



HOUSE OF LORDS

Procedure Committee

2nd Report of Session 2009–10

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The Procedure Committee

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Contacts for the Procedure Committee

All correspondence should be addressed to the Clerk to the Procedure Committee, House of Lords, London, SW1A 0PW.

The telephone number for enquiries regarding the Committee's work is 020 7219 8796.

2ND REPORT OF SESSION 2009–10 FROM THE PROCEDURE COMMITTEE

The Lisbon Treaty: procedural implications

1. We have considered a memorandum by the Leader of the House, outlining her proposals for the implementation of new powers and scrutiny arrangements arising as a result of the coming into force of the Treaty of Lisbon on 1 December 2009; the commencement of the European Union (Amendment) Act 2008; and commitments made during the passage of that Act by the then Leader of the House, Baroness Ashton of Upholland, on 9 June 2008. The Leader's proposals were endorsed by the Chairman of the European Union Committee, Lord Roper.
2. The new powers exist in respect of:
 - The right of each national Parliament or chamber thereof to challenge draft EU proposals on grounds of subsidiarity (Article 6 of the Protocol on the application of the principles of subsidiarity and proportionality, hereafter referred to as “the Protocol”);
 - The right of each national Parliament or chamber thereof to ask national Governments to challenge recently adopted EU legislation on subsidiarity grounds, by bringing cases before the European Court of Justice (Article 8 of the Protocol);
 - The requirement that before voting for or supporting a decision to move any EU Treaty provision from a procedure requiring unanimity to one involving qualified majority voting or co-decision¹ (i.e. a “passerelle” clause), the Government must secure the approval of each House of Parliament (section 6 of the European Union (Amendment) Act 2008).
3. These powers are exercisable by each House independently. In respect of subsidiarity, each House has the right either to challenge a draft EU proposal or to ask the Government to take a case to the European Court of Justice. In respect of passerelle clauses, each House has the right to withhold its approval and thereby block the Government's proposed course of action.
4. The commitments made by Baroness Ashton of Upholland on 9 June 2008 related to enhanced scrutiny by the EU Committees of the two Houses of Government decisions on whether or not to “opt in” to proposals in the area of Justice and Home Affairs.
5. We expect the procedures described below to be used relatively seldom, though it is impossible to make firm estimates. Decisions on timetabling debates under these procedures will of course be a matter for the Usual Channels, in consultation with other interested parties. This Committee will keep the operation of the procedures under review.

¹ “Co-decision” has been renamed, following the coming into force of the Lisbon Treaty, as “ordinary legislative procedure”; similarly, the term “justice and home affairs” has become the “Area of Freedom, Security and Justice”. However, we have used the older and more familiar terms in this report.

Challenging EU proposals on grounds of subsidiarity

6. We recommend the following procedures, as proposed by the Leader of the House and endorsed by the EU Committee:
 - Where the EU Committee comes across an EU legislative proposal that it considers does not comply with the principle of subsidiarity, it will produce a report on the proposal, containing a “reasoned opinion” to this effect. The Committee will recommend its report for debate by the House.
 - The report will be debated in the usual way, on a “take note” motion in the name of the Chairman or a Member of either the Select Committee or the relevant Sub-Committee.
 - The “take note” motion will be debated jointly with a second, free-standing motion inviting the House to support the reasoned opinion contained in the report and instructing that it be forwarded to the Presidents of the EU institutions on behalf of the House. This motion will be amendable and divisible. At the end of the debate the second motion will normally be moved formally, but if there are amendments these will be dealt with in the usual way.
7. The motions would be in the following form:

The following two motions are expected to be debated together:

Lord [name] to move that this House takes note of the Report of the European Union Committee on the XYZ Directive (1111/09) (First Report, HL Paper 10).

