

## Current Legal Developments

### United Kingdom/Norway

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#### **Framework Agreement on Fisheries between the United Kingdom of Great Britain and Northern Ireland and the Kingdom of Norway**

On the 30 September 2020, the UK and Norway signed a Framework Agreement on Fisheries that will provide the basis for future cooperation in the sustainable management of their fisheries. The Agreement is the first such agreement adopted by the UK following its decision to leave the European Union. This note provides some background to the agreement and examines its key features. Whilst the content of the agreement appears to be rather basic, this is broadly consistent with other framework agreements, and it does provide some insight into the direction and focus of fisheries management in the North Sea, and how cooperation may develop between coastal States and the EU.

#### Keywords

fisheries; Brexit; cooperation; framework agreement; United Kingdom; Norway

#### **Background**

The United Kingdom (UK) left the European Union (EU) on 29 March 2019. This is commonly referred to as Brexit. During the transition period that runs until 31 December 2020, the UK is no longer represented in EU institutions, but it remains bound by EU law.<sup>1</sup> This includes the Common Fisheries Policy (CFP), a set of rules adopted by the EU to conserve fish stocks and manage fishing activities in European waters (ie waters under the sovereignty or jurisdiction of Member States). Whilst there have been longer-term concerns about the effectiveness of the CFP,<sup>2</sup> the UK's departure from the EU was in

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<sup>1</sup> Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and European Atomic Energy Community (19 October 2019), Articles 126-7.

<sup>2</sup> The leading work on the CFP is R Churchill and D Owen, *The EU Common Fisheries Policy* (Oxford University press, 2009). See also, Y-h Song, 'The Common Fisheries Policy of the European Union: Restructuring the Fishing Fleet and Financial Instrument for Fisheries Guidance' (1998) 13(4) *IJMCL* 537-78; C Johnson, 'Fisheries Enforcement in European Community Water Since 2002 - Developments in Non-flag Enforcement' (2008) 23(2) *IJMCL* 249-70; JM; S Khalilian et al, 'Designed for failure: A critique of the Common Fisheries Policy of the European Union' (2010) 34(6) *Marine Policy* 1178-82; JM Sobrino and M Sobrido, 'The Common Fisheries Policy: A Difficult Compromise Between Relative Stability and the Discard Ban' in G Andreone (ed) *The Future of the Law of the Sea* (Springer, 2017); S Guggisberg, 'The EU's regulation on the Sustainable management of External Fishing Fleets: International Law and European law Perspectives' (2019) 34(2) *IJMCL* 291-324; F Naert, 'The European Union, Fisheries and Due Regard in the EEZ: Some Reflections' (2019) 34(1) *IJMCL* 89-96; E Kassoti and M Vatsov, 'A Missed Opportunity:

large part motivated by wider public perceptions that the CFP was prejudicial to UK interests. Thus Brexit was motivated in part by a desire of the UK to secure control over access to its waters and to enable a fairer distribution of fishing opportunities as an ‘independent coastal State’.<sup>3</sup> As a matter of EU law, the EU has exclusive competence to regulate fisheries within EU waters.<sup>4</sup> Two key principles of the CFP are: equal access to the waters and resources of the EU;<sup>5</sup> and relative stability, whereby allocation of fishing opportunities is distributed according to historic patterns of catches between Member States. Under the CFP, the EU also has exclusive competence to represent its Member States externally. This includes entering into international agreements with third States. Once the transition period ends, the UK will become responsible for setting its own fisheries law and policy and reaching agreements with other states to cooperate in the conservation and management of marine living resources.<sup>6</sup>

Cooperation is both a practical and legal necessity. As a matter of international law, States are required to cooperate in respect of shared fish stocks under Article 63 and 64 of the 1982 United Nations Convention on the Law of the Sea (LOSC) and Article 8 of the United Nations Fish Stocks Agreement (UNFSA).<sup>7</sup> The UK shares approximately 100 stocks with the EU and neighbouring states, so securing agreement on the common management of these stocks is of critical importance. Without joint agreement on catch levels, unilaterally set quotas risk pushing catches to unsustainable levels, as has happened with mackerel stocks.<sup>8</sup>

Cooperation may occur through regional or bilateral agreements. To this end, the EU has entered into a series of agreements with neighbouring states. At a regional level, cooperation in the North East

