

Personal Data “Up in the Air”

A Tale of Two Malaysian Airlines in Dealing with Consumers Online Privacy

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Abstract— Uncertainties and concerns surrounding the privacy of personal information in Malaysia in the wake of many data abuse incidents had led to the passing of Personal Data Protection Act (PDPA) 2010. In a market where personal data has long been widely traded and unjustifiably exploited, the coming of this law could resemble the arrival of a long-awaited messiah expected to correct the evils and rectify people’s problem in a very immediate manner. Once the law is in force, a wide range of industries that process personal data of individuals would have to reformulate their entire business processes to comply with the new legal requirements. In order to do that, they will need to perform critical self-assessment to ensure their business practice does not contravene the law and not trigger criminal liabilities. Against this background, this paper seeks to analyze how the Malaysian airlines industries – represented by the two biggest players Malaysian Airlines (MAS) and AirAsia – treats consumers’ personal data based on their existing online policies. The reason behind choosing this industry is of two folds; firstly, because airlines industry is relatively massive personal data users (especially on their passengers’ data). Secondly, the two companies have now aggressively embarked into online environment which sees them collecting and processing more personal data through their websites and online processing mechanism. The ultimate goal of this assessment is to see to what extent their existing online privacy policies and practices are in line with the personal data protection principles provided in the PDP Act 2010. Using critical methods of discussion, this paper aims at producing gap analysis and recommendations as to how the industry should improve their privacy policy and make it closer to the legal requirements in protecting consumers’ personal data.

Keywords: *E-business; business information management; airline industry; personal data protection; compliance.*

I. INTRODUCTION

After a long process and anxious waiting [1], Malaysia has recently introduced significant privacy legislation on the protection of personal data. On 2 Jun 2010 the Personal Data Protection Act 2010 (Act 709) (“PDPA” or “the Act”) has officially been given a Royal assent and was subsequently gazetted on 10 Jun 2010. At the time of writing, the law has not been enforced. Once it is enforced, companies and organizations in Malaysia will have a three-month grace period to comply with it. This fact should not be taken lightly.

As the Government’s legal consultant to the Act asserts, the three-month grace period is not quite enough [2]. It is not wise to do nothing while waiting for the enforcement date to be decided. The least any company can do is familiarize itself with the Act.

For the first time in Malaysia, the processing of personal data, both online and offline, has been thoroughly regulated in the area of commercial transactions for the purpose of providing a protection for the interests of data subjects. In a market where personal data has long been widely traded and unjustifiably exploited, the coming of this law could resemble the arrival of a long-awaited messiah expected to correct the evils and rectify people’s problem in a very immediate manner.

PDPA has arguably filled the long-standing gap in relation to protecting consumers’ data privacy. Previously, apart from certain sectoral secrecy obligations, information of a personal nature was only protected as confidential information through contractual obligations or the common law [3]. While proving the existence of those obligations is not an easy task, consumers’ data privacy has been in persistent risk of exposure, abuse and misuse.

With the passing of the Act, Malaysian consumers see a light at the end of the tunnel. The Act gives rise to new legal rights and obligations on data users involving processing personal data in cross-sectoral industries. Once enforced, any person, either natural or legal, who processes or has control over or authorises the processing of personal data in respect of commercial transactions will be affected. “Commercial transactions” is defined in section 4 of the Act as any transaction of a commercial nature, whether contractual or not, which includes any matters relating to the supply or exchange of goods or services, agency, investments, financing, banking and insurance. This Act has therefore changed the industrial landscape in respect with the protection of consumers’ data privacy.

II. THE USE OF PERSONAL DATA IN AIRLINE INDUSTRY

That goes without saying that this Act is going to affect significantly those industries that deal with massive personal data of their clients and business partners, and among them are the airline industry. A typical airline company does collect, process, and store massive personal data of their passengers and business partners such as travel agents and

hotels, etc. Such collection and processing are currently empowered by the massive adoption of the Information and Communications Technologies (ICT), in which respect the law plays a more crucial role [4].

