

MEMORANDUM OF UNDERSTANDING ON MUTUAL
ENFORCEMENT ASSISTANCE IN COMMERCIAL EMAIL
MATTERS BETWEEN THE FEDERAL TRADE COMMISSION
OF THE UNITED STATES OF AMERICA AND THE AGENCIA ESPAÑOLA DE
PROTECCION DE DATOS

The U.S. Federal Trade Commission (“FTC”) and the Agencia Española de Protección de Datos (“AEPD”) (“the Participants”):

RECOGNIZING that the convenience and efficiency of electronic mail are threatened by the extremely rapid growth in the volume of unsolicited commercial email, which often contains deceptive content or material that many recipients may consider offensive in nature;

RECOGNIZING the challenges posed by the proliferation of commercial email in each Participant’s country in various languages, including English and Spanish, and desiring to improve the effectiveness of the enforcement of certain provisions of the Commercial Email Laws of both countries while also recognizing the importance of freedom of expression;

RECOGNIZING that the Commercial Email Laws and the methods of investigating and enforcing such laws differ substantially as between the Participants’ two countries,

RECOGNIZING that the laws of both countries contain certain restrictions on international law enforcement assistance, including information disclosure;

RECOGNIZING that the Participants desire to build on their already developing cooperation on spam and other privacy-related issues, including: a staff exchange where an AEPD official visited the FTC to study spam and privacy enforcement, and to explain AEPD initiatives, in May 2004; FTC participation in a spam discussion at the 3rd Iberoamerican Privacy Meeting in Cartagena de Indias, Columbia, in May 2004; the Participants’ involvement in spam sessions at a Buenos Aires, Argentina, meeting on Consumer Protection and Electronic Commerce co-sponsored by the Forum of Latin-American Consumer Protection Agencies; and the Participants’ involvement in the London Action Plan for Spam Enforcement Cooperation;

RECOGNIZING the need for effective enforcement which, in the case of enforcement of Commercial Email Laws, requires cross-border cooperation; and

RECOGNIZING that spam enforcement cooperation is important both to address violations of Commercial Email Law and to form the basis of future cooperation in other privacy-related areas;

HAVE REACHED THE FOLLOWING UNDERSTANDING:

I: Definitions

For the purposes of this Memorandum,

- A. “Participant” means
 - 1. in the case of the United States, the FTC; and
 - 2. in the case of the Kingdom of Spain, the AEPD.

- B. “Commercial Email Laws” means
 - 1. in the case of the FTC: (a) the CAN-SPAM Act of 2003; and (b) any other laws enforced by the Federal Trade Commission that would prohibit unfair or deceptive acts or practices in connection with commercial email, including Section 5 of the Federal Trade Commission Act, and
 - 2. in the case of the AEPD: the Act 34/2002 of July 11th on Information Society Services and Electronic Commerce, as amended by the Act 32/2003 on Telecommunications; and the Organic Law 15/1999 of December 13 on Data Protection

as well as any amendments thereto, and such other laws or regulations as the Participants may from time to time decide in writing to be a Commercial Email Law for purposes of this Memorandum. The FTC and the AEPD should promptly notify each other of any relevant amendments to their Commercial Email Laws.

- C. “Evidence” means information, testimony, statements, documents or copies thereof, or other things, that are lawfully obtained in anticipation of or during the course of an investigation or proceeding under the Participants’ respective Commercial Email Laws.

- D. “Person” means any natural person or legal entity, including corporations, unincorporated associations, partnerships, existing under or authorized by the laws of the United States, its States, or its Territories, the laws of the Kingdom of Spain, or the laws of other sovereign states.

- E. “Request” means a request for assistance under this Memorandum.

