Fundamental changes to the UK GDPR — what they mean in practice

Eleonor Duhs, Partner and Head of Data and Privacy at Bates Wells, discusses the uncertainty left by the impending removal of retained EU law from the statute book

The UK's departure from the EU created various significant legal challenges, not least among them the questions of how to keep the statute book stable and how to retain legal certainty on leaving the EU when many areas of the economy — including personal data protection — were regulated by EU law.

Through the European Union (Withdrawal) Act 2018 ('EUWA'), the UK government created and implemented a mechanism to save EU rights, obligations and their interpretation into UK law at the point when the EU Treaties stopped applying. Broadly speaking, where EU law applied a new form of law, retained EU law took its place. Domestic law versions of the EU rights and obligations, including in the area of data protection, ensured the stability of the UK statute book and economy.

The Retained EU Law (Revocation and Reform Act 2023 ('REULA') removed the concept of retained EU law from the statute book at the end of 2023. Such law is now relabelled 'assimilated law' and stripped of its previous methods of interpretation. EU fundamental rights have been deleted from the statute book, and domestic law with EU origins has become subordinate to legislation (whenever enacted) which was made in the UK.

The area of data protection will not be immune from these changes. On a practical level, the most risk-averse option for organisations will be to continue to apply and interpret data protection standards as they were before. However, there are many unanswered questions about the effect of these changes, and there will be little clarity about how to interpret areas which were previously retained EU law, including UK data protection law, until cases reach the courts.

The position pre the end of 2023

When the UK stopped being subject to the EU Treaties at the end of 2020, the EUWA saved the rights and obligations which applied in domestic law through the UK's EU membership. This meant that the GDPR became domestic law and was rebadged the UK GDPR. The Data Protection Act 2018 ('DPA') remained on the statute book. The UK GDPR and the DPA became part of 'retained EU law', the vast body of law saved on the UK's departure from the EU legal framework.

Retained EU law was to be interpreted as it had been while the UK was an EU Member State. This was indicated through a number of mechanisms in the EUWA. For example, EU-derived domestic legislation such as the DPA was to be interpreted "as it ha[d] effect in domestic law". This included EU methods of interpretation, such as interpreting domestic law implementing EU rights and obligations consistently with EU fundamental rights. Direct EU legislation such as the UK GDPR was to continue to have the same effect as it had in EU law. This created continuity and certainty as to what the law meant.

Caselaw from the Court of Justice of the EU ('CJEU') from before the end of 2020 was also preserved in domestic law, as was domestic case law interpreting EU rights and obligations. The general principles of EU law, which include fundamental rights and the protection of personal data, were retained as an aid to the interpretation of our data protection frameworks. The principle of the supremacy of EU law was preserved, meaning that in the event of conflicts between the provisions in the UK GDPR and the DPA 2018, the UK GDPR took precedence. This was confirmed in the case of *R (Open Rights Group & the3million) v Secretary of State for the Home Department & Secretary of State for Digital, Culture, Media and Sport* ([2021] EWCA Civ 800). In this case, the retained principle of supremacy was relied on by the Court of Appeal to find that the overly broad exemption in the DPA from data subject rights in an immigration context was unlawful.

The EU's Charter of Fundamental Rights ('the Charter') was not saved into the domestic statute book. The UK government's view was that this made no substantive difference, because the Charter simply listed the rights found in EU law. Because the rights and obligations listed in the

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Charter were being saved into domestic law through EUWA, no rights would be lost. Further, the EUWA clarified that retained case law which referred to rights in the Charter should be read as referring to the underlying rights and obligations listed in the Charter. This ensured that case law which referred to the Charter would still be applicable.

Nothing in the EUWA prevented the UK Parliament from legislating to change the UK GDPR and the DPA. Indeed, the White Paper on the EUWA stated that after the UK's exit from the EU, "it will then be for democratically elected representatives in the UK to decide on any changes to that law, after full scrutiny and proper debate."

The Retained EU Law (Revocation and Reform) Act 2023 and legal uncertainty

The UK's data protection framework is being changed through the vehicle of the Data Protection and Digital Information Bill, the latest version of which recently had its second reading in the House of Lords. However, there were also fundamental changes to the UK's statute book made at the end of 2023 through REULA, which swept away the retained EU general principles (including fundamental rights) and the requirement to interpret retained EU law in accordance with those principles. Further, the principle of the supremacy of EU law has been deleted. The default position is that domestic law (whenever enacted) will trump the law which came from the EU.

The changes introduced by REULA create legal uncertainty. In terms of the UK GDPR and the DPA 2018, EU fundamental rights are the underpinning foundation of the law. If EU fundamental rights are simply deleted (the default position under REULA), then the UK GDPR and the DPA will become more difficult to interpret.

