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The Scottish Parliament  
Edinburgh  
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8 September 2020

Dear Edward,

Thank you for your email of 26<sup>th</sup> August raising a number of questions on the UK Fisheries Bill following my appearance before you on 19<sup>th</sup> August.

Please find my response to your questions attached at Annex A. As ever, my officials and I will be happy to address any further questions the Committee may have.

Finally, we are aware that the Bill will return to the Commons on 2<sup>nd</sup> September and begin Committee stages on 8<sup>th</sup> September. I anticipate that as the Bill progresses a number of amendments will be tabled. My officials will be in contact with the Committee in order to ensure you are kept informed of developments and to discuss what actions, if any, need to be taken as a result.

I am copying this letter to the Chairs of the Environment, Climate Change and Land Reform Committee and the Delegated Powers and Law Reform Committee.

Yours sincerely,

**FERGUS EWING**



## Annex A

### *Environmental questions*

#### **1. How will the Bill interact with environmental law, including the UK Environment Bill, marine environment legislation and other relevant environmental legislation?**

Scottish Ministers are responsible for managing fisheries in Scottish waters and will be required to ensure compliance with relevant environmental law when making regulations using proposed powers in the Fisheries Bill.

Protection of the marine environment is governed by a range of international obligations which all countries in the UK need to comply with. The powers to designate Marine Protected Areas (MPAs) in offshore waters were devolved through the Marine and Coastal Access Act 2009. These powers were created to ensure international obligations could be met. Although the obligations and the powers were the same, differing implementation policies were developed in Scotland and elsewhere in the UK, successfully demonstrating that differing approaches to policy design and delivery can be taken to achieve similar outcomes.

The Scottish Government is content that the measures in the UK Fisheries Bill are drafted to respect devolution and do not undermine devolved competence in this area.

The Scottish Government has also made clear its intentions to maintain or enhance environmental standards in Scotland, and to seek to continue to align with EU Directives and Regulations as far as possible.

#### **2. The Scottish Government has stated its intention to dynamically align with EU standards and regulations. Given that and given the keeping pace provisions in the Scottish Government's UK Withdrawal from the European Union (Continuity) (Scotland) Bill, to what extent will Scotland have the practical ability within the UK internal market to set different policies for fisheries? Please outline, in particular, how this applies to the marine environment in the case of executive devolution.**

There is no question that the current constitutional settlement is a barrier to our ambitions for, and the potential of, Scotland's marine economy and environment and that our ability to keep pace with EU standards is subject to legal and practical constraints, including the UK Government's reserved competence over external trade agreements and aspects of international relations. Its determination to diverge from EU regulations for solely ideological reasons has the potential to harm Scotland's, including the interests of the Scottish fishing industry and wider seafood sector. Even within these limitations, however, the Scottish Parliament has implemented world leading environmental legislation, while sustainably growing both our marine economy and our seafood exports within and outwith the UK. We intend to work to continue these important agendas.

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The Scottish Government has also participated in good faith in the common frameworks process since 2017 and we are clear that these arrangements, based on agreement and respect for devolution are the best means of managing policy difference across the UK in devolved areas currently subject to EU law. The framework arrangements established by the Fisheries Bill are a good example of how this process should and could work.

The Committee is correct to note that the UK Government's internal market proposals are incompatible with the purpose and operation of common frameworks and the devolution settlement in the UK.

The most serious risk to Scotland's marine environment and fisheries is the UK Government's reckless desire to do post-Brexit trade deals at any cost, and to impose uniform regulatory and environmental standards across the UK, and without any heed to the wishes of the Devolved Administrations, through their "UK Internal Market" proposals.

The UK Government internal market proposals threaten both the frameworks process and devolution. Frameworks are based on principles of equal negotiation and agreement. The White Paper proposals are based on the UK Government imposing regulatory choices on Scotland in the form of a requirement to automatically accept standards set elsewhere in the UK, regardless of the views of the Scottish Parliament.

If the UK Government is determined to press ahead with its unprecedented assault on devolved competence, and impose a new system that takes no account of local circumstances and need, the onus is on them to explain to people and communities in Scotland how that will deliver better environmental outcomes than regulations designed in Scotland, tailored to Scotland's specific needs and scrutinised by the democratically elected Scottish Parliament.

Schedule 8 of the UK Fisheries bill also sets out all the powers provided for in the bill that are devolved and will be exercised by the Scottish Ministers on key devolved matters relating to fisheries management. While it would always be our intention to use these powers and manage our fisheries co-operatively, we would always have the right to apply these powers to protect and promote Scottish fishing interests.

However, the UK Government's internal market proposals now potentially fetter this and undermine the months of close partnership working that has been undertaken by fisheries officials all across the UK to create a UK wide bill that respects devolved competences.

