

Cynulliad Cenedlaethol Cymru
Y Pwyllgor Newid Hinsawdd,
Amgylchedd a Materion Gwledig
MCD mewn perthynas â Bil
Pysgodfeydd y DU
NHAMG (5) FB02
Ymateb gan Yr Athro Richard Barnes

National Assembly for Wales
Climate Change, Environment and
Rural Affairs Committee
LCM in relation to the UK Fisheries Bill

CCERA(5) FB02
Evidence from Prof Richard Barnes

General

In general, the Bill establishes a UK-wide framework for fisheries management. However, since fisheries is a devolved matter only the basic coordinating aspects of this extend to the devolved administrations.

In Wales, the fisheries authority are the Welsh ministers.

I expect most attention to focus on clauses 1-2 (Joint Fisheries Statement), and effects thereof; and clauses 36-41 (power to regulate fisheries matters), and general concerns re the extent of devolved powers.

Devolved Matters

Fisheries management is a devolved competence. However, the UK remains responsible for the international commitments of the UK in respect of fishing, as well as a range of other reserved matters. As such, the Fisheries Bill needs to balance the operation of matters. This is challenging since it is not easy to simply divide matters into international/domestic competence. For example, the UK may be required under international law to implement certain gear restrictions of conservation and management measures. Also, the basic agreement over fishing entitlements, through the setting of TAC is undertaken in cooperation with other States, since many stocks are shared and so quotas are agreed internationally.

The 2020 Bill makes changes to the previous Bill. Some changes are significant for Wales:

- The inclusion of a power for Welsh ministers to make regulations enabling the sale of Welsh catch or effort quotas for a calendar year (Cl 27 and schedule 5);
- Creation of powers for the Welsh ministers to impose charges for carrying out functions relating to the regulation of marine activities (cl 34 and schedule 7);

- The power of the National Assembly for Wales has been extended to allow it to make primary legislation for the whole of the Welsh zone (ie beyond 12nm) in relation to fishing, fisheries and fish health (cl 43, amending Government of Wales Act 2006)
- The power of Welsh ministers (and Scottish ministers) is extended to making of byelaws in relation to the exploitation of sea fisheries resources for marine conservation purposes (cl 44, schedule 9). I understand this was done in consultation with the NAW.

In general, the Bill further enhances the authority of the Welsh ministers to regulate fisheries in particular areas. However, the same concerns remain regarding the power to determine fishing opportunities – a tension about whether this relates to a reserved or devolved competence, and so requires legislative consent (note below).

The Legislative Consent Motion presented on 12 February covers the main changes and accurately reviews the provisions requiring consent.

The powers for the Welsh ministers in the Bill may be regarded as ‘interim’ since they can be supplemented/developed with a Wales specific Fisheries Bill. There is scope in the latter to go beyond some of the provisions in the UK Fisheries Bill to better reflect sustainability or social or economic concerns at a Wales level. This could include additional provisions on marine protection, by-catch or gear controls. The generic nature of the UK Fisheries Bill is such that conflicts may be unlikely. Again, coordination through the JFS process could help pre-empt this in practice.

Joint Fisheries Statement

The national fisheries authorities of England, Scotland, Wales and Northern Ireland are required to produce a joint fisheries statement (clause 2) setting out how they intend to achieve the fisheries objectives defined in the bill. A draft JFS would need to be laid before the Welsh Assembly (and similar in other DA, before it can be published, thereby enabling further scrutiny of content. The JFS would have to set out the policies for achieving the fisheries objectives set out in clause 1 (a) the sustainability objective; (b) the precautionary objective; (c) the ecosystem objective; (d) the scientific evidence objective; (e) the bycatch objective; (f) the equal access objective; (g) the national benefit objective; and (h) the climate change objective. The JFS will contain provisions on or referring to fisheries management plans. These are either existing or future plans that show how the details in the JFS will be put into operation. The precise status of the JFS is unclear since it will seek to coordinate fisheries policies within the UK – so may in effect curtail or direct the exercise of fisheries powers at the devolved level. Although a FMP can depart from the JFS, reasons for this must be given by the national authority.

