EXPLANATORY MEMORANDUM TO

THE DATA PROTECTION (FUNDAMENTAL RIGHTS AND FREEDOMS) (AMENDMENT) REGULATIONS 2023

2023 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Science, Innovation and Technology and is laid before Parliament by Command of His Majesty.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 The UK General Data Protection Regulation (UK GDPR) and Data Protection Act 2018 (DPA 2018) contain a number of provisions requiring the Government, the Information Commissioner and data controllers to take account of individuals' "fundamental rights and freedoms".

2.2 "Fundamental rights and freedoms" are currently defined in this legislation as retained EU rights, which will be repealed at the end of 2023 by the Retained EU Law (Revocation and Reform) Act 2023. In order to ensure relevant rights and freedoms are still taken into account after the end of this year, this instrument amends the definition of "fundamental rights and freedoms" to refer to an alternative source of fundamental rights and freedoms, namely those under the European Convention on Human Rights (ECHR), which have been enshrined in the UK's domestic law under the Human Rights Act 1998. This will provide certainty for organisations which are subject to data protection legislation and will establish a clear set of fundamental rights and freedoms to refer to.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 These regulations were originally a proposed negative statutory instrument and were presented to the sifting committees on 11 September 2023 under paragraph 6(3) of Schedule 5 to the Retained EU Law (Revocation and Reform) Act 2023. They were submitted under the same name as detailed in the title above. The sifting committees considered this instrument on 17 October 2023 and recommended that it should be upgraded to the affirmative scrutiny procedure.

3.2 Both sifting committees have published their opinions. The Secondary Legislation Scrutiny Committee (House of Lords) stated that the current position with regards to fundamental rights and freedoms may not be replicated fully under this instrument and that potential differences in the rights and freedoms cannot be ruled out entirely. They stated that "any changes in this sensitive area may be regarded as politically significant" and accordingly they recommend that this instrument be upgraded to the affirmative procedure. The European Statutory Instruments Committee (ESIC) stated that it is unclear to the Committee whether this instrument means that individuals' rights will continue to be adequately protected and it therefore recommends that the

instrument follows the affirmative procedure so that Members may have the opportunity to ask questions to the Minister. The ESIC also commented that the amendment of primary legislation via regulation 3 of the instrument furthers the case for this instrument to follow the affirmative procedure.

3.3 The Minister of State for Data and Digital Infrastructure has accepted the sifting committees' recommendations and is duly laying the instrument before Parliament to undergo the affirmative scrutiny procedure.

3.4 The regulations will come into force before the end of 2023 or on the day after the day on which they are made, whichever is later. The Government intends to make the regulations as soon as possible after they have received parliamentary approval and will seek to bring them into force before the end of 2023 to avoid any gap between the repeal of retained EU rights by the Retained EU Law (Revocation and Reform) Act 2023 and the new definition of "fundamental rights and freedoms" coming into force. Regulation 1(2) of the regulations allows for the regulations to be made after the end of 2023 should there be a delay in the regulations receiving parliamentary approval. If the regulations are made after the end of 2023, there will be a lack of clarity on how fundamental rights and freedoms are to be taken into account in data protection legislation until the regulations are brought into force. In such circumstances, the regulations will be commenced on the day after the day on which they are made to ensure any gap in coverage is kept to a minimum.

3.5 It is therefore possible that the regulations may be brought into force less than 21 days after the date on which they are made. This is considered to be reasonable because the impact on organisations and individuals as a result of the changes is expected to be minimal given that the regulations seek to replicate the current position, to the extent possible, and they do not make significant changes to the substantive obligations of the UK GDPR and DPA 2018. The government also published the draft regulations on Gov.UK on 11 September to give organisations time to consider the proposed changes.

4. Extent and Territorial Application

4.1 The territorial extent and application of this instrument is England, Wales, Scotland and Northern Ireland. Extra territorial effect should also be considered as it amends provisions of the UK GDPR, which apply in certain circumstances to processing by controllers and processors who are established outside of the United Kingdom.

