COVINGTON

Brexit and Data Protection - What Now for the UK?

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Data Privacy and Cybersecurity

At 11 p.m. tonight, the UK will officially leave the EU. Although this is a significant milestone in the development of the UK's data protection framework, the UK will remain very closely linked to the EU in the short term at least, and for many the change may be imperceptible. The UK and EU have ratified the Withdrawal Agreement ("WA"), which provides for a transition period during which EU law will remain applicable in the UK as though the UK were still a Member State (with limited exceptions). The transition period is due to end on December 31, 2020. The UK can request an extension of the transition period for a further one or two years, but the new British government, under the leadership of Prime Minister Johnson, has indicated that it will not extend the transition period beyond the end of 2020.

Related to the above, the UK Parliament has passed the European Union (Withdrawal Agreement) Act 2020. Paragraph 1(1) of Schedule 5 of that Act amends all references to "exit day" (defined originally as 11 p.m. on January 31, 2020) in legislation passed under the original European Union (Withdrawal) Act 2018 to now mean 11 p.m. on December 31, 2020. In other words, the various UK statutory instruments designed to ensure that current EU law operates effectively in the UK after Brexit will now only come into effect at the end of the transition period, rather than at the start.

From a data protection perspective, this all means that the GDPR will remain in force in the UK during the envisioned 11-month transition period in the same way that it does today, and there will be no change to the substantive obligations that are familiar to companies doing business in the UK. The Data Protection, Privacy and Electronic Communications (Amendments etc.) (EU Exit) Regulations 2019, which establish the so-called "UK GDPR" separate from the "EU GDPR", will come into effect December 31, 2020. The UK Information Commissioner's Office ("ICO") has confirmed this in its updated Brexit FAQs.

Although substantive data protection obligations will not change during the transition period, the role of the ICO will change. Article 7 of the WA excludes the UK from participation in the decision-making and governance of EU bodies. As a result, the ICO will lose its status as a full member of the European Data Protection Board ("EDPB"). Article 128(5) of the WA, however, permits the EPDB to invite the ICO to its meetings during the transition period, where discussions relate to individuals or companies established in the EU, or where the presence of the ICO is in the interests of the EU as a whole. Separately, the EDPB could invite the ICO as a guest or expert under its Rules of Procedure, but in either case the ICO would have no voting rights. Thus, it can be expected that the ICO's influence vis-a-vis the EPDB will diminish, but perhaps not entirely disappear.

Despite its changed role within the EDPB, the ICO will still be available during the transition period to act as a lead authority for companies with multiple EU establishments under the GDPR's one-stop-shop mechanism and for the approval or updating of EU Binding Corporate Rules, as explained in the FAQs. Under Article 56 of the GDPR, a supervisory authority has competence as the lead supervisory authority where a controller or processor has their main establishment in a Member State. As the UK will continue to be a Member State during transition, the ICO can still be competent to lead where a company's main establishment is in the UK.

Although the transition period provides welcome continuity and creates a significant breathing space, at the end of it, the UK is likely to become a "third country", meaning (among other things) that transfers of data to the UK will require an adequacy decision or other appropriate safeguards, the ICO's role as a lead authority will come to an end, and companies not established in the UK may need to appoint UK representatives under Article 27 of the GDPR. For all organizations impacted by Brexit, it would be prudent to consider the effect of Brexit early in the transition period rather than later.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Data Privacy and Cybersecurity practice:

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