**3. Given that agreed TACs sometimes exceed ICES advice, will the requirements under the Bill to take a precautionary approach in the absence of scientific data will change the Scottish and UK governments' approach for agreeing catch limits?**

The Scottish Government remains committed to a science-based approach to our fisheries policy. This commitment to the precautionary approach is retained in the UK Fisheries Bill. In the international context, there are a broad range of fisheries specific

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obligations, alongside wider marine management commitments, and our Future Fisheries Management Strategy will fit within this evolving framework. There is a need to take an ecosystem based approach to management ensuring sustainable, resilient stocks and avoiding damage to fragile habitats. This includes complying fully with a range of international conventions and obligations such as the UN Convention on the Law of the Sea (UNCLOS), the Convention on Biological Diversity (CBD), the UN Sustainable Development Goals, and regional obligations such as the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR). These applied while we were members of the EU and leaving the EU does not remove or change these international obligations.

### ***Delegated powers***

**4. How would delegated powers exercisable by both Scottish and UK Ministers (e.g. Paragraph 1 of Part 1 of Schedule 8 – Power of the Scottish Ministers to make provision about fisheries, aquaculture etc. (equivalent power for Secretary of State in clause 38(1))) be used?**

**5. The DPLR Committee highlight that the powers in Paragraphs 1 and 3 of Part 1 of Schedule 8 are particularly significant as they include, for example, the ability for the Secretary of State to create criminal offences and modify the Scottish Ministers' functions in devolved areas. Is it envisaged that these powers will be exercised in this way?**

The powers listed in paragraphs 1 and 3 of part 1 of schedule 8 are powers conferred on the Scottish Ministers. These mirror the powers conferred on the Secretary of State in sections 38-43 of the Bill, which can be exercised in devolved areas with the consent of the Scottish Ministers.

The powers in Schedule 8 will be used by Scottish Ministers to support day-to-day management of Scottish Fisheries. This includes the possibility of creating new criminal offences, for example, Scottish Ministers may decide to ban certain types of fishing net, require certain types of net or to close areas to fishing for certain periods of time in line with current fisheries management practice. As set out above, any decision to ask the Secretary of State to make regulations, with our consent, would be to protect the interests of Scotland and we see this being the exception rather than the rule.

There will be some areas where it is necessary to do this, often in order to protect the interests of the Scottish sector, including reducing the regulatory burden on them, or to ensure sustainable fisheries and marine protection and the collective meeting of international obligations..

This does not alter our ability to act independently nor does it give away devolved powers. All decisions will continue to be made in Scotland. Indeed if UK Ministers tried to do this without our consent they would be acting ultra vires.

**6. Where these powers are exercised by the Secretary of State in relation to Scotland, instruments will not be laid in the Scottish Parliament. Given this, can the Scottish Parliament sufficiently scrutinise the exercise of these delegated powers by the Secretary of State in relation to Scotland?**

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Where it is necessary or appropriate, the Scottish Government is committed to the Parliament being able to scrutinise effectively decisions by Scottish Ministers to consent to UK SIs and the process would be subject to the protocol.

The Scottish Government is keen to agree the new protocol with respect to Scottish Parliament scrutiny of decisions by Scottish Ministers to consent to UK secondary legislation in devolved areas arising from EU Exit. This would replace and have a wider scope than the existing protocol, which was agreed with the Parliament in 2018 and applies to proposals to consent to UK SIs to be made under sections 8 and 9 of the EU (Withdrawal Agreement) Act 2018 (i.e. the “legislative deficiency fixes” aimed at ensuring that the domestic statute book will work effectively once EU law ceases to be directly applicable). This new protocol will apply to regulation making powers, in areas previously within EU competence, for UK Ministers covering devolved competence in Scotland in the UK Fisheries Bill.

Protocol 2 as drafted is explicitly based on the following principles:

- UK Ministers are expected to seek Scottish Ministers’ consent whenever they propose to make secondary legislation containing provisions within its scope;
- Scottish Ministers will normally only wish to give such consent where the policy objectives of UK and Scottish Ministers are aligned, and there are no good reasons for having separate Scottish subordinate legislation; and
- The Scottish Parliament should be able to hold Ministers to account for decisions to give consent.

The new Protocol’s main features are:

- It would cover proposed SI provisions on all matters that were within the competence of the EU immediately before exit day, not just deficiency fixes;
- it will include a list of the regulation-making powers in UK Bills to which it will apply, to be agreed between the Scottish Government and the Parliament: we expect the relevant powers in the Fisheries Bill would be added to this list once it has received Royal Assent;
- Like the existing protocol, the Parliament (in practice the relevant lead committee) will have at least 28 days (except in exceptional cases) to consider proposals by Scottish Ministers to consent to UK SIs; and
- Provision for retrospective notification to the Parliament of consent having been given to purely technical provisions, similar to the process for notifying the Parliament of consent having been given to SIs to implement new EU law under s.2(2) of the European Communities Act 1973.

