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The “keeping pace” power

As a consequence of the United Kingdom’s withdrawal from the European Union (EU), there is no longer a legal requirement for Scottish Ministers to act, nor for the Scottish Parliament to legislate, compatibly with EU law. Nevertheless, there might be practical or political reasons that weigh in favour of continued alignment with EU law in devolved areas. Practical reasons might include a desire to align with EU regulatory standards in specific devolved areas, where those standards diverge from the UK position. Political reasons might include a desire to align more broadly with EU law in order to ease any transition back into the EU either as part of the UK or as an independent country.

No longer a legal *requirement*, any such decision whether or not to align with EU law in devolved areas (and if so, how and to what extent) is now a policy *choice* on the part of the Scottish Ministers. Where a policy choice is made to align with EU law in devolved areas, the Scottish Ministers have a number of options at their disposal in order to achieve this:

- via primary legislation enacted by the Scottish Parliament;
- via primary legislation enacted by the UK Parliament, with the legislative consent of the Scottish Parliament;
- via secondary legislation in specific policy areas under powers conferred upon them by relevant primary legislation;
- via the “keeping pace” power conferred upon them by section 1(1) of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 (the Continuity Act).

The keeping pace power is so-called because it has been created to enable the Scottish Ministers, if they so choose, to make secondary legislation with the effect that the law in devolved areas “keeps pace” with the developing body of EU law. This might be achieved by (i) aligning the law in devolved areas with the provisions of EU regulations, decisions or other tertiary legislation; (ii) implementing an EU directive; or (ii) enforcing any such EU legislation. The purposes for which the power should be exercised are set out in section 2(1), which directs the Scottish Ministers to have “due regard” to the maintenance of, and advancing, standards relating to: environmental protection, animal health and welfare, plant health, equality, non-discrimination and human rights, and social protection (section 2(1)). Section 1(6) states that regulations may make any provision that could be made by an Act of the Scottish Parliament. In other words, it is a (substantial) “Henry VIII power”, similar to the power contained in s 2(2) of the European Communities Act 1972 (ECA) for UK and Ministers to implement EU law via secondary legislation.

There are a number of substantive and procedural constraints that attach to the use of the keeping pace power. Section 3 of the Continuity Act sets out specific limitations on the exercise of the keeping pace power, which may not be used, inter alia, to increase or impose taxation, to create a relevant criminal offence, to undermine the independence of the judiciary or to modify the Scotland Act 1998, the Equality Act 2006 and Equality Act 2010. The procedural constraints on the use of the keeping pace power are relatively weak. Section 5 of the Continuity Act provides

that regulations in certain cases are to be made by affirmative procedure, but otherwise by the negative procedure. Section 4 includes a sunset provision: regulations may not be made more than six years after the power comes into force, albeit that this period may be extended by regulations (subject to the affirmative procedure) up to a maximum of ten years after the keeping pace power comes into force. Further constraints on the use of the power are the duty under sections 8 and 9 to make explanatory statements to accompany regulations laid before the Parliament, a duty under section 6 to lay a policy statement on the approach to be taken, the factors to be taken into account and the process to be followed when using the keeping pace power, and a duty under section 10 and 11 report annually on the use of the power.

The draft annual report and draft policy statement

On 29th October 2021 the Scottish Ministers published the first draft annual report and draft policy statement on the use of the keeping pace power. The draft annual report stated that the power has not been used during the reporting period (at [7]), that its use has not been considered during the reporting period (at [11]), and that there are no current plans to use the power in the upcoming reporting period (at [9]).

The non-use of the keeping pace power (thus far) is explained in the draft policy statement. Having restated its commitment to "work with the EU to realise our shared goals and address global challenges", to "align with the EU where appropriate…in a manner that contributes to maintaining standards across a range of policy areas", and, in so doing, to "ease the process of Scotland's return to the EU", the Scottish Ministers flagged their intention to do so, in the first place, via "the existing policy development process" (p 1). This is to say that alignment should be the "default position" but also that this should be achieved, in the Scottish Government's view, via "[s]pecific domestic powers" unless there is "good reason" to prefer the use of the keeping pace power (p 2).

There are at least four constitutional issues that arise from the draft annual report and policy statement, to which the committee might give further consideration.

1. Between the "default" position, to align with EU law in devolved areas, and the stated preference to do so via specific domestic powers or primary legislation, is a significant transparency and accountability gap that invites further clarification. That is, whether non-use of the keeping pace power during the reporting period, and the absence (currently) of any intended use of the power during the upcoming reporting period, signals a decision (or a series of decisions in specific devolved policy areas) not to align with EU law (and, in which case, what explains the departure from the default position), whether there has been a decision to align with EU law (or a series of decisions to align in specific areas) using specific domestic powers or primary legislation (and if so, via which legislative vehicles, chosen on what principled bases) or whether there have been no (and are currently no foreseen) developments in EU law that engage the question of domestic alignment. The draft policy statement might therefore do more than it does in the bullet-pointed list of factors to be taken into account (at p 3) to explain the approach taken, the

factors taken into account (both practical and principled) and the process to be followed when deciding whether or not to align with EU law, and if so whether or not to make use of keeping pace power. Whilst the Scottish Ministers are not required to report on instances where a decision is taken not to align with EU law or where alignment has been achieved via other means, a greater level of detail in the policy statement about how these decisions are reached will assist the Scottish Parliament and the Committee to examine the extent, and the use (or non-use), of the keeping pace power in context.