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Unilateral Declarations by the European Union and the European Court of Justice’s Venezuelan Fisheries Judgment’ (2020) 35(1) *IJMCL* 55-81; A-C Prikartz, ‘The European Union’s Common Fisheries Policy, the Right to Self Determination and permanent Sovereignty over Natural Resources’ (2020) 35(1) *IJMCL* 82-105; RC Steenkamp, ‘Svalbard’s Snow Crab Row as A Challenge to the Common Fisheries Policy of the European Union’ (2020) 35(1) *IJMCL* 106-132

<sup>3</sup> See further, UK in a Changing Europe, *Fisheries and Brexit* (2020), available at <https://ukandeu.ac.uk/wp-content/uploads/2020/06/Fisheries-and-Brexit.pdf>, checked 11 November 2020; the Special Issue of the *International Journal of marine and Coastal Law* (2020), volume 35(1), and in particular : R Barnes, J Harrison, E van der Marel and M Vatsov, ‘External Aspects of the European Union Common Fisheries Policy: Introduction’ (2020) 35(1) *IJMCL* 5-17; and V Schatz, ‘The International Legal Framework for Post-Brexit EEZ Fisheries Access between the United Kingdom and the European Union’ (2020) 35(1) *IJMCL* 133-162.

<sup>4</sup> Article 3(1)(d) of the Treaty on the Functioning of the European Union (Lisbon, 13 December 2007, in force 1 December 2009) OJ C326/47.

<sup>5</sup> Article 5(1) of Regulation (EU) No 1380/2013 (11 December 2013) OJ L354/22 (Basic CFP Regulation)

<sup>6</sup> See further, Schatz (n 3).

<sup>7</sup> United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, in force 16 November 1994), 1833 UNTS 3; Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (New York, 4 December 1995, in force 11 December 2001) 2167 UNTS 3.

<sup>8</sup> A Østhagen, J Spijkers and OA Totland, ‘Collapse of cooperation? The North-Atlantic mackerel dispute and lessons for international cooperation on transboundary fish stocks’ (2020) 19 *Maritime Studies* 155–165.

Atlantic is conducted under the auspices of the North-east Atlantic Fisheries Commission (NEAFC).<sup>9</sup> Additionally, the EU has entered into a series of bilateral agreements with neighbouring states to determine quota and agree conservation and management measures in respect of shared stocks. Of specific relevance is the 1980 Agreement on Fisheries between the European Economic Community and the Kingdom of Norway (EU/Norway Agreement), which currently governs, inter alia, UK fishing entitlements in respect of shared stocks.<sup>10</sup> There are also three regional arrangements,<sup>11</sup> but the EU/Norway Agreement is the most important of these agreements in terms of catch and economic value.<sup>12</sup> Obviously, these agreements will no longer extend to the UK after the end of 2020, so the UK must seek membership of existing arrangements or develop new agreements as appropriate. The UK applied to join NEAFC on 7 July 2020 and acceded to the NEAFC Convention on 7 October 2020. The UK has also secured framework agreements with the Faroe Islands<sup>13</sup> and an MOU with Greenland.<sup>14</sup> Securing agreement with the EU on fisheries has proven more problematic given the divergence between the UK and EU positions. The UK has pressed for a discrete fisheries agreement based on annual quotas and distribution of quota according to zonal attachment (ie the share of a stock residing in a countries waters). This would entitle the UK to claim greater share of quota over stocks located in its waters. In contrast, the EU has insisted on securing existing fishing rights in UK waters based on relative stability (ie historic fishing patterns) and linking fisheries to a wider agreement on trade and market access.

The EU/Norway Agreement has been regarded as a potential template for future UK third party fishery agreements with neighboring states, although the extent to which it could be easily adapted to cover the more complex stock and fisheries is debatable. This situation is further complicated by the fact that fisheries issues between the EU and UK are politically connected to wider issues of trade and market access under the Political Declaration that accompanied the Withdrawal Agreement.<sup>15</sup> The EU/Norway

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<sup>9</sup> Convention on Future Multilateral Co-operation in North-East Atlantic Fisheries (London, 18 November 1980, in force 17 March 1982) 1285 UNTS 129.

