

## **Submission from Professor David Erdos on the Draft Data Protection (Fundamental Rights and Freedoms) (Amendment) Regulations 2023**

I am getting in touch to bring to the Committee two key concerns about the Draft Data Protection (Fundamental Rights and Freedoms) (Amendment) Regulations (<https://www.gov.uk/government/publications/the-data-protection-fundamental-rights-and-freedoms-amendment-regulations-2023>), a proposed legal change which seeks to remove the fundamental right to data protection from UK data protection law and confine such rights and freedoms only to rights within the European Convention on Human Rights as recognised by the Human Rights Act 1998.

In my opinion, this change has considerably more ramifications for the UK than indicated in the Explanatory Memorandum as it fails to note the tension with the UK's international commitments as a signatory to the updated Council of Europe Data Protection Convention 108+ (see <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatyenum=223>) . This international legal instrument itself recognises data protection as a fundamental right in the third Recital to the Preamble (<https://rm.coe.int/convention-108-convention-for-the-protection-of-individuals-with-regard-to-the-protection-of-personal-data-1981/t1981016808b36f1>, p. 7) as follows:

*Recalling that the right to protection of personal data is to be considered in respect of its role in society and that it has to be reconciled with other human rights and fundamental freedoms, including freedom of expression.*

An even more fundamental issue concerns what appears to be a problem with the Draft Regulations' legal basis. This is stated to be Section 14 of the EU Law (Revocation and Reform) Act 2023. However, such a legal basis is limited to "secondary retained EU law". This is defined in section 11(2) as "(a) any retained EU law that is not primary legislation; (b) any retained EU law that is primary legislation the text of which was inserted by subordinate legislation". Most of the changes proposed do clearly only impact such law. In contrast, one of the changes proposed in the draft Regulation is to section 120(1)(b) which is to amend the Commissioner's duty to provide international mutual assistance from one "subject to appropriate safeguards for the protection of personal data and other fundamental rights and freedoms" (a wording which clearly recognises data protection as a fundamental right) to one which is "subject to appropriate safeguards for the protection of personal data and fundamental rights and freedoms" (a wording which denies data protection such a status). However, the current wording of Section 120(1)(b) of the Data Protection Act 2018 was established by Parliament directly in the original Data Protection Act 2018 (see <https://www.legislation.gov.uk/ukpga/2018/12/section/120/enacted>). It is therefore primary legislation not secondary retained EU law at all. It would therefore appear that this part of the draft Regulations is simply *ultra vires*.

Yours sincerely,

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