG, § 93d (2) of Rules of Procedure.

²⁴ § 12 (2) IntVG. This provision delegates to the Bundesrat to decide on the threshold in its Rules of Procedure.

However, the regulations have not been adjusted yet. Hence, the decision on issuing a subsidiarity action will be taken by a majority vote (Cf. P. Becker, D. Kietz, 2010, p. 20).

²⁵ § 93d (2) of Rules of Procedure.

Bundestag.²⁶ Fourth, the EU Affairs Committee is responsible for drafting an action and carrying out procedures in the Court.²⁷ Fifth, the Bundesrat may issue its own opinion on a Bundestag action.²⁸ Finally, if the deadline to raise the action falls in the period outside of the Bundestag working plan, the Basic Law (Article 45) authorises the EU Affairs Committee to file an action.²⁹ In the last step, the federal government immediately forwards the application to the CJEU.³⁰ At this point the role of the government is complete, and unlike in other Members States, the parliament representative continues the procedure.³¹

For modest scrutinisers, parliamentary democracy, which is the central characteristics of the UK political system, relies on the responsibility of ministers to the government. In order to mitigate the loss of powers at the EU level, the British parliament improved the internal procedures, introducing scrutiny reserve aimed at the control of ministers in EU affairs (Cf. Cygan, 2007, p. 172). However, compared to the Nordic Member States, this control is weaker. The modesty of the EU affairs scrutiny is also visible regarding ex post subsidiarity review. In the House of Lords, subsidiarity action first requires a report of the EU Committee, which the chamber will debate together with a resolution to pursue the action.³² The chamber will call on the government to bring this action before the CJEU.³³ The House of Commons' Standing Order does not directly foresee subsidiarity action.³⁴ Yet, currently, the parliament and the government are working on a Memorandum of Understanding about the implementation of Article 8 of Protocol No. 2.³⁵ The Government has made a commitment, in the event of such a resolution being passed, to bring the action on behalf of the House. So far, the government has also promised that it will lodge the action even if the UK has not been out-voted in the Council.³⁶

²⁶ §12 (1) IntVG, § 93d (3) of Rules of Procedure.

²⁷ §12 (4) IntVG, § 93d (1) Rules of Procedure.

²⁸ §12 (5) IntVG. This provision gives a possibility to the Bundestag to issue a reasoned opinion, if the Bundesrat has issued its own.

²⁹ However, a specialized committee may contradict: §93d (4) and §93b (2) Rules of Procedure.

³⁰ §12 (3) IntVG.

³¹ §12 (4) IntVG. The CJEU Statut (Art. 19 par. 1) indicates that an Agent has to represent Member States and EU institutions before the CJEU. The Agent may be assisted by an adviser or by a lawyer. Hence, as the Bundestag will not have an independent standing before the Court, it may probably arrange with the government to choose its own agent or lawyer on the basis of §12 (4) IntVG.

³² Companion to Standing Orders (2010), para 10.65.

³³ Id., para 10.64.

³⁴ Standing Orders of the House of Commons (2012).

³⁵ European Scrutiny Committee - Twenty-First Report, 28.11. 2012.

³⁶ Id. 7.6.

The bicameral French parliament has a weak position in the national political system, due to the transfer of important prerogatives from the legislative to the executive power in the Fifth Republic (Sprungk, 2007, p. 133). Yet, as the consequence of the Treaty of Maastricht, both of the chambers gained information rights regarding EU affairs, provided in Article 88-4 of the French Constitution. The Treaty of Lisbon caused a further constitutional reform regarding the powers of the parliament in EU affairs, including actions before the CJEU that are regulated at the constitutional level. Similar as the German Constitutional Court, the French Constitutional Council recognised the role of national Parliaments when it had to review, if the new competences of national Parliaments established by the Lisbon Treaty could be applied within the framework of the current provisions of the Constitution.³⁷ In the French case, besides the power of the French parliament to oppose certain aspects of family law subject to ordinary legislative procedure, ensuring compliance with the principle of subsidiarity required a revision of the Constitution to allow the parliament to exercise its functions. As a consequence, for the subsidiarity check, France added Article 88-6 to Title XV on the European Union.³⁸

