



University of Dundee

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Churchill, Robin

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THEY'RE SCOTLAND'S FISH! IMPLICATIONS OF BREXIT FOR SCOTS FISHERIES

LAW

*Robin Churchill**

A. INTRODUCTION

The law relating to freshwater fishing in Scotland is purely of national origin and so will not be affected by Brexit. By contrast, most of the law governing sea fishing in the waters around Scotland, and a significant part of the law relating to salmon farming and other forms of aquaculture, is European Union (EU) law. The aim of this note is to examine how this will change following the United Kingdom's withdrawal from the EU.

In order to understand this change, it is necessary to know something about the current situation. That is outlined in the first part of this note, looking in turn at the EU's Common Fisheries Policy and then at Scots law. The second part of the note discusses what is likely to happen after Brexit. This must necessarily be rather speculative, given the state of the Brexit process at the time of writing (late-September 2017). The discussion is based on the assumption that Scotland will leave the EU at the same time as the rest of the United Kingdom, and that whatever arrangement for the future relationship of the United Kingdom to the EU is eventually agreed will apply to Scotland, notwithstanding the fact that the Scottish Government may wish otherwise.

B. THE CURRENT SITUATION

1. The EU's Common Fisheries Policy

The EU has had competence to regulate sea fishing ever since its inception as the European Economic Community in 1958.¹ In a case decided in 1981, the European Court of Justice held that that competence was largely exclusive,² a ruling eventually codified by the Treaty of Lisbon (2007) as Article 3(1)(d) of the Treaty on the Functioning of the European Union. This provides that the EU has “exclusive competence” in relation to “the conservation of marine biological resources under the common fisheries policy”. The term “conservation” has never been defined either by the Court or the EU legislature. In practice it has been interpreted widely to include most kinds of fisheries management measures.

By the early 1980s the EU had developed a fully-fledged Common Fisheries Policy (CFP). The CFP has taken legislative form as a so-called basic regulation, which has been replaced and renewed at roughly ten year intervals,³ supplemented by a large number of other regulations. Under EU law regulations are directly applicable in all Member States and therefore do not require implementation at the national level. The matters covered by this mass of legislation include: access to fishing grounds, conservation measures (including the setting each year of total allowable catches divided into quotas allocated to individual Member States), adjusting capacity (i.e. placing limits on the number and/or size of vessels

* *Emeritus Professor of International Law, University of Dundee*. I am grateful to my colleague, Professor Colin Reid, for comments on an earlier draft of this note. The usual disclaimer applies.

¹ Treaty establishing the European Economic Community, 1957, art 38 and Annex II.

² Case 804/79 *Commission v. United Kingdom* [1981] ECR 1045.

³ The current version of the basic regulation is Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, OJ 2013 L354/22.

permitted to fish), aquaculture, marketing, enforcement of EU measures and relations with third States.⁴

The consequence of the EU's exclusive competence is that EU Member States may legislate on sea fisheries only to the extent that such a power has been delegated to them. Such delegation has been provided to a limited degree, primarily in the basic regulation.⁵ Member States are also required to take various forms of administrative action to give effect to the policy at the national level and to enforce EU measures.

2. Scots Law

Since devolution in 1998, the “regulation of sea fishing” within the 200 nautical mile (nm) limit around Scotland,⁶ as well as beyond that limit in respect of fishing vessels registered at a Scottish port, has been a devolved matter, and thus within the competence of the Scottish Parliament and Scottish ministers.⁷ However, because of the restrictions on the competence of EU Member States to legislate for fisheries that were outlined above, the Scottish Parliament and Scottish ministers have been able to exercise their powers to regulate sea

⁴ For a succinct and recent overview of the CFP, see European Commission, *The Common Fisheries Policy*, available at <https://ec.europa.eu/fisheries/cfp/>.

⁵ Reg 1380/2013, arts 11, 13, 19 and 20.

⁶ Although it is commonly referred to as the 200 nm limit, the limit in fact extends to a full 200 nm only to the west of Scotland. Elsewhere, because of the location of neighbouring countries, the limit extends to less than 200 nm and is defined precisely in maritime boundary agreements between the United Kingdom and Ireland, Denmark (in respect of the Faroe Islands) and Norway.

⁷ Scotland Act 1998, ss 29, 56 and 126(1) and Sch 5, para C6.

fishing to only a limited degree. Consequently at the present time there is no proper legal framework on which to construct a system for the sustainable management of Scottish fisheries after Brexit. Nevertheless, the Scottish government has been required to administer and enforce EU fisheries law in the 200 nm limit around Scotland, a task primarily carried out by a Scottish government directorate, Marine Scotland. To that extent there is some management experience to build on after Brexit.

