

Rural Affairs and Islands Committee

5th Meeting, 2024 (Session 6), Wednesday, 21 February

UK subordinate legislation: consideration of consent notification

Introduction

1. This paper supports the Committee's consideration of three 'type 1' consent notifications sent by the Scottish Government relating to the following proposed UK statutory instruments (SI)—
 - The Sea Fisheries (Amendment) Regulations 2024
 - The Official Controls (Fees and Charges) Amendment Regulations 2024
 - The Sea Fisheries (International Commission for the Conservation of Atlantic Tunas) (Amendment) (No. 2) Regulations 2024
2. The process for the Scottish Parliament's consideration of consent notifications is set out in a [Protocol on scrutiny by the Scottish Parliament of consent by Scottish Ministers to UK secondary legislation in devolved areas arising from EU Exit](#). Further details of this process are set out in **Annexe A**.

Sea Fisheries (Amendment) Regulations 2024

3. On 12 January, the Cabinet Secretary for Rural Affairs, Land Reform and Islands [wrote to the Committee](#) to notify the Scottish Government's proposal to consent to the UK SI. The proposed instrument is expected to be laid before the UK Parliament on 28 February. The Committee has therefore been asked to respond by **21 February**.
4. The proposed SI removes the expiry dates from landing obligation exemptions and extends the Data Collection Framework and associated Multiannual Plans from 2024 to 2026.
5. The most significant aspect is the removal of the legal obligation to carry out periodic reviews of the landing obligation exemptions (rather than continuing to extend them as done previously). The notification states that the removal of the legal obligation "would act as an interim measure to give respective administrations more time to implement their own policies and avoid being in the position of having no exemptions in place after December 2024" and that "In relation to Scotland this [administrations' own policies regarding landing] will be the Future Catching Policy". The [Scottish Government has consulted on its](#)

[Future Catching Policy \(FCP\)](#) which will provide a devolved policy to replace the EU landing obligation. The FCP consultation states the following regarding the anticipated process for reviewing technical measures and discard exemptions—

“The FCP will implement a new process of engaging with stakeholders to monitor and review the conditions [...] on an annual basis in order to tailor the measures according to the most up-to-date scientific evidence, taking into account stakeholder views and mindful of international negotiations.”

6. Most recently it published its [response to the consultation analysis](#) which states the intention to hold further stakeholder workshops and a further consultation before bringing forward legislative measures through an SSI. The notification further states that “the process of reviewing, changing, removing or improving upon exemptions will be undertaken by administrations respectively as part of their future catching policies”. The committee clerks have asked Scottish Government officials for further information about the timetable for the additional FCP consultation and SSI.

Options available to the Committee

7. The proposed SI will be made under section 36(1)(b) and (c) of the Fisheries Act 2020 and Article 4(1) of Regulation (EU) 2017/1004.
8. Equivalent powers are available to the Scottish Ministers. There is no power to make the instrument by joint procedure (that is, an SI laid in both the UK Parliament and Scottish Parliament). Accordingly, if the Committee is not content with the Scottish Government’s proposal to consent to the instrument, it could make either of these recommendations:
 - I. That the Scottish Government should not give its consent to the provision being made in a UK SI and that the Scottish Government should instead produce an alternative Scottish legislative solution, or
 - II. That the provision should not be made at all (that is, that the Scottish Government should not consent to the provision being included in a UK SI, nor should the Scottish Government take forward an alternative Scottish legislative solution).
9. It is a statutory requirement that the UK Ministers obtain the consent of the Scottish Ministers before making this instrument. Accordingly, the UK Ministers cannot go ahead and make this instrument with the devolved provision included unless they have first obtained the Scottish Ministers’ consent.

Official Controls (Fees and Charges) Amendment Regulations 2024

10. On 19 January, the Minister for Energy and the Environment [wrote to the Committee](#) to notify the Scottish Government's proposal to consent to the UK SI.
11. The proposed instrument is expected to be laid before the UK Parliament on 26 February and to come into force on 30 April. The Committee has therefore been asked to respond by **22 February**.
12. The purpose of this instrument is to facilitate the implementation of the Border Target Operating Model ("BTOM") as published by the UK Government in August 2023. The instrument will enable fees and charges for official controls to reflect changes to the sanitary and phytosanitary ("SPS") border official controls regime as set out in the BTOM. The notification states that "The changes are intended to facilitate flexibility in the application of fees and charging requirements across all competent authorities ("CAs") when conducting official controls on SPS goods arriving in Great Britain; thereby, safeguarding the financial sustainability of CAs and Government owned Border Control Posts ("BCPs"), and enabling the application of risk factors set out in the BTOM".
13. Members will recall that the Committee has considered a number of UK SI notifications, and SSIs, relating to the BTOM and official controls for SPS products.

Options available to the Committee

14. The proposed SI will be made under the powers in section 14(2) and (3) of the Retained EU Law (Revocation and Reform) Act 2023 ("REUL Act").
15. The Scottish Ministers have a concurrent power and there is also a power to make the instrument by joint procedure. Accordingly, if the Committee is not content with the Scottish Government's proposal to consent to the instrument, it could make any of these recommendations:
 - I. That the Scottish Government should not give its consent to the provision being made in a UK SI and that the Scottish Government should instead produce an alternative Scottish legislative solution
 - II. That the Scottish Government should not consent to the provision being made in a UK SI laid solely in the UK Parliament and should instead request that the provision be included in a UK SI laid in both Parliaments under the joint procedure; or
 - III. That the provision should not be made at all (that is, that the Scottish Government should not consent to the provision being included in a UK

SI, nor should the Scottish Government take forward an alternative Scottish legislative solution).