Lord [name] to move to resolve that this House considers that the XYZ Directive (1111/09) does not comply with the principle of subsidiarity, for the reasons set out in the First Report of the European Union Committee (HL Paper 10); and, in accordance with article 6 of the Protocol on the application of the principles of subsidiarity and proportionality, instructs the Clerk of the Parliaments to forward this reasoned opinion to the Presidents of the European institutions.
8. This procedure assumes the publication of a report by the EU Committee, and we expect that this would be the normal practice, as the EU Committee’s routine scrutiny of EU legislative proposals includes an assessment of their consistency with the principle of subsidiarity. However, it would remain open to any Member of the House to table a free-standing motion along the lines set out in the second motion above, replacing the reference to the EU Committee report with a short, self-contained “reasoned opinion”, as required by the Protocol.
9. We note that the Protocol sets an eight-week deadline for the completion of the above procedure, counting from the date on which the draft legislative proposal is transmitted to national Parliaments in the official languages of the Union. This deadline could potentially create difficulty, particularly in the event of a proposal being transmitted shortly before the summer recess. We understand that the European Commission has given a commitment that the month of August should not count towards this eight-week period. The Government has also agreed to propose to other Council Members that the Council would not, under normal circumstances, place a qualifying proposal on its agenda for eight weeks, plus the four weeks of August where they fall

within the eight week period after adoption of the proposal by the Commission. On this basis, we recommend adoption of this approach, subject to review if the timetable proves unworkable.

10. Finally, we welcome the commitment by the Europe Minister, Mr Chris Bryant MP, in a letter to Lord Roper, that the Government will not support a proposal in the Council of Ministers which has been the subject of a reasoned opinion from either House without first further communicating to Parliament their reasons for doing so.

Challenging EU legislative acts on grounds of subsidiarity

11. We recommend essentially the same procedures as those we have described above, except that in this case the procedures would apply in respect of newly adopted EU legislative acts, at the post-legislative stage, rather than in respect of draft proposals at the pre-legislative stage. The motions would be worded as follows:

The following two motions are expected to be debated together:

Lord [name] to move that this House takes note of the Report of the European Union Committee on Directive 2009/10/EC on XYZ (First Report, HL Paper 10).

Lord [name] to move to resolve that this House considers that Directive 2009/10/EC on XYZ infringes the principle of subsidiarity, for the reasons set out in the First Report of the European Union Committee (HL Paper 10); and calls on Her Majesty's Government to bring an action on these grounds before the European Court of Justice.

12. We welcome the Government's commitment, in the event of such a motion being agreed by either House, to take the case forward on behalf of the House concerned, though we would expect the costs to fall upon the House. We also recommend that the same principles apply to motions of this type as have been outlined in paragraph 8 above. However, we note that the issue of summer recesses is less acute in this case, as the deadline is longer (two months and 10 days) and there is likely to be more advance warning.

Seeking approval for the use of "passerelle" clauses

13. Under section 6 of the 2008 Act, the approval of each House of Parliament is required before the Government may support the use of one of the "passerelle" clauses in the Treaties. Passerelle clauses are Treaty provisions allowing Member States to decide, by unanimity, to move to Qualified Majority Voting and/or co-decision with the European Parliament in a specified policy area. According to the Act, approval is only given if "each House agrees to the motion without amendment".
14. The motion, which would be moved by a Government minister, would be as follows:

Lord [name] to move that, in accordance with section 6 of the European Union (Amendment) Act 2008, this House approves Her Majesty's Government's intention to support the adoption of draft Council Decision 1111/09."
15. It would of course be possible for a Member to call "not content" when the question was put a second time. However, it would, we believe, be

undesirable for a Member to precipitate a division on such a motion without giving advance notice. We therefore recommend that notice of opposition should be required, by means of an amendment in the following form:

Lord [name] to move, as an amendment to the above motion, to leave out “approves” and insert “declines to approve”.

16. Given the requirement in the 2008 Act that a motion for approval should be agreed to “without amendment”, we recommend that no other type of amendment should be admissible.
17. Finally, we welcome the Government’s assurance that, save in exceptional circumstances, they expect there to be sufficient “lead-in” time for the EU Committee or any other committee to have the opportunity to make its views known before the House is asked to approve use of a “passerelle” clause.