C. THE POSITION AFTER BREXIT

Once the United Kingdom withdraws from the EU, it will obviously no longer be subject to the CFP. Even if the United Kingdom succeeds in negotiating an agreement with the EU that meets the Prime Minister's aspiration of a "deep and special partnership",⁸ it is very unlikely to include the CFP or some similar arrangement. That can be predicted with considerable certainty from the fact that the closest association that the EU currently has with third States, the Agreement on the European Economic Area between the EU and three members of EFTA,⁹ does not cover fisheries.

The very extensive body of fisheries (and other) law that the EU has adopted will no longer apply, *qua* EU law, to the United Kingdom after Brexit. One possible means of ensuring that UK fisheries (and other matters governed by EU law) continued to be regulated

⁸ Department for Exiting the European Union, *Legislating for the United Kingdom's Withdrawal from the United Kingdom*, Cm 9446 (2017), 5; repeated in the Prime Minister's speech given at Florence on 22 September 2017, available at <https://www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu>.

⁹ OJ 1994 L1/1.

after Brexit would have been for the Westminster and Scottish Parliaments to have engaged in a massive exercise of replacing EU fisheries (and other EU) law with home grown alternatives. That would have had to be done in the two year period between the United Kingdom giving notice that it was withdrawing from the EU and that notice taking effect on 29 March 2017. However, to avoid such a huge and rushed exercise that might well not have been completed in time, thus leaving large and undesirable gaps in the law, the UK Government has adopted a different approach by providing in the European Union (Withdrawal) Bill for EU law to continue to apply in the United Kingdom after Brexit.¹⁰

As mentioned above, EU fisheries law is almost entirely in the form of regulations. It thus constitutes “direct EU legislation” for the purposes of the Bill.¹¹ Under clause 3(1) such legislation in force on the day that the United Kingdom leaves the EU will continue to apply in the United Kingdom and will be known as retained EU law. Clause 7(1) of the Bill gives ministers the power to make regulations to “prevent, remedy or mitigate . . . any failure of retained EU law to operate effectively or any other deficiency.” Clause 7(2) gives a non-exhaustive list of deficiencies, including legislation that has no practical application to the United Kingdom, confers functions on EU bodies, or is dependent on the United Kingdom’s membership of the EU and “no longer appropriate.” EU fisheries law has a large number of such characteristics, or “deficiencies” to use the language of the Bill. There will thus be a need to adopt a substantial number of regulations under clause 7 to weed out “deficiencies”

¹⁰ The Bill was published on 13 July 2017 and received its second reading in the House of Commons on 12 September 2017. The discussion of the Bill that follows is based on the text of the Bill when published. That text is available at <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/18005.pdf>.

¹¹ European Union (Withdrawal) Bill cl 3(2).

and to provide for the mechanisms and structures to determine fisheries policy and give effect to necessary management measures. Clearly ministers concerned with fisheries will be busy after Brexit, especially as there is a two-year limit for making regulations under clause 7.¹²

The question is, which ministers will they be? One might have thought that as the regulation of sea fishing is a devolved matter, they would be Scottish ministers in the case of regulations applying to Scottish waters. However, as the Bill is currently drafted, that is not the case. The Bill amends the Scotland Act to provide that only UK government ministers have the power to make regulations to remedy “deficiencies” in direct EU legislation, not Scottish ministers or the Scottish Parliament.¹³ Similar provisions are made for Wales and Northern Ireland. Scottish ministers will, however, have the power to make regulations amending existing EU-derived legislation (as defined in clause 2 of the Bill), but this will be of far less practical significance than the power to amend direct EU fisheries legislation.¹⁴ The Explanatory Notes accompanying the Bill seek to justify this approach as being “a transitional arrangement while decisions are taken on where common policy approaches are or are not needed.”¹⁵ If a common policy is not needed, the UK Government will make an order removing the restrictions on modifying retained EU law.¹⁶

¹² Ibid, cl 7(7).

¹³ Ibid, cl 10 and 11, Sch 2, para 3 and Sch 3, para 1(b).

¹⁴ Ibid, cl 10 and Sch 2, paras 1 and 2.

¹⁵ European Union (Withdrawal) Bill, Explanatory Notes, para 34, available at <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/en/18005en.pdf>. See also *Legislating for the United Kingdom’s Withdrawal* (n 8) at paras 4.3 and 4.4, which speak of the need for a “common framework”.

¹⁶ Ibid, para 36.