16. There is no statutory requirement on the UK Ministers to seek the consent of, or consult, Scottish Ministers before using the powers under section 14 of the REUL Act. Therefore, from a legal point of view, UK Ministers can use this power to make these regulations in relation to Scotland even if the Scottish Ministers withheld consent. The UK Government has, however, stated that it does “not intend normally to use the powers under the [REUL Act] in devolved areas without the agreement of the relevant devolved administration. Where a UK Minister intends to exercise the powers in devolved areas we will seek agreement on an SI-by-SI basis”.

Sea Fisheries (International Commission for the Conservation of Atlantic Tunas) (Amendment) (No. 2) Regulations 2024

17. On 23 January, the Cabinet Secretary for Rural Affairs, Land Reform and Islands [wrote to the Committee](#) to notify the Scottish Government’s proposal to consent to the UK SI. The proposed instrument is expected to be laid before the UK Parliament on 14 March and come into force on 17 May 2024. The Committee has therefore been asked to respond by 1 March.
18. The regulations propose to prohibit all recreational fishing boats fishing for bluefin tuna in the International Convention for the Conservation of Atlantic Tunas area unless permitted to do so by the Scottish licensing authorities in their waters - “the Scottish zone” - (or by the respective licensing authorities in relation to the Welsh or Northern Irish zones or the remainder of the UK waters). This is in order to implement the obligation that arises under the International Convention for the Conservation of Atlantic Tunas, to which the UK is a contracting party, and in particular the *Recommendation by the International Commission for the Conservation of Atlantic Tunas Establishing a Multi-Annual Management Plan for Bluefin Tuna in the Eastern Atlantic and The Mediterranean*. This requires that any recreational fishing of bluefin tuna is prohibited unless specifically authorised.
19. The Committee may wish to note that the notification does not state why the Scottish Government is content for this to be done through a UK instrument rather than an SSI (the Scottish Government is required to provide this information under the protocol).

Options available to the Committee

20. The proposed SI will be made under the powers in section 36(1)(a) and (b) of the Fisheries Act 2020

21. Equivalent powers are available to the Scottish Ministers. There is no power to make the instrument by joint procedure (that is, an SI laid in both the UK Parliament and Scottish Parliament). Accordingly, if the Committee is not content with the Scottish Government's proposal to consent to the instrument, it could make either of these recommendations:
- I. That the Scottish Government should not give its consent to the provision being made in a UK SI and that the Scottish Government should instead produce an alternative Scottish legislative solution, or
 - II. That the provision should not be made at all (that is, that the Scottish Government should not consent to the provision being included in a UK SI, nor should the Scottish Government take forward an alternative Scottish legislative solution). However, in relation to this option the Committee should be aware (as noted above) that it is a legal requirement that the Convention is implemented, and accordingly it is necessary that provision to achieve that purpose is made whether at UK or Scottish level.
22. It is a statutory requirement that the UK Ministers obtain the consent of the Scottish Ministers before making this instrument. Accordingly, the UK Ministers cannot go ahead and make this instrument with the devolved provision included unless they have first obtained the Scottish Ministers' consent.

For decision

- 23. The Committee is invited to agree with the Scottish Government's decision to consent to the provisions set out in these notifications.**

**Rural Affairs and Islands Committee clerks
February 2024**

Process for parliamentary scrutiny of consent notifications in relation to UK statutory instruments

23. The Protocol provides for the Scottish Parliament to scrutinise the Scottish Government's decisions to consent to certain subordinate legislation made by the UK Government: specifically, UK Government subordinate legislation on matters within devolved competence in areas formerly governed by EU law. It sets out a proportionate scrutiny approach and categorises SI notifications as 'type 1' or 'type 2'.
24. Type 2 applies where all aspects of the proposed instrument are clearly technical (e.g., they merely update references in legislation that are no longer appropriate following EU exit) or do not involve a policy decision. These are notified retrospectively, after the Scottish Government has given its consent.
25. All other proposals are type 1. In this case, the Scottish Parliament's agreement is sought *before* the Scottish Government gives consent to the UK Government making subordinate legislation in this way. Each type 1 notification must be considered by the relevant Committee.
26. **The Committee's role in relation to type 1 notifications is to decide whether it agrees with the Scottish Government's proposal to consent to the UK Government making Regulations within devolved competence, in the manner that the UK Government has indicated to the Scottish Government.**
27. If Members are content for consent to be given, the Committee will write to the Scottish Government accordingly. The Committee may also wish to note any issues in its response or request that it be kept up to date on any relevant developments.
28. If the Committee is not content with the proposal, however, it may recommend that the Scottish Government should not give its consent (more detail on the options available to the Committee in relation to this particular notification is provided above). In that event, the Scottish Ministers have 14 days under the Protocol to respond to the Committee's recommendation. They could—
 - Agree. If so, the Scottish Ministers would then withhold their consent.
 - Not agree. If so, the Parliament will debate the issue.
29. If the Parliament agrees to the Committee's recommendation that the Scottish Ministers should not consent, the Protocol provides that the Scottish Ministers should "normally not consent" to the UKSI. However, the Protocol also provides that if the Scottish Ministers consider that the Committee's proposed alternative cannot be achieved, they may consent to the UK SI. If so, they must explain why they are doing so to the Scottish Parliament.