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# How will data fare in the global fight against the pandemic?

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Data-harnessing companies on both sides of the Atlantic face immense demands and expectations. Public authorities and wider society expect data-harnessing companies to act in fighting against COVID-19, especially through tracing app initiatives. Emerging business partnerships are proactively combining expertise and harnessing data to provide solutions that mitigate or manage the public health crisis, and steer towards socio-economic recovery. Public concerns and regulatory developments on privacy may evolve to account for data's immediate purpose of safeguarding public health.

Governments are now turning to private companies to seek input and collaboration in leveraging the growing potential and inclusion of data. As all market sectors mobilise resources against the gravest global crisis of our time, data-harnessing companies are equally obligated to be proactive. However, as the pandemic starts to level off from its peak, governments may become dependent and wary in equal measure of the power of data as a commodity and what this means for their approach to data-harnessing companies. One outcome could be greater monitoring and scrutiny, and it will be essential for business to maintain and build on existing dialogue with policymakers and regulators.

Recent years have seen data harnessing companies thrown into the spotlight for the perceived risk of compromise that their use of data represents for citizen privacy. Today though, that concern sits in stark opposition to the potential offer of safety and security that data-harnessing companies can make to citizens via tracing apps that track and limit the transmission of COVID-19. Countries face the choice of following or diverging from existing data rules to tackle the pandemic and seek to incorporate new health-related functions for gathering and managing data within their national frameworks. Both options have elicited controversy.

The dichotomy between privacy and freedom is not new to the public consciousness. The post-9/11 period had exacerbated questions about rebalancing and questioning how much society should cede to governments in the name of strengthening safety and security. The legacy of the attacks includes the [Patriot Act](#) (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism – USA-PATRIOT), which enabled enhanced domestic surveillance and increased the authority of law enforcement bodies to detect and prevent terrorism. The underlying doctrine of pre-emption behind this Act aligns, word-for-word, with the need of the hour to detect and prevent the spread of the virus.

The debate on COVID-19 tracing apps has brought many of the same concerns about invasions of privacy to the fore, within the US and beyond, though the potential of the apps is also widely acknowledged. While the US Department of Health and Human Services effectively waived some previously sacrosanct Health Insurance Portability and Accountability Act (HIPAA) health privacy law enforcement provisions to facilitate digital health technologies, the EU approach has aimed to provide COVID-19 relief within existing frameworks and exemptions. The General Data Protection Regulation (GDPR) outlines parameters which Member States apply uniformly and includes exemptions for crisis situations, but the EU Commissioner for Internal Market, Thierry Breton, indicated that the pandemic has proved the need for a “modern framework” for location data and tracing apps. Use of anonymised location data is one GDPR-compliant method EU countries have chosen to serve infection-tracing requirements.

The reason the EU hasn't taken a more heavy-handed or broad approach is the diverging postures its Member States have taken on tracing apps. The GDPR stipulates that the collection of non-anonymised personal data can be enabled based on two legal grounds: a national emergency law or explicit consent. While France and Norway are using domestic tracing apps, Germany, Italy, Ireland, Austria, and Switzerland have opted for the joint Apple-Google API. The former centralised model allows the national health authorities access to data and is also being trialled in the UK, whereas the latter decentralised approach limits government access to data. Data-driven solutions to the crisis are, however, implicated in a much broader and heavily politicised conversation around government overreach and the risk of over-surveillance. The tracing debate continues to be laced with demarcating the extent of

power and access given to data-harnessing companies and governments alike, and we should expect the debate to be subject to intense public interest and scrutiny wherever and whenever such power and access are granted.

People's reliance on online platforms during the pandemic has also prompted policymakers and activist groups to call for the expedited passage of internet safety regulation around the world. In the immediate term, the UK Government is facing pressure to put legislation for its flagship 'Online Harms White Paper' and Age Appropriate Design Code before Parliament as quickly as possible, the impact of which would be significant for tech companies of all sizes. Momentum is more sluggish in the U.S. Congress, where COVID-19 focused privacy bills have also been introduced but will likely face a steep climb to enactment. EU decisionmakers have publicly stated that they consider the pandemic reason to focus on online platforms as a matter of urgency. Actions are set to include tackling misinformation and content moderation online, revisiting core platform liability and responsibility principles with a possible update to existing e-commerce rules, considering new proposals addressing use of data, evaluating how data-harnessing companies affect market competition, and resuming negotiations on taxing digital companies.

The crisis may, however, affect the longer-term vision for data policy. The UK's National Data Strategy for instance has been on hold since December last year, as extensive work during 2019 came to a halt with stakeholder consultations postponed and unlikely to resume until after the crisis subsides. Similarly, regulations including the GDPR review in the EU have been postponed to allow stakeholders time to contribute to consultations and decisionmakers to assess whether to amend upcoming legislation to reflect the changing socioeconomic landscape and account for how tech can help with health security. The German presidency is already widely expected to be the 'COVID-19 presidency', with efforts to be directed primarily towards mitigating the crisis and stimulating recovery. More specifically, Commissioner Breton has indicated that e-privacy will remain a priority and work will continue during the German presidency.

Regardless of the direction pursued in specific jurisdictions, businesses face a complex task of managing expectations and scrutiny. On the one hand, they have the potential to guide society through to socioeconomic safety and recovery. Contributions are expected, if not demanded, of leading tech businesses. Despite social distancing and confinement

measures, the services provided by leading tech businesses from the outset have enabled remote working, online retail of essential goods and services, and access to information from authoritative sources, while working in recent weeks on building tracing apps.

With all the above in mind, businesses will need to accept that policymakers and regulators will play an increasingly vital and delicate role in their operations. Data-harnessing companies must use the window of opportunity during the peak crisis and immediate post-crisis phases to:

- **Maintain dialogue with policymakers** across jurisdictions to understand specific changes and trends, and to offer data-driven solutions addressing both the public health and economic crises.
- **Use those solutions as a blueprint for improving future dialogue** with decisionmakers. The post-crisis environment will bring increased scrutiny and public accountability, and it will be essential for data-harnessing companies to respond proactively to concerns about privacy and the use of public funds.
- **Strengthen cyber resilience.** The risk of cyberattacks is increasing exponentially as a result of more businesses

going online and large segments of the population continuing to work from home.

- **Showcase value** to policymakers and the wider public by highlighting the societal benefits of responsible data-harnessing.
- **Engage and contribute to the post-crisis debate** on use of data to shape a resilient and forward-looking policy framework.

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