

The Brexit Papers



Fisheries

Paper 23



Bar Council Brexit
Working Group
June 2017

**THIRD
EDITION**



Brexit Paper 23: Fisheries

Introduction

1. Fisheries conservation falls within the exclusive competence of the EU. Furthermore, the EU's Common Fisheries Policy (CFP), which deals with fisheries conservation as well as other aspects of fisheries, is implemented almost entirely by EU Regulations. The consequence of these two things is that (a) there is a lot of EU law on the subject of fisheries conservation (and indeed on fisheries more broadly) and (b) because of the directly applicable nature of EU Regulations, very little of that EU law is to be found on the UK statute book.
2. Multiple legal (and political) issues arise for fisheries in the light of Brexit. These relate to, amongst other things, the following matters: (a) a domestic legal framework for fisheries management; (b) management of shared stocks; (c) access by fishing vessels to waters; (d) membership of regional fisheries management organisations (RFMOs); (e) access by fisheries products to markets; and (f) freedom of establishment.
3. For reasons of space, this short paper will address just items '(a)', '(b)' and '(c)' above. It will not make recommendations. Instead, its purpose is simply to provide an introduction to some of the issues involved. This paper was finalised on 22 June 2017, i.e. the day after the Queen's Speech. It has been assumed that the White Paper of March 2017 (referred to below) continues to be applicable. For reasons of space, this paper will assume, rather than provide, a basic level of knowledge about the role of the European Communities Act 1972 in relation to EU Regulations.

A domestic legal framework for fisheries management

4. To avoid a legal vacuum arising, the UK will need a legal framework for fisheries management to be in place on Brexit day (i.e. the day on which the UK leaves the EU, which, it is assumed here, will be the same day as the day on which the European Communities Act 1972 is repealed).

5. The White Paper of March 2017, entitled 'Legislating for the United Kingdom's withdrawal from the European Union' (Cm 9446), makes clear that the government's general policy is, by means of the Great Repeal Bill,¹ to 'convert the body of existing EU law into domestic law, after which Parliament (and, where appropriate, the devolved legislatures) will be able to decide which elements of that law to keep, amend or repeal once we have left the EU' (§1.12).² Fisheries is not identified in the White Paper as being an exception to that general policy, and so the process of conversion will be considered in this paper.

6. The White Paper states that 'EU Regulations will not be "copied out" into UK law regulation by regulation' (§2.8) and that instead the Great Repeal Bill (GRB) will 'make clear' the conversion. This suggests that, to effect the conversion, the GRB will use appropriate legal drafting to make a cross-reference to the Regulations as set out in the *Official Journal of the European Union*. However, in principle, there would appear to be some tension between this approach and a proposed policy of making 'corrections' to Regulations (and other EU law) where necessary (see below).

7. In the context of fisheries, a conversion of EU law into domestic law would not be straightforward. This is for a number of reasons, including in particular the following:

7.1. Some EU Regulations under the CFP, or parts of such Regulations, may not be legally 'operable' in a UK unilateral context,

7.2. Questions arise about how to deal with the politically-charged subjects of allocation and access (which are discussed in a general sense below), and

7.3. There may be a rapid divergence between the CFP Regulations as converted and the CFP as it evolves subsequently at the EU level.

8. The point raised in '(a)' above is dealt with at some length in the White Paper, in relation to EU law in general. The White Paper explains that the GRB will provide time-limited delegated powers to use secondary legislation to make the 'corrections' necessary to render EU law operable.³ Presumably, some kind of balance will need to be struck

¹ The Great Repeal Bill will, of course, only start to take effect once it becomes an Act. However, for ease of reference and to improve consistency with the White Paper, this paper will refer uniformly to 'Bill' rather than 'Act'.

² See also, amongst others, §§1.24(b), 2.4 and 2.5. See further pp.11 and 17–18 of the government's 'associated background briefing' on the Queen's Speech 2017.

³ See, amongst others, §§1.14, 1.15, 1.24(c), 3.7, 3.16, 3.24 and 3.25.

between, on the one hand, the government's general policy of not copying out Regulations into UK law (see above) and, on the other hand, the need to make clear the effect of corrections – particularly in cases where the corrections to be made to a Regulation are not of a generic nature and are significant in number.

