AIJA IP&TMT QUESTIONNAIRE:
Measures aimed at tracking and identifying individuals related to COVID-19 - Switzerland[1]

by JANINE REUDT-DEMONT and KAJ SEIDL-NUSSBAUMER

Question 1: Has your jurisdiction introduced any legislation aimed at tracking individuals (either by use of an app, by obtaining data from mobile communication providers or otherwise) and identifying people they have come into contact with? Or is the government in your jurisdiction planning to do so?

Switzerland has **not yet** introduced any legislation aimed at tracing individuals by use of an app or similar means, but Switzerland is planning to do so in the near future.

On 20 May 2020, the Swiss Federal Council (Swiss government) has adopted a draft legislation for the operation of the Swiss PT-App ("PT" stands for "Proximity Tracing") that is currently being tested by selected institutions and persons. In June 2020, the Swiss Parliament is expected to discuss and pass the legislation. The launch of the Swiss PT-App, often also referred to as the "SwissCovid App", is anticipated to be available to the general public in July 2020. Use of the Swiss PT-App shall be voluntary.

In detail:

Purpose:
During the current state of fighting the COVID-19 pandemic, an important measure is the tracing and interrupting of infection chains. The launch of the Swiss PT-App is aimed at **supplementing** such tracing already practiced today by cantonal authorities via telephone calls.
The Swiss PT-App was created by two leading Swiss universities (namely the EPFL and the ETHZ) in collaboration with the Federal Office of Public Health (FOPH). The necessary backend (server) IT-system was developed and is operated by the Federal Office of Information Technology, Systems and Telecommunication (FOITT) on behalf of the FOPH.

Operation and functions:
The Swiss PT-App functions as follows:

- **Recording of contacts**: The Swiss PT-App is an application software installed on the smartphone (with either the latest version of iOS or Android as operating system) that can be downloaded from the app store. For such download, no personal information such as phone number, name or e-mail address is required. At installation, a random initial encrypted ID is generated. After installation, the smartphone sends out encrypted IDs via Bluetooth (Low Energy). These are long, random and daily changing character strings that do not contain any information on the person using the app, such person's location or the kind of device used. If another smartphone, on which the same Swiss PT-App is installed, is less than two meters away for a total of more than 15 minutes on end, the devices exchange their encrypted IDs. This creates a local list of encrypted IDs received from devices that the person has been close to for a longer time and so registers the epidemiologically relevant encounters. Users do not have to enter or change any settings, but must simply and only carry their smartphone with them with the Bluetooth function turned on. After three weeks, all encrypted IDs collected are automatically deleted from the device. As long as no infection is notified by the user (see below), no data are centrally stored within the PT-system.

- **Notification mechanism**: If a Swiss PT-App user tests positive for COVID-19, he or she receives a so-called "Covidcode" from the cantonal medical service, whereby the code is created via the FOPH's website and via the backend-server operated by FOITT respectively. This step is important to prevent abuse, as the app's notification function can only be activated by the user with this Covidcode. After such activation, which is entirely voluntary, the other app users are automatically – by retrieving the relevant information via the backend-server – informed that they had close contact with a person who tested positive and that they themselves may be infected. The notified persons only receive information on the date, but not on the time or place of the potentially infectious contact. Due to the encrypted and changing IDs, this information is generated anonymously, i.e. neither users, nor the federal authorities hosting the application on their server will know who the infected person is and the privacy of users is guaranteed throughout. Now the informed user can contact the hotline mentioned in the app and clarify the next steps (e.g. quarantine, testing, treatment etc.).

In summary, the Swiss PT-App does not collect any personal data, location data or motion data of the user. The contact data (i.e. the exchanged encrypted IDs) are also not centrally stored, but only locally on the respective devices. Consequently, the Federal Data Protection and Information Commissioner (FDPIC, i.e. the Swiss National Data Protection Authority) as well as the National Ethics Committee have approved of the use of the Swiss PT-App.
The Swiss PT-App has only been designed to fight COVID-19 and as soon as the app is not needed anymore for this purpose, it will be discontinued and all data will be deleted.

Use of data for statistical purposes:
Certain anonymous data, such as (i) the number of generated activation codes (Covidcodes) per canton, (ii) the number of calls to the specific hotline for the informed users, and (iii) the number of app downloads from the Apple or Google store are used for statistical purposes.

Necessity of legislation:
Federal bodies that systematically obtain data from a large number of personal sources, such as mobile phones, and process it automatically must, in view of the associated risks to privacy and informational self-determination, be able to base themselves on a legal basis within the meaning of Article 17 para. 1 of the Swiss Data Protection Act (DPA). This requirement also applies if the use of the app is voluntary.
The legal basis on which the FOPH may process data during the pilot phase is provided for under Article 17a DPA (automated data processing in pilot projects).
Consequently, despite the voluntary use of the Swiss PT-App, the implementation of respective legislation is necessary, as the Swiss PT-App's backend is integrated into the FOITT's infrastructure. Furthermore, the FOPH is responsible for the operation of the app and qualifies as controller of the data file in the sense of the DPA.

