5 August 2020

To
The Personal Data Protection Commission (PDPC), Singapore
10 Pasir Panjang Road,
#03-01 Mapletree Business City, Singapore 117438

Subject: Industry Submission by the Asia Internet Coalition (AIC) on PDPC Advisory Guidelines On Enhanced Consent Framework For Collection, Use And Disclosure Of Personal Data

On behalf of the Asia Internet Coalition (AIC) and its members, I am writing to express our sincere gratitude to the Personal Data Protection Commission (PDPC) for the opportunity to submit comments on the **Advisory Guidelines On Enhanced Consent Framework For Collection, Use And Disclosure Of Personal Data** ("**Draft Guidelines"**) in light of the proposed amendments to the Personal Data Protection Act 2012 ("**PDPA").** AIC is an industry association comprising leading Internet and technology companies in the Asia Pacific region with an objective to promote the understanding and resolution of Internet and ICT policy issues. Our members are Airbnb, Amazon, Apple, Expedia Group, Facebook, Google, LinkedIn, LINE, Rakuten, Twitter, SAP, Booking.com, Cloudflare and Yahoo (Verizon Media).

As responsible stakeholders, we appreciate the ability to participate in this discussion and the opportunity to provide input into the policy-making process. As such, please find appended to this letter detailed comments and recommendations, which we would like to respectfully request PDPC to consider.

Should you have any questions or need clarification on any of the recommendations, please do not hesitate to contact our Secretariat Mr. Sarthak Luthra at Secretariat@aicasia.org or at +65 8739 1490. Importantly, we would also be happy to offer our inputs and insights on industry best practices, directly through meetings and discussions and help shape the dialogue around effective data protection framework in Singapore.

Sincerely,

Jeff Paine
Managing Director
Asia Internet Coalition (AIC)

Detailed Comments and Recommendations on the Advisory Guidelines On Enhanced Consent Framework For Collection, Use And Disclosure Of Personal Data

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1. Deemed consent by conduct

In paragraph 2.13, we note that for deemed consent by conduct to apply, the purpose must be limited to those that are objectively obvious and reasonably appropriate from the surrounding circumstances. We would suggest extending this consent mechanism to circumstances where the individual would reasonably expect the company to use or disclose their personal data and that this purpose is related to the primary purpose of collection. A similar approach has been adopted in Australia.

2. Deemed consent by notification - opt out period

In paragraph 2.17(c), the Draft Guidelines refer to the requirement for an organisation, when relying on deemed consent by notification, to provide a reasonable period for the individual to opt-out before the organisation proceeds to collect, use or disclose the personal data. If an organisation were to rely on deemed consent by notification prior to collecting personal data, it may be impracticable for there to be any gap between the point at which notification is given and the point at which data is collected, particularly for online services. While we welcome the clarifications on the opt-out period, the draft guidelines add various additional obligations to companies: "[a]part from identifying the likely adverse effects, the organisation's assessment should take into account any measures to be taken by the organisation to eliminate, reduce the likelihood or mitigate the adverse effects identified." These additional steps are not necessary to ensure a valid consent and we would suggest to maintain current practice.

We would welcome clarification in the Draft Guidelines of how a reasonable period would be determined in the context of collection of personal data for a fast-moving online service. Though the addition of the new legal bases of deemed consent by notification is to be welcomed, the requirement to provide a reasonable opt-out period before personal data can be collected, used or disclosed may result in an inability for businesses in the modern digital economy, where data is collected, used and disclosed to provide services to users in milliseconds, to avail of this enhanced consent framework proposed.

3. Withdrawal of consent

At paragraph 2.18, the Draft Guidelines refer to "the section on withdrawal of consent below". It is not clear which section this refers to - the Draft Guidelines contain a few other references to withdrawal of consent and then a short discussion in paragraph 2.46. We would welcome more detailed guidance on how withdrawal of consent would apply, particularly in the context of the new concept of deemed consent by notification.

4. Assessment for collection, use or disclosure of personal data based on deemed consent by notification

Paragraph 2.20 indicates that there is a mandatory requirement for organisations to provide a copy of their assessment for collecting, using or disclosing personal data based on deemed consent by notification. We would welcome clarification of what provisions of the PDPA are relied on as the basis for this requirement.

5. Adverse effects

We support the clarification that an adverse effect will generally mean the various types of serious harm listed in paragraph 2.22 of the Draft Guidelines. Other parts of the Draft Guidelines suggest a different standard (e.g. paragraph 2.34(i) which refers to "all reasonable foreseeable risks and adverse effect") and we would suggest these should be aligned with the guidance in paragraph 2.22.

It would be helpful for the Draft Guidelines to further explain how an organisation should assess an "adverse effect on the individual" (whether for the purposes of deemed consent by notification or for legitimate interests) when the organisation may have no personal data about the individual given that this assessment may need to take place before personal data about the individual is collected. We suggest that the assessment can only assess potential adverse effects based on the organisation's view of the typical type of individual it deals with in the circumstances. In particular, it is difficult to see how an organisation could take into account whether the individual belongs to a vulnerable segment (as per paragraph 2.34(ii)) before it has collected any personal data about the individual.

6. Proposed Legitimate Interests Exception (para 2.27 to 2.38 of Draft Guidelines)

As we understand it, this new exception is intended to enable organizations to collect, use or disclose an individual's personal data without consent in circumstances where it is in the legitimate interests of the organization and the benefit to the public is greater than any adverse effect on the individual.

According to the Draft Guidelines, in order to rely on this exception, organizations will need to: (i) assess any likely adverse effect to the individuals and implement measures to eliminate, reduce or mitigate such identified adverse effect, (ii) make a determination that the benefit to the public (or any section thereof) outweighs any likely residual adverse effect to the individual; and (iii) disclose their reliance on legitimate interests to the individual to collect, use or disclose personal data.