<sup>10</sup> Agreement on Fisheries between the European Economic Community and the Kingdom of Norway (Brussels, 29 August 1980, in force 16 June 1981) OJ L226/48

<sup>11</sup> Agreement in the form of an exchange of letters between the European Economic Community and the Kingdom of Norway relating to the Agreement on fisheries between the European Economic Community and the Kingdom of Norway (Oporto, 2 May 1992, in force 1 January 1993) OJ L346/26; Agreement between the European Union and the Kingdom of Norway on reciprocal access to fishing in the Skagerrak for vessels flying the flag of Denmark, Norway and Sweden (Brussels, 15 January 2015, in force 19 December 2016) OJ L224 Agreement between the Government of Sweden and the Government of Norway concerning Fisheries (Oslo, 9 December 1976, in force 20 April 1977) 1258 UNTS 88.

<sup>12</sup> European Commission, 'EU and Norway reach agreement on the fisheries arrangements for 2020' 17 December 2019. Available at [https://ec.europa.eu/fisheries/press/eu-and-norway-reach-agreement-fisheries-arrangements-2020\\_en](https://ec.europa.eu/fisheries/press/eu-and-norway-reach-agreement-fisheries-arrangements-2020_en)

<sup>13</sup> <https://www.gov.uk/government/news/uk-signs-fisheries-agreement-with-the-faroe-islands>

<sup>14</sup> See <https://www.gov.uk/government/news/uk-and-greenland-strengthen-cooperation-on-fisheries>

<sup>15</sup> Political Declaration setting out the framework for a future relationship between the European Union and the United Kingdom, para 73. Available at <https://www.gov.uk/government/publications/new-withdrawal-agreement-and-political-declaration> (checked 10 November 2020)

has been used as a model for the UK/Norway Agreement, so it is useful to briefly outline that agreement for comparative purposes.

### **The EU/Norway Agreement**

The EU/Norway Agreement provides for the joint management of certain stocks of cod, haddock, herring, plaice, saithe, and whiting, as well as cooperation on stocks or issues that are not jointly managed. It predated the LOSC, although it recognizes the need to be consistent with the LOSC.<sup>16</sup> In line with the LOSC, it recognizes exclusive fisheries jurisdiction out to 200m, within which each party shall grant access to the other's vessels in accordance with the agreement.<sup>17</sup> There is a general obligation to cooperate in order to ensure the proper conservation and management of joint stocks and stocks of common interest, and to facilitate scientific research.<sup>18</sup> More specifically, each party determines the total allowable catch (TAC) for stocks in their waters, and sets out fishing 'allotments' for the other party's vessels with a view to establishing 'a mutually satisfactory balance in their reciprocal fisheries relations, and the conditions prescribed in the Annex'.<sup>19</sup> In effect this accommodates historic fishing patterns in each other's waters. If there is a significant distortion of fishing patterns of either party (eg though natural changes in stock distribution) then fishing arrangements may be renegotiated.<sup>20</sup> In practical terms, each party proscribes and enforces fisheries measures in its own waters, with parallel duties on the flag state to ensure compliance by its vessels.<sup>21</sup> Each party communicates the details of fishing vessels eligible to fish in the other party's waters to enable licensing.<sup>22</sup> Such vessels are under a duty to comply with the host states fisheries regulations.<sup>23</sup>

The Agreement is implemented through annual arrangements that set out the total allowable catches (TAC) for joint stocks, provide for transfer of fishing opportunities, establish joint technical measures and coordinate monitoring control and surveillance activities.<sup>24</sup> Notably, the quotas for jointly managed stocks are fixed percentages based upon zonal attachment. This differs significantly from the proposed UK position on a Fisheries Agreement with the EU, which would seek to negotiate shares anew on an annual basis.

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<sup>16</sup> Above (n 10) Arts 10 and 14.

<sup>17</sup> Ibid, Art 1.

<sup>18</sup> Ibid, Art 7.

<sup>19</sup> Ibid, Art 2.

<sup>20</sup> Ibid, Art 3.

<sup>21</sup> Ibid, Art 6.

<sup>22</sup> Ibid, Art 4.

<sup>23</sup> Ibid, Art 5.

<sup>24</sup> The annual arrangements are available here: [https://ec.europa.eu/fisheries/cfp/international/agreements/norway\\_en](https://ec.europa.eu/fisheries/cfp/international/agreements/norway_en) Last checked 9 Nov 2020.

