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Interview: There is nothing objectionable about reporting information regarding a disease that is dangerous to the public

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“THERE IS NOTHING OBJECTIONABLE ABOUT REPORTING INFORMATION REGARDING A DISEASE THAT IS DANGEROUS TO THE PUBLIC”

Given the importance of testing measures to contain the Covid-19 pandemic, digital tools using a variety of models have been launched, sometimes hastily, by governments in many countries, based on local cultural and legal traditions. In France, there was passionate parliamentary debate regarding the Stop Covid contact tracing app, as well as considerable public mistrust. The issue, however, still remains topical in view of the problems related to storage of the data collected, but also in the event of a resurgence of the epidemic in the short term. In the following interview, Winston Maxwell, a researcher specialising in digital law, gives his analysis of the situation in France and abroad.

ILB: In the early stages of the pandemic, contact tracing apps appeared to be performing well in Asia, with countries such as Singapore and South Korea setting an example in their management of the health crisis. Can you describe the specific features of these countries?

Winston Maxwell: The two countries have had very different approaches. In Singapore, the TraceTogether app was dependent on people using it on a voluntary basis, as in France. And it didn't work well, because only 25% of the population downloaded it, whereas a rate of at least 60% would be needed for such a tool to be effective. In South Korea, it's a completely different story and it's very interesting to consider the South Korean case in relation to France. In 2015, South Korea was hit by an epidemic of MERS-CoV (Middle East Respiratory Syndrome Coronavirus). Even though the disease did not claim many lives, there was considerable political turmoil: the government was accused of amateurism and trial and error in dealing with the crisis. Later in 2015 a law was passed that changed the approach and established a new framework for dealing with major epidemics. This law provided for a series of interrelated measures, including one that allows the Minister of Health to order communication of data from mobile operators



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and bank card operators in order to trace the location of infected persons. This model is quite intrusive and not at all voluntary. Nevertheless, the South Korean legislation, which I have looked at with a view to drawing comparisons with France, is subject to robust safeguards and supervision by independent authorities. South Korea, unlike some of its neighbours, has strong privacy laws that are almost equivalent to the European GDPR (General Data Protection Regulation). The 2015 law created an effective toolbox which the authorities were able to use in fighting Covid-19. There was no trial and error, because the authorities already had a toolbox that had been fully debated in the context of the MERS epidemic.



Winston Maxwell is director of law and digital technology studies at the department of economic and social sciences of Telecom Paris - Institut Polytechnique de Paris. With Professor David Bounie, he coordinates the school's Operational AI Ethics programme (telecom-paris.fr/ai-ethics). Previously, he was a partner in the law firm Hogan Lovells, specializing in data law. Winston Maxwell is a graduate of Cornell Law School and holds a PhD in economics from Télécom Paris (Smarter Internet Regulation Through Cost-Benefit Analysis, published by Presses des Mines in 2017). His research work is mainly focused on the regulation of artificial intelligence.

Should France imitate the South Korean system?

WM: Debates are currently taking place in the French National Assembly to make a preliminary assessment of the crisis in France. Should we adopt a similar toolbox? I think a toolbox including digital tools would be helpful for mitigating a possible second wave of Covid-19 or another unrelated epidemic. Of course, it will have to be thought through and discussed on the basis of lessons learned in managing the Covid 19 crisis, and based on France's constitutional framework. It is unlikely that France would go as far as South Korea. It's hard to imagine a law in France permitting authorities to use bank card data. Such an approach would surely be considered disproportionate. Moreover, there are important cultural differences between the two countries. Given France's history, its citizens are particularly distrustful of tracking technologies operated by the state.

You draw a parallel between the health crisis and the fight against terrorism. Why is that?

WM: Following the terrorist attack of 11 September 2001 in the USA and those in Paris in 2013 and 2015, new laws on security and intelligence were adopted with the aim of combatting terrorism. In this context, there were heated debates on how to strike the right balance between public security and individual privacy. Today, we have arrived at a point of equilibrium for anti-terror measures, thanks to a number of court decisions, and the establishment of institutional safeguards to prevent abuse. In the fight against pandemics, we don't yet have the same level of maturity.

On what basis might France adopt an anti-epidemic "toolbox"?

WM: There has to be a balance between protecting public health, which is a strong constitutional right, and the protection of privacy, another competing right. There is nothing unusual about this balancing approach; it is a straightforward trade-off that is commonly

adopted in other areas, such as the fight against terrorism. However, as I said before, this trade-off needs to be debated, reflected in a law and tested by courts. In the context of the current pandemic, there has been little time for this kind of analysis and debate.

Let's turn more specifically to France. Two systems were launched in May: the Covid contact system of the French Health Insurance and the SI-DEP screening system administered by Paris Hospitals. However, the collection of data is not subject to consent. Is this proportional and compatible with the regulations in force, in particular the GDPR?