Scrutiny of Justice and Home Affairs (JHA) opt-ins

18. Baroness Ashton of Upholland, in her statement on 9 June 2008,¹ gave an undertaking that the Government would take account of the views of the EU Committees of each House as to whether or not the United Kingdom should opt in to a specific JHA proposal, providing that any such views were forthcoming within eight weeks from publication of the proposal.² The Government would, as a general rule, not make any formal notification to the Council of a decision to opt in within this scrutiny period, except where an earlier opt-in decision was necessary, in which case the Government would explain their reasons to the Committee as soon as possible. Baroness Ashton’s statement noted that, as with all EU legislative proposals, it would be open to the EU Committees to make a report to the House, and recommend it for debate. The Government undertook that it would seek to arrange debates on such reports through the Usual Channels, on a motion that would be amendable.
19. The Leader of the House has now proposed that the motion, to be tabled in the name of either the Chairman or another Member of the Committee or Sub-Committee, should be as follows:

Lord [name] to move that this House agrees the recommendation of the European Union Committee that Her Majesty’s Government [should/should not] exercise their right, in accordance with the Protocol on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, to take part in the adoption and application of the proposed XYZ Directive (1111/09) (First Report, HL Paper 10).
20. We note also that the European Union Committee has in fact already published a report of this type, which was debated in accordance with the procedure now recommended.³

¹ See European Union Committee, *Enhanced scrutiny of EU legislation with a United Kingdom opt-in*, 2nd Report, session 2008–09 (HL Paper 25).

² The time-limit within which the United Kingdom must notify the Council of its decision is three months from publication.

³ European Union Committee, *Asylum directives: scrutiny of the opt-in decisions* (First Report, Session 2009–10, HL Paper 6). The report was debated on 12 January 2010, and the motion calling on the Government to opt into the two directives was disagreed to on division.

Conclusion

21. **We recommend the above proposals to the House.**

Standing Order 19

22. Standing Order 19 describes the procedure for the election of the Lord Speaker. Standing Order 19(2) states that “All members of the House shall be entitled to stand for election and to vote, save that (a) Lords who have not taken the Oath in the current Parliament, or who are on Leave of Absence, may not stand or vote”.
23. At the time the Standing Order was agreed, in 2006, there was, for most practical purposes, only one relevant statutory disqualification for members of the House, namely that applying to bankrupts.¹ Since 2006 two additional disqualifications have been created, in relation to Members of the European Parliament and holders of disqualifying judicial office.² As a result, a total of 17 members of the House are currently disqualified by statute from taking any part in proceedings.
24. In addition, in May 2009 the House established that it possessed the power to suspend Members for a defined period not longer than the remainder of the current Parliament.³
25. In most cases, members who are disqualified will not have taken the Oath, and will therefore be covered under the present terms of the Standing Order. However, for the avoidance of doubt, we propose the Standing Order should specify that, like members on Leave of Absence, members who are either disqualified or suspended are not entitled to stand for election as Lord Speaker or to vote. **We therefore recommend the addition of the words highlighted in bold below in Standing Order 19(2):**

“All members of the House shall be entitled to stand for election and to vote, save that (a) Lords who have not taken the Oath in the current Parliament, **who are subject to statutory disqualification, who are suspended from the service of the House,** or who are on Leave of Absence, may not stand or vote”.

Private notice questions

26. Paragraph 5.29 of the *Companion*, on private notice questions (PNQs), states that “The decision whether the question is of sufficient urgency and importance to justify an immediate reply rests in the first place with the Speaker, after consultation, and ultimately with the general sense of the House.” Paragraph 5.30 goes on to describe the procedure whereby the Lord Speaker’s initial decision can be challenged:

“5.30 If a member of the House challenges the preliminary decision of the Lord Speaker on the question of urgency, they should:

- (a) give as much notice as possible to the Speaker that they propose to challenge the preliminary decision in the House; and

¹ By virtue of the Insolvency Act 1986, as amended.

² By virtue of the European Parliament (House of Lords Disqualification) Regulations 2008 and section 137 of the Constitutional Reform Act 2005 respectively.

³ Committee for Privileges, First Rpt, session 2008–09 (HL Paper 87).

