

The Data Protection (Fundamental Rights and Freedoms) (Amendment) Regulations 2023 – A Failure to Contain Damaging Uncertainty by *Eleonor Duhs, Barrister and Partner at Bates Wells* (20th November 2023)

When the UK left the EU, the European Union (Withdrawal) Act 2018 (“EUWA”) created legal certainty by saving the UK GDPR, ensuring that it had the same meaning as before (see [section 3\(2\)\(a\)](#)): preserving the fundamental right to the protection of personal data as an aid to interpreting the UK GDPR and the Data Protection Act 2018 (“DPA 2018”) (see [section 5\(5\)](#) and [section 6\(3\)\(a\)](#)); keeping “retained case law” (see [section 6\(7\)](#)), so that the meaning of the legislation remained stable; and **guaranteeing that if there were a conflict between the UK GDPR and the DPA 2018, the UK GDPR would continue to have precedence** (see [section 5\(2\)](#), as considered in the [Open Rights Case](#) at [11]–[13]).

Examples of where the Retained EU Law 2023 (Revocation and Reform Act) (“REULA”) removes the legal certainty created by the EUWA include:

- deleting EU fundamental rights and the general principles (see [section 4](#)),
- **creating significant uncertainty as to whether retained case law will still be relevant to interpreting the UK GDPR and the DPA 2018 because most of that case law relies on EU fundamental rights,**
- **reversing the relationship between the UK GDPR and the DPA 2018, with only limited exceptions** (see [section 3\(1\)](#)). The exceptions for data protection law (see [section 3\(1\)](#)) do not prevent the lowering of data protection standards, see [here](#) for further discussion).

The government has the power under REULA to remove these uncertainties by turning the effect of EU fundamental rights and supremacy back on (see the powers in [section 11](#)) or restoring the current relationship between the UK GDPR and the DPA using the power in [section 7](#) and clarifying that established case law still applies. It has chosen not to do so. **These regulations seek only to solve the problem of deleting EU fundamental rights by replacing those references to human rights under the ECHR, using the powers in [section 14](#), which creates additional uncertainties.**

MPs are urged to use the affirmative debate on the regulations to point out that:

- **the EU fundamental rights framework contains a specific right to the protection of personal data, and it is not clear that Article 8 of the ECHR confers the same level of protection – a critical issue in the age of AI,**
- **it is uncertain whether retained case law on the fundamental right to the protection of personal data still applies.** This is profoundly detrimental to legal certainty,
- **reversing the relationship between the UK GDPR and the DPA 2018 [lowers protections](#),**
- **introducing this level of uncertainty in a key area for economic growth could undermine consumer trust and the UK’s ambitions of becoming a “technology superpower” by 2030.**