Sustainable Fishing

The Introduction of the provisions on the JFS strengthen the Bill, particular given the importance of a having coordinated policy for the UK as a whole. This can better ensure ecosystem and cross-jurisdictional issues are addressed, at least within the UK.

A general caution about the link between the objectives contained in the JFS, then put into operational terms in the Fishery Management Plans (FMPs), will be the extent to which there is adequate scrutiny and accountability for achieving objectives. This is because the objectives in the UK Fisheries Bill are drawn in broad terms. The fact that there is a power to depart from the JFS in the FMPs when ministers decide this is necessary for a 'relevant change of circumstances' (cl 7) or when the fisheries management authorities wish to depart from their duty to exercise their functions in accordance with the JFS/FMP (Cl 10). Legally, this will be covered by the potential for judicial review. Politically, this will depend upon the rigour of scrutiny of the JFS/FMP and reports thereon.

There is concern (from environmental groups) that the UK Fisheries Bill lacks a clear duty to require that stocks be managed at levels that produce the maximum sustainable yield. It provides a weaker commitment to the MSY than Art 2 of the CFP. MSY is a requirement under UNCLOS, although is qualified by economic, developmental and environment factors (Art 61(3)). Under the UK Fisheries Bill, MSY remains a policy objective. There is no target date for policy measures to be adopted that will achieve the MSY.

Fishing Entitlements.

Under the CFP, the UK's share of the total allowable catch determined annually at the December Fisheries Council was distributed between England, Scotland, Wales and Northern Ireland according to an agreed system of fixed quota allocations. This was established in 1999, and based on amounts of fish landed during a fixed reference period (1993-6). All four nations manage their own fishing quotas and licensing of fishing boats in line with a concordat agreed in 2012. Maintaining the status quo internally is likely to help avoid disagreement, which in turn could unravel the current fisheries settlement in the UK. However, there is a growing awareness of a need to consider the position of inshore fleets that operate mostly out with the quota system and who are seeking some degree of rebalancing in the availability of fishing opportunities. In effect securing a greater share of existing opportunities, either by a rebalancing of quota, or a greater share of new fishing opportunities post Brexit.

When the Bill appeared in the last Parliamentary session, some its provisions concerning the balance between UK and devolved competences generated disagreement between the UK and devolved administrations. Thus the Scottish Government took the view that provisions on determining fishing opportunities required legislative consent because it was a devolved matter. There were also calls for amendments to provisions on quota and effort limits, seafood levies and support

funding. The Welsh Assembly were critical of provisions on determining fishing opportunities.¹ In practice it may be difficult to identify particular conflicts of interest (and authority) in advance, so having a mechanisms that allows room for manoeuvre and political accommodation is important. This may involve avoiding a hard/abrupt division of specific competence in primary legislation.

The setting of the UK TAC will be done by the UK government (cl 23). This is referred to as determining fishing opportunities. This could include setting a zero opportunities (either quota or effort), replacing existing opportunities, or withdrawing existing opportunities. This must be done in consultation with the DAs (cl 24). If there is disagreement, then it is not clear how opportunities would be determined. Presumably, the UK Government could simply set them, since consultation is not the same as permission. This may be an unpalatable point politically, but conflict could be avoided in practice through careful consultation and management of expectations. The UK Government will also distribute fishing opportunities within the UK to the DA's. In effect this replaces the mechanisms under the CFP where by the Commission determines fishing opportunities for each Member State, which in turn has discretion over how that is distributed. Under the Fisheries Bill, each devolved administration will continue to decide how fishing opportunities are allocated to their respective fleets.