2. The draft policy statement *does* contemplate (hypothetical) recourse to the keeping pace power where there is no available, or appropriate, specific domestic power and where alignment via primary legislation would be constrained by a lack of available legislative time (p 2). In such circumstances, we are told, recourse to the keeping pace power would be in keeping with recourse, pre-EU withdrawal, to the regulation-making power in section 2(2) of the European Communities Act 1972 (ECA) (p 2). However, there are two important contextual differences between section 2(2) of the ECA and section 1(1) of the Continuity Act. First, alignment with EU law was previously a legal *requirement* on the part of the Scottish Ministers, and so recourse to section 2(2) ECA carried its own justification. This is no longer the case. Alignment is now a policy *choice* on the part of the Scottish Ministers, which requires more by way of justification. Second, and following from this, whereas section 2(2) of the ECA conferred a broad discretion upon Scottish Ministers to implement EU obligations in devolved areas, these were obligations into which the UK, by virtue of its membership of the EU, was able to input directly at the policy development and drafting stages. By contrast, recourse to the keeping pace power affords a broad discretion to the Scottish Ministers to implement, among other things, entirely new policy objectives s at the EU level and into which neither the UK nor Scotland have had direct input (most obviously through the implementation of directives (Continuity Act section 1(a)(iii))). As such, the draft policy statement might usefully distinguish between uses of the keeping pace power that are of a technical nature and uses of the power that make more fundamental changes at the level of policy. This should include how that distinction between technical and policy measures might be drawn and what are the implications for parliamentary input and scrutiny, in particular where the keeping pace power engages questions of policy that are subject to no direct input at the development and drafting stages and that are subject to relatively week procedural safeguards at the implementation stage.

3. According to the draft policy statement, when making a decision whether *or not* to align with EU law (for example, because alignment might run contrary to the intended domestic policy outcome or because of additional constraints, such as the operation of the UK internal market) ministers will have “due regard” to the purposes set out in section 2(1) of the Continuity Act (p 3). A statutory duty to have “due regard” to the purposes or possible effects of

legislation is an onerous one. More than a mere "general" regard, judicial authority in the context of the public sector equality duty (PSED) (the so-called *Brown* and *Bracking* principles) tells us that:

1. The purposes referred to are integral to the statutory scheme;
2. The decision maker must be aware of the "due regard" duty;
3. The duty must be exercised before, and at the time that, the policy is executed;
4. The duty must be exercised in substance, with rigour and with an open mind;
5. Having "due regard" means taking a "conscious" approach to the relevant purposes;
6. The duty is non-delegable;
7. The duty is continuing;
8. It will be good practice to keep records demonstrating consideration of the duty – warts and all.[1]

The draft policy statement might therefore be more clear in setting out both the Scottish Ministers' "proper and conscientious"[2] approach (to be taken) to the "due regard" duty and also the approach (to be) taken by the Scottish Government with regard to the keeping of records that relate to the exercise of that duty. This will be particularly helpful where, having had "due regard" to the purposes set out in section 2(1), a decision is taken not to align with EU law.

4. There are at least three important aspects of the decision-making context that have still to take to shape. One such aspect relates to parliamentary *input*. During the passage of the Continuity Bill the Cabinet Secretary committed to "working with the Parliament to agree an appropriate and proportionate decision-making framework" that would "provide for an appropriate level of consultation at the earliest stages of policy development".[3] Given the scope of the keeping pace power to implement new policy decisions made at the EU level, into which the UK and Scotland has had no direct input, there are good reasons of constitutional principle (transparency, democratic legitimacy and responsiveness, accountability) why the establishment of a robust framework, focused on early policy engagement with the Scottish Parliament, should be a priority during the current reporting period. The second and third such aspects

[1] *R (Brown v Secretary of State for Work and Pensions* [2008] EWHC 3158; R *(Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345. This approach was met with approval by the Supreme Court in *Hotak v London Borough of Southwark* [2015] UKSC 30. See generally, C Harlow and R Rawlings, *Law and Administration* (4th) (2022) p 789.
[2] *Hotek* at para 75.
[3] Scottish Parliament Finance and Constitution Committee. (2020, November 25). Official Report 30th Meeting 2020, Session 5, available at https://archive2021.parliament.scot/parliamentarybusiness/report.aspx?r=12968.

relate to parliamentary *scrutiny*. On the one hand, the draft policy statement could do more to outline the process by which the Scottish Government tracks developments in EU law and, in so doing, selects those areas in which alignment is appropriate. On the other hand, the continuing and private nature of inter-governmental negotiations about Common Frameworks, and about how those Common Frameworks will interact with market access principles contained in the Internal Market Act 2020 and with the terms of existing or future UK trade agreements, obscures the true extent of the freedom Scottish Ministers will in fact have to align with EU law where there UK diverges from EU law and regulatory standards. Any policy statement made under the Continuity Act should therefore be reviewed and revised urgently as and when both the formal processes for tracking and sifting EU law and the interactions between the keeping pace power, Common Frameworks, the Internal Market Act and current or future UK trade agreements become clear.