However, the Committee may wish to note that while the new protocol is being agreed, the Scottish Government is applying the existing protocol to any SIs that would be expected to fall under Protocol 2 to ensure scrutiny can be undertaken by the Parliament.

## **Resources**

### **7. Does the Scottish Government have sufficient resources to carry out compliance requirements under this Bill?**

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The Scottish Government will continue to take whatever steps needed to protect Scottish marine interests.

However, the move to a Coastal State will severely test the resources currently available as enhanced patrols of the outermost regions of the EEZ, and the additional burden of monitoring uptake of quota from these vessels will have consequential financial issues. There are also additional costs associated with the new catch verification systems that must be implemented in order to allow exports of fish to the EU and other countries.

The UK Government must not shirk its responsibilities by devolving responsibility whilst denying adequate support to the Scottish Government. UK Ministers have previously said that the costs of implementing change related to Brexit will be fully borne by the UK Government and we expect them to fund our needs to allow us to maintain safe and secure waters for all and to adequately manage our fisheries interests.

### *Consent and scrutiny*

**8. With regard to the previous version of the UK Fisheries Bill, in a [letter sent to then Secretary of State Michael Gove](#), Cabinet Secretary Fergus Ewing raised the need for consent from the Scottish Government to allow the Secretary of State to determine fishing opportunities for British vessels. In the current version of the Bill, the same clause (now Clause 25) remains, which requires the Secretary of State to consult with devolved administrations, rather than to obtain their consent. Has the outstanding issue of consent for determining fishing opportunities (now clause 25) has been resolved, and if so, can you please outline what the respective roles are for the Scottish and UK Governments in determining fisheries opportunities?**

The issue of consent has been resolved. Clause 25 only applies where there is an international obligation in place, for example where the UK's quota of a stock is determined in international fisheries negotiations or in accordance with the United Nations Convention on the Law of the Sea (UNLCOS).

In such a scenario, the Scottish Ministers cannot determine quota for Scotland without affecting the quota for the UK as a whole, so the power in this clause is not one that is capable of being exercised separately by the Scottish Ministers in relation to Scotland. As such, it remains a reserved function of the Secretary of State. We will expect UK Ministers to respect this power and use it in such a way that it does not harm Scottish fishing interests.

After the UK's quota is determined, the quota is allocated to the devolved administrations according to established administrative rules. The distribution of this quota remains a devolved matter for the administrations concerned. The Bill therefore reaffirms the existing position on the distribution and allocation of fishing opportunities.

**9. Can you please outline the mechanisms for Scottish Parliament scrutiny of the activities of the Scottish Government on an ongoing basis in relation to fisheries management?**

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I currently update the Scottish Parliament regularly on the activities of the Scottish Government in relation to fisheries and will continue to do so. The new powers given to Scottish Ministers and the Parliament under the Bill, combined with the transfer of legislative powers formerly exercised by the Commission to the Scottish Ministers, will mean that any new regulations on fisheries made by Scottish Ministers will be subject to the normal scrutiny processes for SSIs.

### ***Recent amendments***

**10. There have been three recent amendments to the Bill. Firstly, the amendment to the Sustainability objective (clause 1(2)), secondly, the inclusion of a National Landing Requirement (after clause 17) and thirdly on a regulatory enforcement and data collection scheme (after clause 45). Is the Scottish Government content with the policy intention of these amendments, and do the amendments comply with the devolution settlement?**

**11. At the meeting the Cabinet Secretary referred to amendments on the National Landing Requirement and the Regulatory enforcement and Data Collection scheme, and offered to keep the Committee updated: “I have asked my officials to work with DEFRA to see whether modifications can be made to protect devolution. I will keep the committee informed of developments, as necessary” (Column 3, Official Report) Can any update be provided?**

As I indicated to the Committee during my appearance, I am unable to support or consent to the amendments as drafted. I have significant concerns about their operability and that, as drafted, they do not respect the devolution settlement. However, I understand the concerns which have motivated the amendments and the principles are in line with existing Scottish Government commitments. On that basis I think it would be wrong to dismiss them out of hand and I have written to Victoria Prentis in this vein.

Therefore, I would prefer to work with UK Government to develop the amendments to make them operable and respect the devolution settlement rather than simply reverse them. It is disappointing that UK Ministers have laid amendments doing just that and have failed to engage with the intent behind the amendments. However, I also note that, we already have, or will gain through the Bill, the powers to put such measures in place should the Scottish Parliament choose to do so.

### ***Technical clarification***

**12. The Cabinet Secretary when replying to 2 questions said officials would let the Committee know if further technical answers were needed. These were in response to Emma Harper’s questions on inshore fishing (Columns 10-11 Official Report) and Colin Smyth’s questions on dispute resolution (Columns 11-12). Are any further answers required?**

I am content with my answers to the Committee on the questions raised, however, I am also happy to address any further specific questions the Committee may raise on these matters.

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