WM: Consent to the collection of personal data is not always required. It is not necessary when the collection of data is necessary for an important public interest, as is the case with the Covid-19 pandemic. Moreover, the National Commission for Information Technology and Liberties (CNIL) has to be consulted and give an opinion, and this has been done. For many years France has required communication of data for certain contagious diseases (Zika, yellow fever, cholera, tuberculosis, etc.). If someone has the symptoms of any of these diseases, it will be reported by the doctor or laboratory making the diagnosis and the case will be registered by health authorities for the purposes of protecting public health. There is nothing objectionable about reporting information regarding a disease that is dangerous to the public. Especially since this practice is covered by medical secrecy and pseudonymisation of data.

Nevertheless, the data for these two tools are hosted by an American company, namely Microsoft. Yet data legislation is very different on the two sides of the Atlantic. Are there any concerns about possible data leaks?

WM: I don't have the details regarding the use of Microsoft. I know that there is considerable controversy about Microsoft's hosting of a large French database – the Health Data Hub,

created in 2019. This database is intended for medical research using Big Data and contains very sensitive data. It is currently being debated because the United States does not have a good reputation in the protection of personal data, especially after the Snowden affair and the decision by the European Court of Justice in the "Schrems Safe Harbor" case. The US CLOUD Act is often cited as a specific threat, but here I am less concerned. The CLOUD Act allows a U.S. judge to order the disclosure of data hosted abroad as part of a criminal investigation. But this power is closely controlled constitutionally in the United States. The judge's powers are similar to those of a French judge. Finally, it should also be recalled that Microsoft received French certification as a health data hosting provider in 2018. I do not know the reasons why the government chose Microsoft for data hosting, but I imagine that data security was an important criterion.

Following the health emergency, the Scientific Council recently recommended extending the storage period for this data to six months, as opposed to three months previously. Do you think this recommendation is justified?

WM: I don't have any specific comment to make on that. Here, too, the usefulness of this measure has to be weighed against the protection of personal data. In law, this approach amounts to testing the proportionality of a measure restricting individual freedom. This proportionality test is based on three criteria. The first implies that the curtailment of freedom is justified by a legitimate objective, in this case public health. The second requires the creation of a specific law that is transparent to the public. The third criterion is more complicated to assess, and includes the concepts of necessity and proportionality. Why is the measure implemented? How effective is it? What are the alternatives? Are there adequate safeguards? Clearly, this amounts to setting limits to ensure that the pursuit of one right (e.g. public health) does not completely override the other right →

(data protection). The two rights must coexist, with each right giving some ground to accommodate the other.

France has made a technological choice based on data centralization for the Stop Covid app. What is your opinion?

WM: France has chosen to have a fully controlled, all-French system, with centralized collection of pseudonymized data. Germany has decided on a decentralized system that is dependent on foreign technology. The French decision does not worry me at all.

Prior to the launch of the Stop Covid app, you expressed scepticism about a voluntary tool of this kind. Why are you sceptical?

WM: Making its use voluntary means that the app will be useless, as became apparent in Singapore several weeks after its introduction. Various studies estimated that an adoption rate of at least 60% was needed for such a tool to be effective, and if it was voluntary we were sure that percentage would not be reached. And

actual download figures in France confirm this.

More generally, digital tools and artificial intelligence (AI) have not always lived up to expectations during this pandemic. How might they evolve in order to reconcile public interest and privacy?

WM: It is true that AI has revealed its limitations and has been somewhat disappointing. It failed to see the Covid-19 pandemic coming, even though it is supposed to be a great tool for prediction. This is a lesson to remember. Machine learning is very good at predicting highly repetitive small events, but bad at predicting infrequent major events. This is because there are not enough historical examples for the algorithm to work with and learn from. This is a good reminder of the inherent limitations of this technology. One possible area for improvement is hybrid AI techniques, which are of interest to many researchers. There are a number of projects underway that involve surrounding neural networks with a knowledge base – for example, in epidemiology. This technique would help

guide the algorithm in its predictions. The idea sounds simple, but implementing it is complicated, because it brings together two areas of AI that are traditionally separate. On the one hand, there is machine learning, which is statistical and probabilistic. And on the other, there is symbolic AI, focussed on logic, rules, expert systems and knowledge bases. Ideally, we would like to be able to combine the best of the two techniques. Research along these lines is being explored at Télécom Paris.

In conclusion, while AI has shown its limitations in predicting the epidemic, could it not still be of use in combatting the economic crisis?

WM: Absolutely. Within the framework of the Digital Finance Chair, Professor David Bounie is using Big Data techniques to study the evolution of spending patterns in France, before, during and after the Covid crisis (see previous article). These studies will enable better targeting of public actions to help the country emerge from the crisis. ●