- (b) make clear to the House, when rising to ask for leave to ask the question, that they are appealing to the House for support against the preliminary decision of the Speaker.”
27. We have now reconsidered the procedure for challenging the Lord Speaker’s decision, on the basis of a memorandum by the Clerk of the Parliaments. He points out that the procedure has for many years been largely ineffectual: records show that no challenge has ever been upheld on the floor of the House on the same day, though in one or two cases an identical PNQ has been allowed the following day. Moreover, until 2006 the role assigned to the Lord Speaker was performed by the Leader of the House, and while the Leader was able to defend his or her decision on the floor of the House, the Lord Speaker cannot do so; nor would it be appropriate for her either to defend her decision herself or to delegate this task to a representative. The Clerk of the Parliaments has accordingly invited us to consider whether the Lord Speaker’s decision in respect of the admissibility of PNQs should henceforth be made final.
28. We were unable to reach agreement on this proposal, though a majority of the Committee supported a change that would make the Lord Speaker’s decision final and remove the procedure for challenging her decision on the floor of the House. But we are agreed that on a matter such as this the final decision must be taken by the House as a whole. In order to enable the House to take this decision, **we therefore recommend that the Lord Speaker’s decision in respect of the admissibility of PNQs be made final.**
29. If the House agrees this recommendation, the next edition of the *Companion* will be amended accordingly.

Guidance on motions and questions

30. As part of the process of reviewing the text of the *Companion*, we have considered the guidance on the content and wording of questions and motions (paragraphs 5.11-5.19 of the *Companion*). This guidance has not been reviewed for many years, and we believe that the lack of a comprehensive and authoritative guide could create difficulty for members, members’ research staff, and the staff of the House—particularly as the number of questions for written answer being tabled has increased threefold since 1997, and continues to increase. We believe that the time has come for the guidance to be reviewed.
31. The Clerk of the Parliaments has therefore put forward revised guidance, which is annexed to this report. We fully endorse the revised guidance, which is significantly more consistent and more comprehensive than that found in the current *Companion*. At the same time we emphasise that it contains nothing new: it is a summary of existing rules and conventions, which already form the basis of the advice given by the clerks to members. Moreover, nothing in this revised guidance affects the fundamental principle of self-regulation. It will remain the case that “the advice tendered by the Clerks should be accepted”; but also that “there is no official who has authority to refuse a question or motion on the ground of irregularity.” Members will continue to be responsible for the form in which their questions and motions appear in *House of Lords Business*, “subject to the sense of the House which is the final arbiter.”

32. **We have therefore agreed that the revised guidance set out in the annex to this report should be incorporated in the next edition of the *Companion*, in place of paragraphs 5.11-5.19 of the 2007 text.**

ANNEX: PROPOSED GUIDANCE ON QUESTIONS AND MOTIONS

Questions and Motions: general principles

5.11 Questions and motions are expected to be worded in accordance with the practice of the House. The Clerks are available to assist members in drafting questions and motions, and the advice tendered by the Clerks should be accepted.¹ However, there is no official who has authority to refuse a question or motion on the ground of irregularity. Members are responsible for the form in which their questions and motions appear in House of Lords Business, subject to the sense of the House which is the final arbiter.

5.12 It is open to any member of the House to call attention to a question or motion which has appeared on the order paper and to move that leave be not given to ask the question or move the motion, or to move that it be removed from the order paper. Such a motion should only be used in the last resort; it is debatable and is decided by the House.²

Questions

The nature of parliamentary questions

5.13. The purpose of parliamentary questions is to elicit information from the Government of the day, and thus to assist Members of both Houses in holding the Government to account. The House has resolved that it is of “paramount importance” that Ministers should give “accurate and truthful” information to Parliament, and that they be as “open as possible” in answering questions.³ Such requirements are inherent in ministerial accountability to Parliament. A parliamentary question is not a “request for information” under the Freedom of Information Act 2000.

Form and scope of questions

5.14. Parliamentary questions should relate to matters of Government responsibility. Questions should be as short and clear as possible and are drafted so as to be precise in their requests for information. Statements of fact should be included in questions only to the extent necessary to elicit the information sought. Questions should be worded neutrally, and should not presuppose their own answer. They should not contain expressions of opinion or argument.

5.15. Questions are normally addressed to “Her Majesty’s Government”, rather than to a particular Department or Minister. It is for the Government to decide which Department or Minister should answer a particular question. There are certain exceptions, including oral questions addressed to Secretaries of State sitting in the House of Lords in a designated question time such as that agreed by the House on a trial basis in December 2009. Such questions are addressed to “the Secretary of State for [Department]”. For questions addressed to the Leader of the House or the Chairman of Committees see below, paragraph 5.20.