Content of draft legislation:
The draft legislation, which consists in an urgent adaptation of the existing Epidemics Act, authorizes the FOPH to operate the Swiss PT-App, regulates the basic principles of the app's purpose and functions as well as the purpose of the data processing connected therewith (all as described above). In addition, it contains a prohibition of discrimination or preference based on participation or non-participation in the PT-system, so that the principle of voluntary participation and the right of informational self-determination are preserved. The draft legislation further provides that the operation of the PT-system may only last as long as is necessary to fight the COVID-19 pandemic. It also authorizes the Federal Council to conclude agreements with other states with regard to the interoperability of similar systems.
All details on the Swiss PT-App's operation will be regulated in a separate implementation ordinance.

<u>Swiss PT-App as medical device</u>:
With the technical implementation as outlined above and in particular with regard to the health-related recommendations provided, the Swiss PT-App likely qualifies as medical device under Swiss law.
According to the Federal Council's dispatch for the attention of the Swiss Parliament with regard to the legislation to be implemented ("*Botschaft*"), the Swiss PT-App fulfils all respective regulatory requirements under the Therapeutic Products Act.

<u>Question 2</u>: Has your government recommended or promoted the voluntary use of technological measures to track individuals and identifying people they have come into contact with?

Yes, the use of the Swiss PT-App is voluntary but recommended.

The Federal Council also plans to promote the use of the Swiss PT-App, inter alia by way of a mass media campaign (TV-spots, banners etc.).
According to a survey conducted at the end of April 2020, 70% of Switzerland's population is in favour of the introduction of a PT-app. Most of the questioned persons are likely to install and use the app themselves.

For more information on the app and its functions, see answer to <u>Question 1</u>.

<u>Question 3</u>: Have any companies in your jurisdiction storing movement and/or communication data (e.g. mobile phone providers) voluntarily offered to provide data to your government to enable the tracking of individuals and identification of people they have come into contact with?

No.

However, Swisscom, the state-owned and largest Swiss mobile phone provider, has provided the FOPH with certain information about the mobility of the population and size of local gatherings throughout the COVID-19 pandemic. The purpose of this information was to enable the FOPH to ascertain whether the Federal Council's prohibition of gatherings of more than 5 people had generally been adhered to. This information was not shared entirely voluntarily, as the FOPH had issued an order based on the Epidemics Act obliging Swisscom to grant access to its pre-existing Mobility Insights Platform (MIP). Swisscom and the FOPH both stated that no personal data was disclosed to the FOPH, but still the cooperation was subject to critical media coverage.
Due to these media reports, the FDPIC started a summary enquiry, the results of which can be accessed here in [German](). The FDPIC came to the conclusion that Swisscom (and the FOPH) had rightfully stated that only anonymized data is shared with the FOPH. In particular, it held that

- localisation data had been pseudonymized as early as possible by hashing and subsequent aggregation;
- no organisational measures had been described, but that there was no reason to believe that there were obvious deficiencies, since the product (MIP) had been in operation for a number of years;
- Swisscom made available statistical and visualised information to the FOPH, but none of the non-obfuscated ("*Klardaten*") or pseudonymized data that underlie the MIP; and
- the data made available to the FOPH is anonymized.

However, the FDPIC criticized that information to the public about the cooperation had been scarce and not easily found, which is why he requested Swisscom to make available detailed information about the data processing underlying the cooperation. Meanwhile, Swisscom has complied with that

request and issued a FAQ, detailing the FOPH's access to the MIP. The FAQ is available here in [German](). Additionally, the FOPH has released a media statement, which inter alia shows what the visualizations it received look like. This statement is available here in [English]().

Given the scrutiny, which already this rather high-level information sharing between Swisscom and the authorities has been subject to, as well as the imminent release of the Swiss PT-App for broader public use (see Question 1 above), it is unlikely that either Swisscom or any another company storing movement or communication data in Switzerland will voluntarily offer to provide the government with data allowing the tracking of individuals. Neither is it expected that the government will push for any such disclosure of personal data in the current situation.

Contact Details:

Janine Reudt-Demont
Niederer Kraft Frey AG
Zurich, Switzerland
janine.reudt-demont@nkf.ch

Kaj Seidl-Nussbaumer
Probst Partner AG
Winterthur, Switzerland
kaj.seidl-nussbaumer@probstpartner.ch