9. Others have already written, quite rightly, about the need for adequate scrutiny of the conversion process where 'corrections' are being made. In principle, some comfort is provided by the White Paper, which states that the GRB 'will not aim to make major changes to policy or establish new legal frameworks in the UK beyond those which are necessary to ensure the law continues to function properly from day one' (§1.21). It adds that 'we will ensure that the [delegated] power [provided in the GRB] will *not* be available where Government wishes to make a policy change which is not designed to deal with deficiencies in preserved EU-derived law arising out of our exit from the EU' (§3.17; emphasis added). However, questions inevitably arise about the precise meaning of some of the key terms used in those statements and attention will now turn to how the statements come to be reflected in the wording of the clauses of the GRB itself.

10. Given the constraints referred to in the preceding paragraph, and assuming those constraints are applied strictly, conversion of EU Regulations under the CFP into domestic law would not itself be a vehicle for affecting major policy changes in the field of fisheries, beyond those needed to ensure properly functioning law on Brexit day. Although the White Paper is silent as to whether any major policy changes are envisaged for fisheries, it does state that the government 'will ... introduce a number of ... bills during the course of the next two years to ensure we are prepared for our withdrawal' (§1.21).

11. It is now clear from the Queen's Speech, as delivered on 21 June 2017, when read in conjunction with the 'associated background briefing' published by the government (hereafter, 'the Queen's Speech briefing'), that there will be a fisheries bill. The Queen's Speech briefing lists the purpose, 'main benefits', 'main elements' and geographical scope of the bill.⁴ The purpose is stated to be to '[e]nable the UK to control access to its waters and set UK fishing quotas once it has left the EU'. That wording is supplemented, under 'main benefits' and 'main elements', with references to 'management' by the UK of its waters. The broad nature of the wording used in the Queen's Speech briefing means that predicting with any accuracy the likely material scope of the bill, including whether or not it is intended to be a comprehensive legal framework, is difficult. However, the Queen's Speech itself refers to fisheries as a subject area for which there will be legislation establishing a new national policy – which perhaps means that a comprehensive approach is intended.

⁴ See p.22. A simple electronic word search for 'fish' reveals other fisheries-related words at pp.3, 5, 7, 8, 12 and 80; there may be other occurrences missed by that search.

12. The White Paper refers to bills being introduced 'to ensure we are prepared for our withdrawal' (see above). The reference to being 'prepared' suggests an intention for the bills to have received Royal Assent on or before Brexit day. However, in contrast, the White Paper also refers to converted EU law being available for Parliament 'to keep, amend or repeal *once we have left the EU*' (again, see above; emphasis added). The Queen's speech briefing provides clarity on timeframes for some of the intended bills, by reference to an intention to have certain bill-based changes in place 'on exit' (or similar). However, regarding the fisheries bill, it states that that bill will enable certain things '[a]s the UK leaves the EU' or 'once it has left the EU'.⁵ That wording, in contrast to 'on exit', is rather ambiguous.

13. For a fisheries bill to be drafted properly, there will need to be meaningful consultation with all relevant stakeholders. That will take time. In addition, of course, the UK's devolution settlements will be relevant. In that regard, the Queen's Speech briefing states that: 'We will consult widely with the devolved administrations on the appropriate extent of any legislation.'⁶ Furthermore, fisheries is not a blank canvas in that some relevant primary legislation already exists. In addition, a fisheries Act would need to be implemented by means of secondary legislation. All that serves to raise questions about whether a comprehensive and well-designed fisheries Act could be operational in time for Brexit day and, if not, for how long after Brexit day CFP Regulations converted into domestic law would need to apply in order to provide an interim legal framework for fisheries management in UK waters.

Management of shared stocks

14. The term 'shared stocks', as used in international fisheries law, tends to be reserved for those fish stocks which occur in the exclusive economic zones of more than one coastal State. The exclusive economic zone (EEZ) is a zone beyond, and directly adjacent to, the territorial sea. It extends out to a maximum of 200 nautical miles from the baseline or, if constrained by an opposite neighbour, to a median line. As from Brexit day, a significant number of fish stocks will become shared between the UK and the EU, having previously not been shared because they were encompassed by EU waters as a whole.

15. The 1982 UN Convention on the Law of the Sea (UNCLOS), in Article 63(1), contains a duty regarding shared stocks, namely that coastal States must 'seek ... to agree upon the measures necessary to coordinate and ensure the conservation and development' of these stocks (without prejudice to certain other obligations). (In 2015,

⁵ See, respectively, p.12 and p.22.