¹ Procedure 1st Rpt 1985-86.

² LJ (1982-83) 108.

³ LJ (1996-97), 404.

5.16. In drafting a question, thought should be given to the nature and scope of the response:

- Oral questions are not intended to give rise to debate, and should be drafted in such a way that the Minister can make his or her initial reply in no more than 75 words. Proceedings on each question, including supplementary questions and answers, are normally limited to a total of seven or eight minutes.
- Questions for written answer should usually be answerable using no more than two columns of Hansard. The Government applies a “disproportionate cost threshold”, currently set at £800,¹ to written questions, and may decline to answer questions where the cost of answering would exceed this figure.
- Questions for Short Debate give rise to debate lasting 1 or 1½ hours, and may therefore be broader in scope than other types of question.

What makes a question inadmissible?

5.17. Although the House allows more latitude than the House of Commons, questions are generally regarded as inadmissible if they fall into one or more of the following categories:

- Questions that cast reflections on the Sovereign or the Royal Family.
- Questions that relate to matters sub judice.
- Questions that relate to matters for which the Church of England is responsible.²
- Questions that relate to matters devolved to the Scottish Parliament, the Welsh Assembly or the Northern Ireland Assembly.
- Questions that contain an expression or a statement of opinion, or whose purpose is to invite the Government to agree to a proposition, or to express an opinion. It is not in order to italicise or underline words in the text of motions or questions in order to give them emphasis.³
- Questions that are phrased offensively. The principles of Standing Order 33 (asperity of speech) also apply.

Government responsibility

5.18. In addition, questions which are not matters for which the Government are responsible are regarded as inadmissible. In judging Government responsibility, Members should take account of the following guidance:

- Questions should relate to ministers’ official duties, rather than their private affairs or party matters.
- Where Government functions are delegated to an executive agency, accountability to Parliament remains through ministers. When a minister answers a parliamentary question, orally or in writing, by reference to a letter from the chief executive of an agency, the minister remains

¹ HL Deb., 20 January 2010, col. WS60.

² Procedure 2nd Rpt 1989-90.

³ Procedure 1st Rpt 1985-86, 9th Rpt 1970-71.

accountable for the answer, which attracts parliamentary privilege, and criticism of the answer in the House should be directed at the minister, not the chief executive.

- Questions should not ask about opposition party policies.
- Questions should not ask the Government for a legal opinion on the interpretation of statute or of international law, such matters being the competence of the courts.
- Questions should not ask about matters which are the particular responsibility of local authorities or the Greater London Assembly.
- Questions do not ask about the internal affairs of another country (save for questions about human rights or other matters covered by international conventions to which the United Kingdom is party).¹
- In general, questions should not contain accusations against individuals. The names of individuals or bodies are not introduced into questions invidiously or for the purpose of advertisement.
- Questions should not ask the Government about the accuracy of statements in the press, where these have been made by private individuals or bodies.
- Questions should not ask about events more than 30 years ago without direct relevance to current issues.
- The tabling of questions on public utilities, nationalised industries and privatised industries is restricted to those matters for which the Government are in practice responsible.
- Questions should not be hypothetical, and should address issues of substance. Questions which are “trivial, vague or meaningless”² are not generally tabled.

Questions relating to the business of either House

5.19. The Government are not responsible for the business or decisions of either House of Parliament. Questions should not criticise the decisions of either House.

5.20. In respect of the House of Lords, questions may be addressed to certain Members of the House as holders of official positions but not as members of the Government. Thus the Leader of the House has been questioned on matters of procedure, and the Chairman of Committees on matters falling within the duties of his office or relating to the House Committee and other domestic committees.

5.21. Questions are not tabled about the internal affairs of the House of Commons. Questions should not ask about House of Commons select committee reports to which the Government have yet to publish their response. Nor do questions usually refer to evidence given before a Commons select committee.

¹ See also *Erskine May* (23rd edition), p 348.

² *Erskine May* (23rd edition), p 353.

Wording of questions

5.22. The Clerks can advise on how questions may be amended to conform to House style—for instance, the use of punctuation and abbreviations, the standard form for references to previous answers, and so on. Questions should use plain English and should generally be understandable without reference to other documents (with the exception of Hansard).