First, Article 88-6 of the Constitution obliges the government to refer an action to the Court. Second, a resolution declaring a need for an action may be passed by a minimum of sixty members of the Assemblée, even when the parliament is not in session.³⁹ In the Assemblée, draft resolutions are admissible within a period of eight weeks after publication of the legislative act.⁴⁰ The procedure in the Sénat seems broader at the first glance:⁴¹ any senator may initiate an action against a European act for violation of the subsidiarity principle within eight weeks following its publication,⁴² but still sixty senators need to support the action.⁴³ The President of the Sénat transfers the resolution to the government.⁴⁴

The weak scrutinisers, including Spain, Luxembourg and Italy, seem to impose high hurdles on subsidiarity action originating from parliamentary chambers. Despite the detailed solutions for

³⁷ Conseil Constitutionnel, DECISION N° 2007-560 DC – December 20th 2007 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community. The Constitutional Council considered, in response to a request from the President of the Republic pursuant to Article 54 of the Constitution, whether the authorization to ratify the Treaty of Lisbon required prior revision of the Constitution. Interestingly, the Council invoked the principle of subsidiarity stating that: “implementation of this principle may not suffice to preclude any transfers of powers authorized by the Treaties from assuming a dimension or being implemented in a manner such as to adversely affect the fundamental conditions of the exercising of national sovereignty” (at p. 16).

³⁸ LOI constitutionnelle n° 2008-724 du 23 juillet 2008 de modernisation des institutions de la Ve République.

³⁹ Also Article 151-11 Rules of Procedure repeats that the government receives from the President of the Assemblée nationale an action lodged by at least sixty MPs.

⁴⁰ Résolution n° 292 du 27 mai 2009 adjusted the Rules of Procedure for the subsidiarity review, Article 151-9 Rules of Procedure.

⁴¹ Résolution du 20 décembre 2010 adjusted the Rules of Procedure for the subsidiarity review.

⁴² Article 73 nonies 1-2 Rules of Procedure.

⁴³ Article 88-6 of French Constitution.

⁴⁴ Article 73 octies 7 Rules of Procedure.

the action of annulment in Spain,⁴⁵ the system reflects the general weak position of the Spanish parliament, where the control of the Spanish government by Cortes Generales relies mainly on hearings, which do not ensure much control (Closa, 1996, p.141). Accordingly, where two parliamentary fractions or one-fifth of the members of the chambers initiated an action within two weeks of the publication of an act,⁴⁶ the Joint Committee, within six weeks, discusses and decides on the initiative.⁴⁷ Yet, the government can dismiss the action without stating any reasons. In this instance, the Presidium of the Joint Committee, two parliamentary fractions or one-fifth of the members of the chambers may only demand that the government explains its decision during one of the Joint Committee meetings.⁴⁸

Next, the Luxembourg Chambre des Députés is a low profile parliament in EU affairs due to a number of reasons. Traditionally, the parliament possesses very little controlling competences over the government, there are few controversies surrounding EU issues in Luxembourg and the capacity of both the central administration and the parliament itself is limited compared to the larger Member States (Bossart, 2001, p. 306). Not surprisingly then, the ex post subsidiarity review is not designed as an effective mechanism either. Namely, the Luxembourg parliament may launch a subsidiarity action only if its reasoned opinion is not taken into account.⁴⁹ The majority of MPs in a public session adopts, in such a circumstance, a motion to begin proceedings.⁵⁰ Moreover, some measures are also provided for cases when there is no planned public debate, so that the two-month limit may be respected. In such a case, the presidium of the Chambre des Députés takes the decision⁵¹ and invites isolated members to participate in the drafting of an action.⁵² Consequently, the presidium informs the chamber about the decision during the next public session.⁵³

Finally, in Italy, where the political system generally strengthens the executive at the

⁴⁵ Article 7, Ley 24/2009, de 22 de diciembre, de modificación de la Ley 8/1994, de 19 de mayo, por la que se regula la Comisión Mixta para la Unión Europea, para su adaptación al Tratado de Lisboa de 13 de diciembre de 2007 and the Resolución de las Mesas del Congreso de los Diputados y del Senado, de 27 de mayo de 2010, sobre reforma de la Resolución de las Mesas del Congreso de los Diputados y del Senado, de 21 de septiembre de 1995, sobre desarrollo de la Ley 8/1994, de 19 de mayo, por la que se regula la Comisión Mixta para la Unión Europea, para su adaptación a las previsiones del Tratado de Lisboa y de la Ley 24/2009.