Their traditional services such as flight booking, ticketing, tickets payment, travel itinerary advices etc, are now going online and automated. Airline companies make use of online portals, websites, e-mails and online databases to facilitate that. These online services have indeed made it much easier to exploit consumers' –both prospective and actual– personal information. Such online and automated services give rise to new business models and infrastructure such as customers profiling, mileage and loyalty programs, the creation of no-fly lists, cargo databases, and security control. Meanwhile, due to a stiff competition in the industry, airline companies have developed a more comprehensive travel package to offer to the market, i.e. to include ground arrangement such as accommodation, transport services as well as travel guides. This business model opens wide to a more massive collection, processing, disclosure and exploitation of customers' data. This leads to situations where their personal data have to be transferred from one place to another, from one company to another, and from one country to another.

In this respect, the data protection law comes to strike the balance between the need to use and disclose personal data on one hand, and the protection of customers' data privacy on the other [5]. Given the imbalances thus far, the PDPA is naturally seen with mission to save those personal data from unwanted disclosure and unsolicited privacy intrusion or data theft. For that purpose, the Act introduces a set of data protection principles, rights of data subjects, and even criminal penalties for certain offences in relation to the processing of personal data.

The question that this paper pose is, to what extent the Malaysian airline companies have complied with the statutory requirements prescribed in the Personal Data Protection Act 2010? This paper however limits itself to assessing the practices of airlines industry in dealing with consumers' data privacy as a result of their online activities. Such assessment will be based mainly on the provisions of online privacy policy of the main players in the industry, namely the Malaysia Airlines System Bhd ("MAS") and AirAsia.

III. AIRLINE INDUSTRY IN MALAYSIA

The airline industry in Malaysia has developed tremendously over the past ten years. In Malaysia there are two big players in the industry, Malaysia Airlines and AirAsia. Malaysia Airline System is the government-owned flag carrier. It is founded in 1947 as Malayan Airways. In 1973 after several reorganization, the company was known as Malaysian Airline Limited, which was subsequently renamed Malaysian Airline System Berhad (MAS), or simply known as Malaysia Airlines. Today, Malaysia Airlines flies nearly 50,000 passengers daily to some 100 destinations worldwide. The airline holds a lengthy record of service and best practices excellence, having received more than 100 awards in the last 10 years. The most notable and latest ones include being the "World's Best Cabin Staff " by

Skytrax UK in 2009, the "5-star Airline" in 2009/2010, as well as the "Staff Service Excellence for Asia Award 2010" and "World's Best Economy Class Award 2010" (both by Skytrax, UK). Having recorded a net income after tax (NIAT) of RM490 million which includes a derivative gain of RM1.16 billion, Malaysia Airlines has set its vision now to be the world's Five Star Value Carrier (FSVC) [6].

On the other hand, AirAsia Berhad has since 2001 swiftly broken travel norms around the globe and has risen to become the region's leading low cost carrier. It has now a route network that spans through over 70 destinations in more than 20 countries. Through their philosophy of "Now Everyone Can Fly", AirAsia is a pioneer of low-cost flights in Asia, and was also the first airline in the region to implement fully ticketless travel. Recently it was awarded "Best Low Cost Airline" and the airline of the year for 2009 and 2010. With over 14 million passengers in 2009 alone, AirAsia recorded at the end of that year a net profit of RM506 million while the Group revenue was up by 9.71% to RM3.133 billion [7].

IV. PERSONAL DATA PROTECTION PRINCIPLES UNDER THE PDP ACT

The PDPA applies to any person who processes data. Processing here includes collecting, recording, holding or storing personal data or carrying out any operation or set of operations on the personal data, including the organisation, adaptation or alteration of the personal data, the retrieval, consultation or use of the personal data, the disclosure of the personal data by transmission, transfer, dissemination or otherwise made available, or the alignment, combination, correction, erasure or destruction of the personal data [8].

At the heart of the PDPA are the personal data protection principles. Understanding those principles is crucial to reformulate business processes and ensure compliance of the law because from those principles stem all the rights, duties and liabilities of each of data user and data subject. There are seven such principles: the General Principle, Notice and Choice Principle, Disclosure Principle, Security Principle, Retention Principle, Data Integrity Principle and Access Principle [8]. Any company that contravenes any of these principles shall be liable to a fine not exceeding RM300,000 or imprisonment for a term not exceeding two (2) years, or both.