5. European Convention on Human Rights

5.1 The Minister of State for Data and Digital Infrastructure (The Rt Hon John Whittingdale OBE MP) has made the following statement regarding Human Rights:

"In my view the provisions of the Data Protection (Fundamental Rights and Freedoms) (Amendment) Regulations 2023 are compatible with the Convention rights."

6. Legislative Context

6.1 The UK GDPR and DPA 2018 contain numerous references to "fundamental rights and freedoms". Prior to EU Exit and the end of the EU Exit Transition Period, the terms "fundamental rights and freedoms" were not defined but referred to fundamental rights and freedoms which were recognised in EU law and reaffirmed in

the Charter of Fundamental Rights of the European Union. This included, for example, the right to respect for private and family life, the right to protection of personal data and the right to freedom of expression.

6.2 At the end of the EU Exit Transition Period, a new definition of "fundamental rights and freedoms" was inserted into Article 4(28) of the UK GDPR by regulation 3 and paragraph 6(13) of Schedule 1 to the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019 (the 2019 Regulations). A new definition of "fundamental rights and freedoms" was also inserted into section 205(1A) of the DPA 2018 by regulation 4 of and paragraph 85 of Schedule 2 to the 2019 Regulations. These new definitions were intended to ensure that references to "fundamental rights and freedoms" only captured those EU fundamental rights and freedoms which continue to form part of domestic law after the end of the EU Exit Transition Period by virtue of section 4 of the European Union (Withdrawal) Act 2018 (EUWA 2018).

6.3 Section 2 of the Retained EU Law (Revocation and Reform) Act 2023 repeals section 4 of European Union (Withdrawal) Act 2018 (EUWA 2018) at the end of December 2023 and provides that anything which, immediately before the end of 2023, is retained EU law by virtue of that section is not recognised or available in domestic law at or after that time. This means that EU-derived rights which were retained in UK law under section 4 of EUWA 2018 following the UK's exit from the EU will cease to be recognised in UK law after that time.

6.4 This instrument amends provisions in the UK GDPR and DPA 2018 using the powers to revoke or replace secondary retained EU law under section 14(1) and (2) of the Retained EU Law (Revocation and Reform) Act 2023. The UK GDPR is secondary retained EU law within the meaning of section 11(2)(a) of the 2023 Act, as it is direct EU legislation incorporated into domestic law under section 3 of EUWA 2018.

6.5 Provisions of the DPA 2018 which are amended by these regulations are secondary retained EU law within the meaning of section 11(2)(b) of the Retained EU Law (Revocation and Reform) Act 2023 or amended as a consequence of amendments made to that secondary retained EU law. In particular, the instrument amends section 205(1A) of the DPA 2018 which was inserted by subordinate legislation namely regulation 4 of and paragraph 85 of Schedule 2 to the 2019 Regulations. Section 205(1A) is retained EU law to the extent that the definition set out therein applies to Part 3 of the DPA 2018 or provisions in the DPA 2018 relating to Part 3. It is therefore EU-derived domestic legislation under section 1B(7)(c)(i) of EUWA 2018.

7. Policy background

What is being done and why?

7.1 The data protection legislation contains several references to fundamental rights and freedoms. Some examples in the current legislation of where the government has to consider 'fundamental rights and freedoms' include when it is making new conditions allowing the processing of special category data under Article 9 of the UK GDPR; or where it is restricting data subject rights on public interest grounds under Article 23(2) of the UK GDPR. Data controllers are also required to consider the fundamental rights and freedoms of individuals when relying on the 'legitimate interests' lawful ground for processing under Article 6(1)(f) of the UK GDPR.

7.2 "Fundamental rights and freedoms" are currently defined in data protection legislation by reference to rights retained under section 4 of EUWA 2018 which will be repealed at the end of 2023. It is important that the fundamental rights and freedoms of individuals continue to be considered carefully in these situations. That is why the provisions in this instrument amend the meaning of fundamental rights and freedoms so that references to retained EU rights and freedoms which would become redundant at the end of 2023 are replaced with references to rights under the European Convention on Human Rights (ECHR) which has been enshrined in the UK's domestic law under the Human Rights Act 1998.