⁴⁶ Article 7.2. Ley 24/2009, Resolución, Noveno, par. 1.

⁴⁷ The chambers may, however, decide within four weeks to take over the debate for a plenary session, Resolución, Noveno, par. 2 and par. 3. Additionally, alternative proposals for an action are also foreseen, as in the ex ante review. Resolución, Noveno, par. 2 in connection with Octavo par. 4-5.

⁴⁸ Article 7.3, Ley 8/1994, as amended by Ley 24/2009, Resolución, Noveno par. 4.

⁴⁹ Art. 169 (6) par. 1 Reglement de Chambre des Députés.

⁵⁰ Art. 169 (6) par. 2 Reglement de Chambre des Députés.

⁵¹ Art. 169 (6) par. 3 Reglement de Chambre des Députés.

⁵² Art. 169 (6) par. 3 Reglement de Chambre des Députés.

⁵³ Art. 169 (6) par. 3 Reglement de Chambre des Députés.

expense of the legislative, the transfer of power from the national to European level has additionally reinforced the “deparliamentarisation” of Italian politics (Magone, 2007. p. 119). Yet, the position of the Italian parliament seems to have improved recently. In 2012, the parliament approved the Act on the Italian participation in the EU, which significantly enhances the role of the Italian chambers in scrutinizing government action at the EU level, especially through extensive information rights and scrutiny reserve.⁵⁴ Above all, the new regulation specifies conditions for subsidiarity action. Accordingly, the government must submit actions issued by of chambers without any delay.⁵⁵ Most probably, however, the details of ex post subsidiarity procedure will be incorporated into the Rules of Procedure of the chambers. Currently, the Rules of Procedure do not grant the Camera dei Deputati the right to initiate subsidiarity action. Similarly, the Rules of Procedure of the Senato do not address subsidiarity action at all.

On the margin, it is worth mentioning that the participation of regional parliaments in the ex post subsidiarity scrutiny is characterised by even fewer or no regulations at all.⁵⁶ In Germany, a political agreement of the Ministerpräsidenten-Konferenz from 2005 decided that the action of one Land will be supported by all the other Länder (P. Becker, D. Kietz, 2010, p. 20). It seems that the Bundesrat may, however, represent the interest of a Land in this matter.⁵⁷ This is important, as the right of one Land or Länder as a group to bring an action may be seen as contrary to Article 8 of Protocol No. 2, if this is understood as listing an exclusive circle of applicants (Mellin, p. 675). Similarly, §12 (1)-(2) IntVG provides subsidiarity action only for each of the chambers. The additional value of this mechanism is that the Bundesrat, acting for the Länder without the intermediary government, “underpins the independent character of the action and corresponds with the structural difference between the action and the hitherto available possibility” (Mellin, p. 675).⁵⁸ In Italy, the government may fill actions to the CJEU on request of the Italian Regions and Provinces of Bolzano and Trento against illegitimate EU legislative acts concerning matters within the legislative competence of these bodies, if requested so by majority of their votes in the State-Regions Conference.⁵⁹ It might be assumed that Regions and Provinces of Bolzano and Trento will consider subsidiarity violations as illegitimate EU legislative acts.

⁵⁴ Art. 4 and Art. 10 Legge 24 dicembre 2012, n. 234 Norme generali sulla partecipazione dell'Italia alla formazione e all'attuazione della normativa e delle politiche dell'Unione europea.

⁵⁵ Art. 42.4 Legge 24 dicembre 2012, n. 234 Norme generali sulla partecipazione dell'Italia alla formazione e all'attuazione della normativa e delle politiche dell'Unione europea.

⁵⁶ Spanish, Finish and British laws do not provide for a role of the regional legislative bodies in the subsidiarity action.

⁵⁷ In a case where the Länder are affected by the action or omission of a EU institution in matters in which they have a legislative power, or where the federation does not have the legislative power, the federal government brings an action to the Court on the behalf of the Bundesrat. This is a general rule, not provided exclusively for subsidiarity violations, §7 (1) EUZBLG.