⁶ See p.22.

the International Tribunal for the Law of the Sea (ITLOS) interpreted that duty in its Advisory Opinion in Case No.21.)

16. As from Brexit day, the duty in Article 63(1) will apply in respect of stocks shared between the UK and the EU, since both are parties to UNCLOS. Irrespective of that duty, it is anyway in the common interests of both parties to cooperate since otherwise the sustainability of the stocks concerned could be threatened.

17. For any given shared stock, the success of cooperation between the UK and the EU is likely to turn on, in particular, the allocation between the two parties of the total allowable catch (TAC) of that stock. While the UK is still an EU Member State, allocations of TACs are determined by a principle called 'relative stability'. It remains to be seen how that principle is treated in the negotiations for a withdrawal agreement: the negotiating parties may be under pressure from some quarters to change the allocations provided by relative stability and from other quarters to keep things as they are. If relative stability is abandoned, it in turn remains to be seen whether any alternative system can adequately guard against unilateralism in the claiming of allocations of any given TAC and hence the possibility that allocations, when added together, could exceed the TAC concerned.

Access by fishing vessels to waters

18. The following, when it refers to 'waters', relates just to EEZs (rather than to territorial waters or marine internal waters). So-called 'historic access' to coastal waters is beyond the scope of this short paper.

19. While the UK is still an EU Member State, vessels flagged to certain Member States other than the UK may fish for certain stocks in UK waters; and UK-flagged vessels may fish for certain stocks in EU waters other than UK waters. As with allocation, it remains to be seen how access is treated in the negotiations for a withdrawal agreement. For example, the UK government may be under pressure from some quarters to, initially at least, remove access by foreign-flagged vessels to UK waters and the EU may be under pressure from other quarters to keep things as they are.

20. UNCLOS, in Article 62, contains provisions on access to the EEZ for fishing. Article 62 relates in particular to 'surplus', i.e. where the coastal State's harvesting capacity is not sufficient to harvest the entire allowable catch of its EEZ. If a surplus exists, there is a duty on the coastal State to provide other States with access to that surplus. The coastal State can charge a fee for that access (see Article 62(4)(a)). The access is subject to the coastal State's (UNCLOS-consistent) fisheries conservation and management regime.

21. As from Brexit day, the duty in Article 62 regarding access to surplus will apply between the UK and the EU, since both are parties to UNCLOS. However, UNCLOS provides a broad discretion to coastal States in determining the allowable catch and it also provides discretion in determining the harvesting capacity. In principle, for its own reasons, a coastal State might seek to determine a low figure for allowable catch and/or a high figure for harvesting capacity in order to reduce or eliminate the amount of surplus for the purposes of Article 62.

Dispute settlement under UNCLOS

22. Part XV of UNCLOS deals with the settlement of disputes between parties to that treaty regarding its interpretation or application. Put very simply: as a general rule, if no settlement has been reached by recourse to section 1 of Part XV, a party to UNCLOS can be taken to an international court or tribunal by another party for a binding decision by that court or tribunal. However, there are various limitations and exceptions to that general rule. In particular in that regard, in potential disputes relating to fisheries resources in the EEZ, the effect of Article 297(3) of UNCLOS, and especially Article 297(3)(a), should not be overlooked.

Conclusion

23. This short paper has sought to provide an introduction to some of the issues relating to three matters: a domestic legal framework for fisheries management; management of shared stocks (including allocation); and access by fishing vessels to waters. The matters of allocation and access are very political and, as such, will be watched closely by the fishing industry both in the UK and elsewhere as the negotiations between the UK government and the EU proceed. As noted above, other fisheries-related matters for which issues arise in the light of Brexit include, amongst other things, membership of regional fisheries management organisations (RFMOs), access by fisheries products to markets and freedom of establishment; these may be the subject of a further paper in due course.

Daniel Owen

Fenners Chambers, Cambridge

June 2017

© Daniel Owen 2017

For further information please contact:

*Philip Robertson, Director of Policy or
Luke Robins-Grace, Senior Public Affairs and Communications Adviser
The General Council of the Bar of England and Wales
289-293 High Holborn
London WC1V 7HZ
Direct line: 020 7242 0082
Email: PRobertson@BarCouncil.org.uk
LRobins-Grace@BarCouncil.org.uk*