7.3 There is no comprehensive or authoritative list of "fundamental rights and freedoms" which continue to be recognised in domestic law by virtue of section 4 of EUWA 2018. In practice, the right most relevant in this context is the right to private life which also constitutes a right under Article 8 ECHR. Other relevant rights such as the right to freedom of expression will also continue to be captured by the new definition of "fundamental rights and freedoms".

7.4 The overall effect of the changes made by these regulations does not increase the regulatory burden. The impact on organisations and individuals as a result of these changes is expected to be minimal because these changes seek to replicate the current position as far as possible, while providing clarity on the rights that need to be considered in a domestic law context. They are unlikely to require significant changes to regulatory guidance for organisations. There could be some benefits for organisations in the sense they will only need to consider how the rights of individuals are protected by rights recognised in domestic law rather than trying to comprehend how retained EU law protects those rights. The changes to the definition of "fundamental rights and freedoms" are made using the revoke and replace power under section 14(2) of the REUL Act 2023 as the Secretary of State considers this to be appropriate provision to achieve the same or similar objective to the existing provision which is to ensure that the key rights and freedoms of individuals recognised in domestic law must be taken into account under data protection legislation.

7.5 The regulations also omit references to EU concepts of "fundamental rights and freedoms" which are redundant in domestic law, in particular the right to the protection of personal data. The omission of this wording is not considered to have an impact upon the operation of data protection legislation as it is redundant. Before the UK left the EU, the right to the protection of personal data was set out in Article 8 of the Charter of Fundamental Rights of the European Union and Article 16(1) of the Treaty on the Functioning of the European Union. There is no direct equivalent to the right to the protection of personal data in the UK law. However, the protection of personal data falls within the right to respect for private and family life under Article 8 of the European Convention of Human Rights, which is enshrined in UK law by the Human Rights Act 1998. Data protection rights are also protected by UK GDPR, the Data Protection Act 2018 and will continue to be protected by the Data Protection and Digital Information Bill in our domestic legislation.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

8.2 This instrument does however relate to the reform of REUL (i.e. the UK GDPR and certain provisions in the Data Protection Act 2018) using 'revoke and replace' powers under section 14(1) and (2) of the Retained EU Law (Revocation and Reform) Act 2023.

9. Consolidation

9.1 This instrument replaces references to terminology on fundamental rights in the data protection legislation which will become redundant at the end of December 2023. There are no plans or need for further consolidation at this time.

10. Consultation outcome

10.1 Under Article 36(4) of the UK GDPR, the government is required to consult the Information Commissioner's Office (ICO) on any proposals for legislative or statutory measures they are developing which involve the processing of personal data. The government duly consulted the ICO on the development of this instrument.

11. Guidance

11.1 The government has no plans to publish guidance on these changes because the practical effect on organisations will be insignificant.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 A full Impact Assessment has not been prepared for this instrument because there is no significant impact to businesses or other organisations.

13. Regulating small business

13.1 There is no or no significant impact on small businesses.

14. Monitoring & review

14.1 The instrument does not include a statutory review clause. The changes are designed to provide continuity and legal certainty as far as possible.

14.2 As this instrument is made under the Retained EU Law (Revocation and Reform) Act 2023, no review clause is required.

15. Contact

15.1 Robin Edwards at the Department for Science, Innovation and Technology (email: Robin.Edwards@dsit.gov.uk) can be contacted with any queries regarding the instrument.

15.2 Owen Rowland, Deputy Director for Data Protection Policy, at the Department for Science, Innovation and Technology can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Rt Hon John Whittingdale OBE MP, Minister of State in the Department for Science, Innovation and Technology can confirm that this Explanatory Memorandum meets the required standard.