⁵⁸ Own translation.

⁵⁹ Notes to Art. 42 Legge 24 dicembre 2012, n. 234.

5. Comparison of Subsidiarity Action Provisions

Keeping in mind the differences between strong, modest and weak national Parliaments as indicated in the previous part, the following section will compare national provisions according to factors such as the number of parliamentarians required to lodge an action, the role of the government by transmission and representation of the national parliament before the CJEU. This analysis is helpful to identify the most vital aspects and in highlighting the hurdles of ex post scrutiny.

In some of the Member States, subsidiarity action is the right of a minority. In other words, the government will have to lodge an action on behalf of the parliament for a certain non-majoritarian number of the MPs. In France, the government is obliged to act when sixty members of *Assemblée nationale* or sixty members of the *Sénat* request it. Further, one-fourth of the members of the German Bundestag is needed to lodge an action in the CJEU. Accordingly, it must be underlined that leaving the initiative to the minority, which is most commonly the governmental opposition, improves the democratic control over the government during the EU decision-making process. Thanks to such a minoritarian tool, the opposition gains easier access to the scrutiny of the government, and hence the government whilst voting on legislative acts in the Council will pay more attention. Yet, national legal systems benefit only if the action is appropriate, namely when detecting a subsidiarity violation. Otherwise, the CJEU may face an enormous inflow of actions from opposition parties using subsidiarity action as a tool to fight with the government outside of the national arena, thus bringing internal conflicts to the EU level. This might be the *rationale* behind the Spanish scenario. Even though two parliamentary fractions or one-fifth of the members of the chambers in Spain may initiate an action within two weeks of the publication of an act, the government still decides if the action will be lodged.

Regarding the minoritarian action, it must be finally pointed out that it is difficult to imagine a minority directly submitting an action to the Court without any previous parliamentary discussion. Such a situation could contradict Article 8 of Protocol No. 2, identifying the subject eligible to bring the action. Article 8 foresees only a parliament or a chamber thereof (and the action is submitted in fact by a member state on their behalf) as eligible to lodge an action. As the discussion within the German doctrine tries to establish, Article 8 Protocol 2 seems to be against shaping the action as a minority right, as it contains a standing for national parliament and not a group of MPs or a party. Another problem is that in order to avoid that the action will be submitted under Article 263 (4) TFEU (standing for natural and legal person), it should be seen as an action of the whole parliament (Cf. arguments raised by R. Uerpmann-Witzack, A. Edenharter, 2009, p. 317).

Where the subsidiarity action is designed as a majority decision, it means, in fact, that the plenary – the governing party or coalition - determines the fate of the action. Accordingly, the whole parliament in Denmark, Finland and Luxembourg decides the fate of an initiative. On the one hand, the plenary debate may encourage more discussion of the principle of subsidiarity or even EU affairs in general. On the other hand, the majoritarian decision may, first, diminish the possibility of bringing an action within the prescribed time and second, as plenary voting implies a decision taken by a majority, it may contradict the idea of subsidiarity action as a minority action. As a result, additional scrutiny of the government through subsidiarity action may be easily misused. In sum, both the minoritarian and majoritarian type of subsidiarity action have their “lights and shadows.”

The rules on the transmission of subsidiarity actions provide for a possibility to overcome the problem of actions directed against the government instead of a violation of the principle of subsidiarity. In the Member States analysed, with the exception of Spain, government serves only as a “courier”. This shows that even though Member States might have been concerned with reserving subsidiarity action rights to a minority, they left it to the CJEU to decide on the admissibility of an action. The Court will filter out actions purely directed against the government and those that do not raise subsidiarity violations.

Finally, the self-representation before the CJEU is directly foreseen only for the German Bundestag, whereas the Italian provisions rightly refer to the rules of representation.⁶⁰ In reality, national Parliaments and governments will have to agree to representation by an agent, as foreseen by the CJEU Statute. Such a representation may help national Parliaments to overcome resource and expertise problems. Since governments have experience in action for annulment proceedings, their assistance may play an essential role. The direct right of Bundestag to have its own representative, on the one hand, is a step forward because it grants national Parliament some choice, distinguishing subsidiarity action within the action of annulment framework, but on the other hand, the CJEU Statute provisions limit this right. Another option, represented by Denmark, is that the government presents the case, but the delegation consists of participants from the Folketing, concerned governmental departments and the Ministry of Foreign Affairs, which also chairs the delegation. Thus, even if national Parliaments may not have a *locus standi* before the CJEU, Member States might shape their national provisions in a way that will allow the parliament more influence on the procedure.