## The UK/Norway Agreement

The UK/Norway Fisheries Agreement was signed in London on 30 September 2020 by the Secretary of State for Environment, Food and Rural Affairs, George Eustice and the Norwegian Ambassador, Wegger Strømme.<sup>25</sup> It is expected to enter into force on 1 January 2021, assuming domestic ratification requirements are met. In the UK, the agreement will be implemented by powers under the Fisheries Bill (when it enters force), so it will be subject to constraints and direction according to domestic law. Similar constraints operate under Norwegian Law.<sup>26</sup> Like the EU/Norway Agreement, it is a basic framework agreement, setting out broad cooperative parameters in respect of fishing. It covers four key issues: cooperation over living resource use; a framework for agreeing access to waters and quotas; licensing; and compliance, control and enforcement. The Agreement applies only to waters beyond and adjacent to the territorial sea in which the Parties exercise sovereign rights or jurisdiction (ie the exclusive economic zone).<sup>27</sup> The Agreement provides no basis for fishing in the Norwegian or UK territorial sea, which perhaps signals the national importance of inshore fisheries to local fishermen. Of course, this does not preclude fishing in such waters becoming the object of later agreements. In any event, good management practices require that any fishing (including by foreign vessels) in the EEZ is conducted in a manner that is compatible with and sensitive to fishing activities in the 12m zone.

The main objective of the agreement is to establish a framework for cooperation towards the objective of long-term conservation and sustainable use of resources, and, in doing so, to safeguard the ecosystems within which the resources are located.<sup>28</sup> This objective is reinforced by reference to eight principles: the promotion of the long-term sustainability and optimum utilisation of marine living resources; the use of best scientific evidence; the application of the precautionary approach; full and accurate data collation and sharing; ensuring compliance with management measures; and facilitation of scientific research.<sup>29</sup> Notably, the principles do not contain a clear commitment to reduce or minimise by-catch. Neither is there a reference to measures to control IUU fishing. However, domestic laws generally require such measures, so will form part of more specific regulations or licensing controls in

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<sup>25</sup> Framework Agreement on Fisheries between the United Kingdom of Great Britain and Northern Ireland and the Kingdom of Norway, London, 30 September, CP308. Not yet in force. Available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/927151/CS\\_Norway\\_1.2020\\_UK\\_Norway\\_Framework\\_Agreement\\_on\\_Fisheries.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/927151/CS_Norway_1.2020_UK_Norway_Framework_Agreement_on_Fisheries.pdf) See also: <https://www.gov.uk/government/news/uk-and-norway-sign-historic-fisheries-agreement>

<sup>26</sup> Act of 6 June 2008 no. 37 relating to the management of will living marine resources.

<sup>27</sup> Above (n 25), Art 2. The agreement only applies to UK metropolitan areas, so excludes overseas territories.

<sup>28</sup> Ibid, Art 1.

<sup>29</sup> Ibid.

practice.<sup>30</sup> Beyond this, the agreement says nothing more about the detail of conservation and management measures.

A review of the key provisions of the Agreement reveals it to be very thin on detail, with considerable importance attached to the outcome of annual consultations under Article 4. Thus, the agreement only recognises that access may be granted.<sup>31</sup> It does not secure mutual access nor require it to be granted. This appears to be in contrast with the EU/Norway Agreement, which specifically requires the parties to grant access in accordance with the agreement (ie establishing quota and receiving notice of eligible vessels to be licensed to fish in the waters). In the UK/Norway Agreement, any access to fishing grounds will be contingent on future agreement resulting from the annual consultations.<sup>32</sup> As such the UK Norway agreement concedes little to each party by way of access: only that access is a possibility and that it is anticipated. Indeed, beyond the reference to the management principles, the Agreement says nothing about the practical aspects of joint management. The UK Norway Agreement has no provision for setting of joint TACs for shared stocks or stocks of common interest. And conservation and management appear to be left to unilaterally determined measures. Access of vessels to each other's waters and quota transfers, *inter alia*, are left in a quite open manner to be advanced through annual consultations under Article 4. The reference to 'inter alia' in Article 4 suggests that annual consultations could be a vehicle for agreement upon a wider range of issues, but how far this might be utilised is clearly open to interpretation. This open-ended approach can be contrasted with the EU/Norway Agreement, which explicitly requires cooperation to ensure proper conservation and management, and which has resulted in agreed management approaches.<sup>33</sup> The EU/Norway Agreement also refers to annual setting of TACs and determination of fishing opportunities, but in practice these allocation of fishing opportunities operate on the basis of fixed percentages. Given the significance attached to annual consultations in the UK/Norway Agreement, it provides little indication of how this will work, other than the implication it will be conducted with regard the general principles in Article 1. In effect all important decisions on conservation and management, access and quota allocations are effectively pushed into the future.