It may well be that the UK Government will decide that a common policy is needed for fisheries, at least beyond the 12 nm limit, because of the international aspects of regulating fisheries. Many of the fish stocks around the coasts of the United Kingdom are “shared”, that is to say they are found in the maritime zones of both the United Kingdom and neighbouring States, including other EU Member States, Norway and the Faroe Islands. If such stocks are to be managed sustainably, there needs to be cooperation between the States concerned. Currently such cooperation takes place within the framework of bilateral agreements between the EU and Norway and between the EU and the Faroes. Until now these cooperative arrangements have worked quite well. The two bilateral agreements also provide for the access of Faroese and Norwegian vessels to EU waters beyond the 12 nm limit and vice versa. Once the United Kingdom leaves the EU, it is desirable that these bilateral agreements should become trilateral agreements, with the United Kingdom also becoming a party to the agreements. It is also likely that there will be a need for a bilateral agreement between the United Kingdom and the EU to provide for the cooperative management of stocks that they share but that are not shared with other States, for example in the southern North Sea and the English Channel. It is also likely that the EU will press for the access of its vessels to UK waters, at least beyond 12 nm, as part of any Brexit settlement.

These international issues, and the fact that international relations are a reserved matter under the Scotland Act,¹⁷ suggest that there may well be a common, UK-wide policy for regulating fishing beyond the 12 nm limit after Brexit and that the UK authorities will legislate for and administer it. That is also hinted at in the announcement of a new Fisheries Bill, as one of the bills for “delivering Brexit”, in the Queen’s Speech opening Parliament on 21 June 2017. The Bill has not yet been published. According to the background briefing on

¹⁷ Sch 5, para 7.

the Speech,¹⁸ the main purpose of the Bill is to enable the United Kingdom to regulate access to and manage fisheries in UK waters. On the territorial extent of the Bill, the briefing states that “aspects of the Bill will extend to the UK, as international matters are not devolved. We will consult widely with devolved administrations on the appropriate extent of any legislation.”¹⁹ The Speech itself refers to a “new *national* polic[y] on . . . fisheries” (emphasis added).

All this suggests that the UK Government sees much regulation of sea fishing after Brexit being by the UK authorities rather than the devolved administrations. A further reason for the strong hints of a UK-wide policy for fisheries may be because, were the Scottish authorities to have responsibility for regulating fisheries around Scotland, questions would arise about the access of fishing vessels from elsewhere in the United Kingdom to Scottish waters and about the need for cooperation between the Scottish authorities and authorities from other parts of the United Kingdom on the management of shared fish stocks.

Not surprisingly, the Scottish Government is very unhappy with the provisions of the European Union (Withdrawal) Bill emasculating the role of the devolved administrations in

18 *The Queen’s Speech and Associated Background Briefing, on the Occasion of the Opening of Parliament on Wednesday 21 June 2017*, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/620838/Queens_speech_2017_background_notes.pdf.

¹⁹ *Ibid*, p. 22.

modifying retained EU law.²⁰ It remains to be seen whether those provisions will survive without amendment during the passage of the Bill through Parliament.

D. CONCLUSIONS

Brexit will have no impact on the law relating to freshwater fisheries in Scotland. The position is very different with marine fisheries and aquaculture, however. Much of the law currently governing these areas is stamped “Made in Brussels”. This law will continue in being immediately following Brexit, but will fairly quickly be amended and supplemented. As things stand after the second reading of the European Union (Withdrawal) Bill, this new law will be stamped “Made in London”, rather than “Made in Edinburgh”. Many Scottish fishers welcome Brexit and see it as an opportunity to increase their share of the catch in Scottish waters.²¹ That expectation may or may not be realised, depending on what arrangements for continued fishing by EU vessels in British waters after Brexit are eventually agreed between the United Kingdom and the EU. But what may turn out to be a great

²⁰ See, for example, First Minister, *Legislative Consent Memorandum. European Union (Withdrawal) Bill* (September 2017), available at <http://www.parliament.scot/S5ChamberOffice/SPLCM-S05-10-2017.pdf>.

²¹ See, for example, the website of the Scottish Fishermen’s Federation (www.sff.co.uk/Brexit). However, other parts of the Scottish fishing industry are more equivocal about Brexit. For example, Scottish fish processors are heavily dependent on labour from other EU Member States; while exporters of fish products are concerned about tariffs that may be imposed and additional documentation that may be required after Brexit.

opportunity for Scottish fishers looks like being a lost opportunity for the Scottish Parliament and Government to take back control over the regulation of fishing in Scottish waters.