The more general analysis of subsidiarity action, as well as the detailed description of the national procedures for subsidiarity action, seems to show a causal link between the parliaments categorised as weak EU affairs scrutinisers and the national provisions that create obstacles for

⁶⁰ Art. 42 par. 4 Legge 24 dicembre 2012, n. 234.

national parliaments (Spain, Luxembourg) or did not provide for procedure at all until very recently (Italy). Yet, parliament - government relations do not seem to establish a straightforward ground for the shape of subsidiarity action in strong and modest scrutinisers. The decision to lodge the action by the majority vote of MPs in Denmark and Finland might have its roots in the multiparty political system of those Member States: a subsidiarity action designed as a minority action could be seen as a tool to fight against the government that does not have a single-party majority or a stable coalition. Yet, the fact that the government will lodge the action without any margin of appreciation and the Danish possibility for the parliament to be a part of the delegation before the CJEU indicate that the strong impact of Nordic national Parliaments on EU affairs does not anticipate any obstacles from the government. Similarly, the strong German parliament, the Bundestag and to some extent the Bundesrat, have firm, constitutionally guaranteed rights to apply ex post subsidiarity scrutiny: minority action and the possibility of self-representation before the CJEU. Finally, the parliaments characterised as modest EU affairs scrutinisers - France and the UK – have differentiated regulations for subsidiarity action. In France, especially minority action is a big advantage to the French parliament. This might be a consequence of the decision of the Constitutional Council to strengthen the role of the parliament. In the case of the UK, the planned Memorandum of Understanding might elaborate on the scarce provisions regarding subsidiarity action in the House of Lords and provide the House of Commons with a similar right.

6. Conclusions

The purpose of this paper has been to analyse internal legislative organisation for ex post subsidiarity scrutiny. The aim was to assess how the position of national Parliaments in EU affairs impacts subsidiarity action. From the beginning of European integration, EU institutional reforms have influenced parliamentary functions. At first, the adjustments were connected with the shift of national competences to the EU level. In this respect, national Parliaments have established EU Affairs Committees to scrutinise their governments, as well as to implement EU law. However, with the Treaty of Lisbon, when parliaments received new functions, suitable new procedures were required. As a consequence of the Lisbon Treaty, constitutional and infra-constitutional changes had to be introduced for subsidiarity review, which in the literature is one of the most essential and disputed new functions.

As I have demonstrated in this paper, Member States have offered different models for the regulation of ex post subsidiarity review, depending on the role of national Parliament in EU affairs and its relation to the national government. Unsurprisingly, weak EU affairs scrutinisers did not gain effective powers and their ex post subsidiarity review will be limited by the role played by the government. The national Parliaments, with a strong position towards the government in EU affairs, have retained a significant role in subsidiarity review. The government cannot pose any obstacles, however, in Denmark and Finland, probably due to the multi-party system, a majority of MPs must bring an action. The most effective procedure is provided for the German Bundestag – both a minority action and right of self-representation before the CJEU. Definitely, the German Constitutional Court is constantly increasing the role of this parliament in EU affairs. Finally, from the modest EU affairs scrutinisers, only the position of the French parliament has improved, as a minority of MPs can lodge a subsidiarity action. Yet, in both cases, parliaments win, as the government has to act as a “courier” for their actions.

Since ex post review has not been applied yet, it is difficult to predict if and how national provisions will be enforced. It remains to be seen if national Parliaments are well equipped to challenge EU legislative acts before the Court. As my analysis shows, the right to initiate action, the role of plenary, transmission of an action and the representation before the Court are all crucial points. Whether the subsidiarity action will evolve from a “science-fiction instrument” to a hard system of ex post control of subsidiarity depends, however, on the determination of parliaments. Then, subsidiarity action could become, next to “yellow” and “orange,” a “red card.”

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