It is expected that the way in which fishing opportunities are distributed within the UK will remain the same as there were under the CFP. Here quota opportunities are apportioned administratively to each of the four fisheries administrations by the secretary of state according to a methodology set out in the UK Quota Management Rules (QMRs). This is based on arrangements made in the 2012 Fisheries Concordat. Fixed Quota Allocations (FQAs). This is based upon catch levels during a reference period of 1993 to 1996. It is notable that some degree of continuity of quota allocation is expected, with the Fisheries White Paper indicating that there would be no changes to FQAs, other than to account for new fishing opportunities post Brexit. This reflects the desire to avoid disrupting expectations, destabilizing fishing practices and respecting investments (eg new boats/gear) made in fishing on the basis of those expectations.

Fisheries Administrations are under a duty to ensure catch or effort quotas are not exceeded (cl 26)

Licensing powers.

Such powers are vested in the fisheries authorities (Cl 15). However, the Secretary of State can make regulations that control licensing across the UK. Such regulations can only be adopted with the consent of the DAs. This is intended to balance the devolved settlement with the need for consistent rules across the UK. The DAs can

¹ Welsh Government, *Supplementary Legislative Consent Memorandum (Memorandum No 2): Fisheries Bill*, p 2.

issue licences for foreign vessels for fishing in their respective waters (cl 17). Such licences only apply to those waters. For example, a Scottish licenced EU flagged fishing vessel could not fish in waters subject to regulation by the NI department. However, a Scottish flagged British vessels could exercise licence rights in NI waters. The Delegated Powers and Regulatory Reform Committee commenting on the last version of the Bill (which is virtually the same as the present version) suggest this will provide a degree of transparency in licencing regulation. The Law Society of Scotland take the view this replicates the status quo – that a licence issued by a UK Fisheries administration will be effective throughout UK waters” for British boats.

Powers to impose charges for carrying out administrative functions is established under cl 34 (And Schedule 7). This includes setting fishing quotas; ensuring that commercial fishing activities are carried out lawfully; registration of buyers and sellers of first-sale fish; and issuing catch certificates for importing and exporting fish.

A potentially difficult issue is the way in which powers to regulate over international aspects of fisheries is balanced with the devolved management of fisheries. This is covered by Cl 26-42.

Cl 36 gives the Secretary of State power to make regulations: for the purpose of implementing the UK's international obligations relating to fisheries, fishing or aquaculture; for a conservation purpose; or for a fish industry purpose (eg marketing). These powers are considered necessary by the UK Government to ensure the UK can operate as an 'independent coastal State' (unspecified by could include eg negotiating quota exchanges, or conservation rules, or closed fishing areas). Such powers cannot be used to regulate matters within the legislative competence of the Scottish Parliament, Welsh Assembly or Northern Ireland Assembly (unless that provision is merely incidental to, or consequential on provision which would be outside their legislative competence). Regulations can be made on matters that are devolved if consent is obtained from the devolved administration. There is a general requirement of consultation in respect of cl 36 powers.

Any regulations relating to the amendment or repeal of primary legislation; amendment of article 17 of the Common Fisheries Policy regulation; fee imposition, creation of criminal offences or regulation of a UK producer organisation or inter-branch organisation would be subject to affirmative procedures. Other matters would follow the negative procedure.

Corresponding powers for each of the DAs in its area of competence are created under Cl 42 (and schedule 8). Thus each DA can also regulate for matters related to the above. In effect this mirrors the provisions in respect of what were devolved powers.

Financial Assistance to Fishing Industry

The Bill now contains provisions enabling the devolved administrations to establish financial assistance schemes in their respective administrative areas in order to

replace the European Maritime and Fisheries Fund (EMFF). Power to establish funding mechanisms to support fishing is provided under cl 33 (and Schedule 6)

Historic Rights

The UK withdrew from the London Fisheries Convention on 31 January 2020. As such, there are no rights for EU fishing vessels to continue to fish in selected areas of UK waters under the agreement. However, the enjoyment of such treaty-based rights was superseded by the CFP, which establishes rights of access to certain waters between 6-12nm (See Article 5 of the CFP Regulation, and Annex I). Such rights of access will continue until the end of the transition period.