In order to try to contain some of the uncertainties created by REULA, the government has introduced secondary legislation: the Data Protection (Fundamental Rights and Freedoms) (Amendment) Regulations 2023 ('the Regulations'). The Regulations ensure that references to fundamental rights and freedoms in the UK GDPR and the DPA 2018 are read as references to fundamental rights and freedoms as set out in the European Convention on Human Rights ('ECHR') as implemented through the Human Rights Act 1998.

> ***"The deletion of supremacy also turns the relationship between the UK GDPR and the DPA 2018 on its head. If there is a conflict between the UK GDPR and the DPA 2018, the DPA 2018 will take precedence."***

On one level, this makes sense. Article 8 (right to the protection of personal data) of the Charter of Fundamental Rights of the European Union ('the Charter') is based on Article 8 (right to a private and family life) of the ECHR. However, it is uncertain that the rights under Article 8 of the ECHR provide exactly the same protections as the right to data protection in the EU legal order. First, this is because the ECHR has no specific right to the protection of personal data. In the case of *R (Davis & Watson) v Secretary of State for the Home Department* [2015] EWHC 2092 (Admin), the High Court held that Article 8 of the EU Charter "goes further" and "is more specific" than Article 8 of the ECHR.

Second, the EU Charter contains general provisions explaining how the relevant rights should be interpreted. Article 52 of the Charter confirms that where the rights in the Charter correspond to the rights in the ECHR, the meaning and scope of those rights should be the same as in the ECHR, although the EU is not prevented from providing more extensive protections. Whether EU fundamental rights provided more extensive protection than those under the ECHR will be tested in the courts over the coming years, but there is likely to be uncertainty in relation to this point from the end of 2023.

Uncertainty about the application of established case law

Another area of significant uncertainty will be if, how, and the extent to which the CJEU's case law still applies when interpreting the UK GDPR and the DPA 2018. Much of the CJEU's case law on data protection references EU fundamental rights as set out in the EU Charter. If EU fundamental rights have been deleted, then it is not clear that the case law still applies. The EUWA clarified that case law referencing the EU Charter still applied and should be read as a reference to underlying fundamental rights which were saved into domestic law.

The Regulations could have contained a similar provision which clarified that references in the case law to rights set out in the EU Charter should be read as references to rights as guaranteed in the ECHR, but they do not. The government may have elected not to do this because of a concern that the rights are not, in fact, the same. Again, we will have to wait for cases to reach the courts to understand whether and to what extent EU case law is still applicable.

The explanatory note to the Regulations makes no attempt to answer this question, other than stating that "no, or no significant impact" is foreseen by the implementation of the Regulations. Ministers' attempt during the debate in the House of Commons to portray the Regulations as an exercise in "simply tidy[ing] up the existing statute book as a result of the UK's withdrawal from the European Union" show a worrying lack of insight.

The relationship between the UK GDPR and the DPA 2018 — lowering rights

The deletion of supremacy also turns

the relationship between the UK GDPR and the DPA on its head. If there is a conflict between the UK GDPR and the DPA 2018, the DPA will take precedence. This is the opposite of the intention of the legislation when it was drafted, and may have unforeseen consequences.

There is a limited exception to the general rule that REULA introduces whereby domestic law will trump retained direct EU legislation. This exception operates in the context of data protection rights. Data subject rights in the UK GDPR will generally take precedence over rights or obligations in other domestic law. However, the rights and obligations in Chapter III of the UK GDPR (rights of the data subject) are subject to the exceptions in Schedule 2 to the DPA. There is, it appears, no scope under REULA to disapply the Schedule 2 exceptions on the basis that they are overly broad, as happened in the *Open Rights* case. Instead, the courts would need to make an 'incompatibility order' under section 8 of the REULA which may delay, explain, remove or constrain the consequence of the Schedule 2 condition trumping data subject rights, but this is a less certain remedy than would have existed before. Under EUWA or when EU law still applied, it would have been clear that the UK GDPR had precedence and that overly broad exceptions in Schedule 2 to the DPA were unlawful.

In practice, this means that data subject rights in UK law will be less certain and potentially less protective than before.

What will the outcome of these changes be?

Lowering the standard of data protection rights in the UK creates obvious risks to the continuing UK data adequacy decision, which rests on data protection rights being 'essentially equivalent' to those rights in the EU. If the Conservative Party campaigns to leave the ECHR at the next election, then this simply magnifies the uncertainties — the substitution that the Regulations make of ECHR human rights for EU fundamental rights may be short-lived. Lowering the standard of protection of personal data in the UK also risks failure in delivering the "trusted data regime" which purports to be one of the underpinning foundations of the UK's ambition to become a "technology superpower" by 2030.

From a practical perspective, it makes sense to deal with these uncertainties by continuing to apply the UK GDPR and the DPA 2018 as before. There is no doubt that the government has made some fundamental changes to the regime. Exactly what effect those changes will have remains to be seen.

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