- We agree that this Legitimate Interests Exception is useful and in-line with current international practices, especially the GDPR.
- We agree that the example cited at para 2.38 regarding fraud prevention and corporate due diligence would be a relevant use of this new exception.
- We propose that the following three examples, which are taken from the GDPR at Recital 47/48, be included as well, as accepted relevant uses of this new exception:
    - (a) processing employee or client data;
    - (b) direct marketing;
    - (c) intra-group administrative transfers.

- Including these examples would bring Singapore further in-line with international practices and standards.

- In particular, we take the view that there is no compelling reason for excluding the sending of direct marketing messages to individuals from the scope of the Proposed Legitimate Interests Exception. In particular, we would highlight that given the comprehensive safeguards under the Proposed Legitimate Interests Exception, which requires organizations to *inter alia* conduct an assessment before the collection, use and disclosure of personal data as well as to inform the individual of the organization's reliance of the Proposed Legitimate Interests Exception for such collection, use or disclosure of personal data, are adequate safeguards for the collection, use and/or disclosure of personal data for the purposes of sending of direct marketing messages to individuals. This would be aligned with GDPR position: See Recital 47, Overriding Legitimate Interest, which states in part: "*The processing of personal data for direct marketing purposes may be regarded as carried out for a legitimate interest*."

7. Business improvement exception for collection, use and disclosure of personal data without consent

In Paragraph 2.39, we note that the business improvement exception applies to limited cases: (i) where the use of the personal data is to achieve specified business improvement purposes and (ii) where there is a sharing of personal data between entities of a group of companies (i.e., collection and disclosure) to achieve specified business improvement purposes. As sharing of personal data with external parties such as data processors is more common, we would suggest extending the business improvement exception to all third parties, and not only entities within the same group.

8. Marketing Messages

The Draft Guidelines proposes that "*[a]s good practice, organizations should obtain express consent for the purpose of sending marketing messages to individuals. Generally, the Commission does not consider the opt-out method as appropriate for obtaining consent for this purpose, and organizations will not be able to rely on deemed consent by notification to obtain consent for this purpose*."

According to paragraph 2.23 of the Draft Guidelines express consent for the purpose of sending marketing messages is good practice. We would welcome clarification that the concept of "marketing messages" refers only to direct marketing messages (such as email or SMS) and does not include more indirect marketing (such as advertising content in a social media feed). It would also be helpful for the Draft Guidelines to explain why the legitimate interests exception cannot be relied on to send marketing messages (see paragraph 2.30). It would be preferable to align to the GDPR position where legitimate interests may be relied on for direct marketing.

- We respectfully disagree with the proposal that the "opt-out" method is inappropriate for sending of marketing messages.
- Mandating an "opt-in" mechanism for such marketing purposes (e.g. where consumers will have to affirmatively tick a box to express consent to receiving marketing messages, as opposed to "opt-out", where organizations can rely on a pre-

ticked box or negatively worded non-ticked box) will affect businesses when it comes to reaching out to their customers, especially during these uncertain times.

- For instance, during the post-pandemic business recovery period, organizations in the travel & hospitality industry might wish to reach out to their customers to give them information about rebates/using travel & hospitality credits, and these organizations might be hamstrung by a draconian "opt-in" requirement.

By expanding cases where consent is valid and providing exceptions to the consent obligation, the PDPC recognises that consent may not always be suitable and there are other mechanisms for processing personal data which do not result in any harm to individuals. However, we note that organisations should still obtain express consent for the purpose of sending marketing messages to individuals. We would recommend removing this blanket approach and provide a limited exception for previous customers, known as the soft opt-in. This means organisations can send marketing messages if:

1. they have obtained the contact details in the course of a sale (or negotiations for a sale) of a product or service to that person;
2. they are only marketing their own similar products or services; and
3. they gave the person a simple opportunity to refuse or opt out of the marketing, both when first collecting the details and in every message after that.

As the soft opt-in rule applies to the company's own customers and provides an opt out, harm to the individuals is very unlikely. A similar approach has been adopted in the EU and we would recommend the PDPC to do the same.

9. Business contact for questions about legitimate interests exception

Paragraph 2.36 indicates that there is a mandatory requirement for organisations to provide the contact details of a person who is able to answer questions about the organisation's reliance on the legitimate interests exception. We would welcome clarification of what provisions of the PDPA are relied on as the basis for this requirement.

Examples

We suggest it would be useful for the examples provided to better explain the reason why a particular use case is acceptable or not. It would also be helpful to include more examples of scenarios which are not acceptable as the examples are currently heavily weighted towards scenarios which are acceptable.

10. Other drafting suggestions

Finally we would like to suggest a number of other drafting clarifications:

- In paragraph 2.17, the cross references to paragraph 2.16 should be amended to refer to paragraph 2.17.
- In paragraph 2.17(c)(ii) there is a reference to having an "easily accessible and hassle-free" opt out method. We suggest that the concept of a "hassle-free" opt out method is not commonly found in international data protection laws and regulatory guidance. We suggest that this sentence could refer to a more commonly understood concept like "easy to use" in place of "hassle free".

- In the second example after paragraph 2.20, we suggest that “collect voice data” should be “collected voice data”. We also suggest that "foolproof" (meaning incapable of going wrong) is too high a standard for a method of identification. In this context, the guidelines could say "appropriate" instead of "foolproof".
- In paragraph 2.22 we suggest replacing "discriminatory" with "differential". It is very common for different pricing is offered to be offered to different groups of people (e.g. student discounts) but that doesn't necessarily mean that there is "discrimination" in the legal sense.