General Principle that is laid down in section 5 of the Act provides, among others, that data user shall not process personal without the consent of the data subject concerned. More stringent requirements are imposed on the category of 'sensitive personal data.' By virtue of this principle, too, the processing of personal data can only be done for a lawful purpose directly related to data user's activity. It also requires that the data processed must not be excessive (imagine if a bank requires from its customer to declare the history of his illnesses, a data which is not directly related and is likely excessive).

Notice and Choice Principle (section 7) prescribes, among others, that when collecting personal data, data user shall properly notify the data subjects as to the purpose of that collection/processing, as well as the related rights of data

subject with regards to that processing. Disclosure Principle (section 8) meanwhile puts forward the restriction on the disclosure of the personal data. Security Principle (section 9) sets forward the requirements of technical and organizational security measures that have to be adopted by data users. The bottom line is that data users are responsible to the security, integrity and reliability of the personal data that they process or store from unwanted, negligent or unauthorized leakage and other security threats. Furthermore, Retention Principle (section 10) prescribes about the period in which a company may keep the personal data that they used. There is no fixed length of period given out but the word 'necessary' is central in determining how long they can keep and retain the data. Once such period lapse, data users must ensure they retain them no more and must thereby destroy such data.

Data Integrity Principle (section 11) provides that it is the duty of data user to ensure the accuracy and completeness of the personal data they collect. Furthermore, according to the Access Principle (section 12), this law requires data users to provide certain mechanism where individuals should be able to have access to and correction upon their personal data. This law is in effect pushing for more accountability.

In sum, this Personal Data Protection Principles will become a central concern of organizations and companies across the industries and businesses in the years to come. Therefore the extent to which airline companies such as Malaysia Airlines and AirAsia protect consumers personal data should be measured especially against these central principles. In turn, their online privacy principles would be an important yardstick to measure the corporate conduct in dealing with the customers personal data online.

V. ASSESSMENT OF ONLINE PRIVACY POLICY

In this assessment, this paper seeks to critically analyze the two Airline's compliance of the data protection principles as prescribed in the PDPA based on what is reflected in their website privacy policies, i.e. in <<http://www.malaysiaairlines.com>> for Malaysia Airlines (MAS) and <<http://www.airasia.com>> for AirAsia. While MAS' online privacy policies are located in three distinct online documents (i.e. "Privacy Policy", "Legal Notice" And "General Conditions of Carriage"), its counterpart's policy could be comprehensively found in a single document ("Privacy Policy").

The PDPA in sections 6 and 7 respectively requires data users to ensure that data subjects (individuals whose personal data is in question) duly consent to the data processing (including collection) and to be informed of the source of those collection. In this respect, both MAS and AirAsia provides in their privacy policies that they collect data from a number of ways: (1) through customer's IP address when the browsers communicate, (2) through customers' own action by filling up a form; and (3) through cookies. While these three methods are arguably acceptable, there is another method used by AirAsia that can raise doubt as to its legal compliance. Their collection "from other sources and related links in connection with providing your transportation and/or accommodation needs and services" may be held vague or

uncertain. This opens up widely to the inference of consent on data collection from any unidentified sources.

Regarding the use of personal data, the Act requires that it must not be excessive and must only be used for purpose(s) which is lawful and directly related to the data user's activity (section 6(3)). Besides, such purpose must be informed in writing (section 7(1)). What amounts to "directly related" purpose would arguably be a question of fact depending the nature of business and industry. Nevertheless, one may not be sure what amounts to the purpose of "helping us in any future dealings with you" as provided in clause 6.3.1 of MAS General Conditions of Carriage and similarly in AirAsia's Privacy Policy. Furthermore, are they collecting excessive data? It is understandable that they would in near future collect more complex data than they did in the past due to the more integrated and comprehensive business model. Nevertheless, it is found that MAS privacy policy to collect customer's "demographic and profile data" is potentially excessive. Likewise, AirAsia's collection of customer's "corporate-contract, employer and/or other corporate affiliation (i.e. employer name, title, address and contact information)" could possibly be excessive or otherwise unnecessary. It is suggested that those use and purpose be made clearer, more specific and non-excessive.