The open-ended nature of the provisions reflects wider political positions of the parties. For example, the pivotal role of annual consultations reflects a strong UK preference for regular, short-term mechanisms that ensure that longer-term fishing rights are not conceded. There is also a reference in the preamble to zonal attachment, another key UK policy goal. However, this only signals it as a principle of fisheries management. There is no requirement under international law (or this agreement)

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<sup>30</sup> See Marine Resources Act, above (n 26), Chapter 8.

<sup>31</sup> Above (n 25), Art 3.

<sup>32</sup> *Ibid*, Art 4.

<sup>33</sup> See the annual agreements documented at (n 24)

to use it as the basis of quota allocations. This in part sends out a signal to the EU about the UK Government's stance: that the UK is unwilling to tie itself into longer term agreements on access and fixed quota shares. For Norway, the agreement concedes little, and it signals its willingness to cooperate with the UK – something it recognises as a practical necessity. Of course, we should not read too much into the significance of this one agreement. First, specific agreements reflect the specific political positions and bargaining power of individual parties. Just because this approach is acceptable to the UK and Norway does not mean it will be acceptable in a UK/EU agreement or trilateral UK/Norway/EU agreement. Second, the agreement only requires that annual consultations take place. However, the fact consultations take place does not entail that specific outcomes on access and or quota will happen. Neither does this rule out agreements to determine quota shares for longer or shorter periods. The Parties remain free to agree such matters. Indeed, the Agreement may be amended by agreement between the parties by way of diplomatic notes.<sup>34</sup> This further emphasises the flexible nature of the agreement.

The UK/Norway Agreement is without prejudice to other agreements concerning fishing in each other's waters.<sup>35</sup> This leaves open the door for a trilateral agreement between UK, Norway & EU, which could take priority over the UK/Norway Agreement. In theory, a series of bilateral agreements could be adopted to govern the different fishing relations between the UK, Norway and the EU, but each would still need to be considered in light of other agreements. This would provide a more complex and potentially contentious way of managing fisheries relationships. The broad and somewhat anodyne nature of the framework agreements mean that they are unlikely to be contentious of themselves. The potential for disputes or disagreement is most likely to arise when the hard bargaining of quotas for different species takes place. Given the history of fishing, the existence of common stocks and the general legal duties to cooperate, a trilateral agreement between the UK, Norway and EU would ultimately provide a more effective way of managing shared stocks and questions of access and quota allocations.

### **Concluding Thoughts**

The UK/Norway Agreement allows the Parties considerable flexibility as to how they will manage common fisheries matters. Indeed, the agreement is perhaps more symbolic than substantive in that it really only provides a starting point for more detailed agreements. Given the basic nature of its provisions, its impact on fisheries can only really be judged by how it will be implemented in practice. In this respect, I would make three key observations. First, a key test will be ensuring that any access

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<sup>34</sup> Above (n 25) Art 8.

<sup>35</sup> Ibid, Art 9.

and quota measures adopted under the agreement respect scientific advice on sustainable fishing levels. There is nothing in the agreement that ties the parties to the use of scientific advice in any specific way. The failure of decision-makers to adhere to scientific advice is a widely recognised deficiency of fisheries management regimes.<sup>36</sup> There is nothing in this framework to suggest a more robust approach to following scientific advice will be taken. Second, given that licensing is a devolved matter, there is a potential for disputes to arise within the UK as to how best manage the licensing and coordination of foreign fishing activities in UK waters that are subject to different control under the regulatory competence of the devolved administrations. Whilst this is a domestic constitutional law matter, it still has implications for the smooth operation of the agreement in practice. Third, a bilateral agreement between the UK and Norway is only one component of a wider regional fisheries management regime. A large number of stocks are shared between the UK, Norway and the EU. Moreover, fishing in the region is conducted by a large number of UK, Norwegian and EU vessels in each other's waters. The current balance of fishing opportunities reflects historic entitlements, as well as more complex trade-offs in respect of quotas for different species. As such wider cooperation in their management is required. Although the UK is keen to advance a new approach to fisheries management based on regular annual negotiations, these will be difficult to separate from long standing historic claims to access and quota, and wider political pressures related to trade and access to markets, both for seafood and goods and services more generally.

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<sup>36</sup> R Foese, AC Tsikliras, G Scarella and D Gascuel, 'Progress in ending overfishing in the Northeast Atlantic' (2020) *Marine Policy* (104282).