The PDPA prohibits the disclosure of personal data for other purposes without the consent of the data subject. The prohibition on unauthorized disclosure has two aspects, namely the purpose and the recipient of the disclosure[8]. In this regard, it is unconvincingly worth-noting to find that MAS Legal Notice (clause 6) deems that any communication from customers sent to website by emails shall be treated as non-confidential and can be used "for any purpose" and whenever necessary such customer's information will be disclosed "within our own offices, authorized agents, government/security agencies, other airlines or the providers of such services, in whatever country they may be located". It is argued here that such practice will not only amount to unauthorized disclosure but also a potential contradiction to the trans-border data restriction as provided in section 129 of PDPA. It is preferred that any potentially excessive use or disclosure should only be considered after removing the identifiability of such data so as to make it anonymous and non-personalized as provided in AirAsia's Privacy Policy.

There is however another caution in this respect. Assuming that the data user's company has to go for a business transition such as merger and acquisition, in which there would be a transfer of ownership of the company and its assets; would it justifiably warrant the transfer of the personal data as contemplated in AirAsia's Policy? There is no clear answer to this at the moment. But if the law is to be interpreted in favor of data protection, this practice may potentially amount to non-compliance.

With regards to data security practices, the attention should be directed to two aspects: the types of security threats and the measures of protection. As for the first aspect, the Act lists out "any loss, misuse, modification, unauthorized or accidental access or disclosure, alteration or destruction." The companies' policies however only mention loss, misuse and alteration. This could unjustifiably reduce

the scope of the security protection since those three threats are typically originating from intentional acts thus leaving the accidental threats nowhere to be seen in the policy. As for the second, it must be reminded that security principle consists of technical and organizational measures, including personnel's security. While both airlines mention clearly about "technical measures", MAS Privacy Policy only mentions "procedural safeguards" while AirAsia writes a clearer indication of such safeguards including the handling by "authorized employees and agents who are under appropriate confidentiality obligations". It is submitted here that the two Airlines should improve this aspect so as to be closer to compliance. In this respect, AirAsia also has a clearer policy in relation to the security of processing by any third party such as data processors who are hired or contracted by the Company (section 9(2) of the Act). This aspect is nevertheless missing from MAS policies.

To comply with Retention Principle, data users shall not keep personal data longer than is necessary for the purpose of its use. In such case, the Act requires the data user to destroy or permanently delete the personal data. The appropriate retention period for the personal data would depend on the purpose for which it was collected [8]. Therefore what is appropriate for an airline company will be a question of fact to be assessed objectively. It is submitted here however that such principle is nowhere to be seen in both Airlines' policies. This is clearly another area where the policies need to be improved at.

Data Integrity Principle and Access Principle are inter-related and often been provided in a single provision. This is due to the fact that the latter is usually seen as a pre-requisite for the former. One may not be expected to know and correct any inaccuracies of his personal data unless he is aware what data exists at the data user. AirAsia provides that for correcting or updating personal information, "the instructions to do this are clearly outlined in every piece of promotional material issued by AirAsia". This is arguably not a clear-cut privacy policy statement. If they want the practice to be clearly in compliance, the policy should be improved to explain further how such measure can be exercised by the customers. As far as MAS policies are concerned, the authors could not find any express information that shows data accessibility and possible updating methods. It is however provides customer contact center should the customers have any questions about their privacy policy, the practices of site, or customers' dealings with the Website (clause 6 of MAS Privacy Policy).

VI. CONCLUSION

From the above assessment based on the Airlines' privacy policies, few conclusions and recommendations are hereby made. First, both Airlines have initially made good efforts to pledge and guarantee the protection of customers' personal data generally as made out in the beginning of their policies. But when it comes to details, as discussed and pointed out, certain areas require improvements to make them closer to compliance of PDPA.

Secondly, in the wake of the new law on data protection, providing privacy policy in simplicity mode arguably does not help. This is because the law has raised the bar in defining the requirements of data protection. The more comprehensive a privacy policy is the better. Besides, international players such as MAS and AirAsia should also remember certain requirements on trans-border data flow, i.e. the transfer of personal data to countries outside Malaysia that do not have adequate legal protection. Taking some measures such as contractual arrangements should be seriously considered. Finally, it is to be reiterated here that since airline industry will be hugely affected by the new law, it is worth considering for the players to prepare themselves to anticipate the enforcement and reformulate their business process in dealing with customers personal data. As it was earlier mentioned, merely waiting and doing nothing may not help. Instead, familiarizing with the law and starting some works will tremendously do.

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