- F. “Requested Participant” means the Participant from which assistance is sought under this Memorandum, or which has provided such assistance.
- G. “Requesting Participant” means the Participant seeking or receiving assistance under this Memorandum.
- H. “Spam Violations” means conduct prohibited by the Commercial Email Laws of one Participant’s country that is substantially similar to conduct prohibited by Commercial Email Laws of the other Participant’s country, including, but not necessarily limited to:
 - 1. sending commercial email without providing the recipient with a means, such as a valid email address or an Internet-based mechanism, to request that such communications cease; or
 - 2. sending commercial email, when the recipient has specifically requested the sender not to do so.

II: Object and Scope of Assistance

- A. The Participants recognize that it is in their common interest to share Evidence that will: facilitate effective enforcement against Spam Violations; facilitate research and user and business education on spam; promote a better understanding by each Participant of economic and legal conditions and theories relevant to enforcement against Spam Violations and related activities; and keep each other informed of developments in their respective countries having a bearing on this Memorandum.
- B. In furtherance of this common interest, and subject to Section IV, the Participants intend to use best efforts to exchange and provide appropriate information in relation to: user and business education; self regulatory and technical enforcement solutions; amendments to relevant legislation; and staffing and resource issues, including the possibility of staff exchanges, visits, and teleconferences to discuss these issues.
- C. In furtherance of this common interest, and subject to Section IV, the Participants intend to use best efforts to work together to examine the possibility of cooperating with universities to promote (1) research; (2) speeches, conferences or seminars; (3) compliance education programs; (4) establishment of student internships; and (5) projects relating to Spam Violations.
- D. The Participants recognize that Spanish and English-language spam affects both U.S. and Spanish users. Accordingly, subject to Section IV, the Participants intend to use best efforts to: work together to explore the

nature of the Spanish-language spam problem; and to consult regarding the dimensions of the Spanish-language spam problem in other countries.

- E. Subject to Section IV, the Participants intend to use best efforts to assist one another and to cooperate on a reciprocal basis against Spam Violations occurring or originating in the territory of the other Participant, or that affect users, commerce or markets in the territory of the other Participant. Participants intend to use best efforts to:
1. provide or obtain Evidence that could assist in determining whether a Person has committed a Spam Violation; or
 2. facilitate the administration of or enforcement against Spam Violations.
- F. Subject to Section IV, assistance contemplated by this Memorandum includes, but is not limited to:
1. using best efforts to disclose, provide, exchange, or discuss Evidence related to Spam Violations in the possession of any Participant, including appropriate information provided in complaints by users;
 2. using best efforts to cooperate in the detection and investigation of Spam Violations, and in appropriate cases, to coordinate enforcement against cross-border Spam Violations;
 3. using best efforts to obtain, or arrange the obtaining of Evidence at the request of a Participant, including:
 - a. taking the testimony or statements of Persons or otherwise obtaining information from Persons;
 - b. obtaining documents, records or other forms of documentary Evidence; or
 - c. locating or identifying Persons or things; or
 4. using best efforts to assist in service of process regarding Spam Violations.
- G. The Participants recognize that a large percentage of unsolicited commercial email is also deceptive. Accordingly, subject to Section IV, the Participants intend to use best efforts to cooperate in investigations or proceedings involving deception in relation to unsolicited commercial email. The Participants also intend to use best efforts:

1. to involve other enforcement agencies in their respective countries with jurisdiction to deal with such deception; and
 2. to assist each other in working across borders with such enforcement agencies.
- H. The Participants recognize that it is not feasible for a Participant to offer assistance to the other Participant for every Spam Violation. Accordingly, the Participants intend to use best efforts, subject to Section IV, to seek and provide cooperation focusing on those Spam Violations most serious in nature, such as those that are causing or may cause injury (financial or otherwise) to a significant number of users, and those otherwise affecting particularly large numbers of users or otherwise causing substantial user harm.
- I. The Participants also intend to use best efforts to encourage multilateral spam enforcement cooperation among government agencies around the world, such as the London Action Plan on International Spam Enforcement Cooperation endorsed by the Participants in the fall of 2004. The AEPD intends to use best efforts to engage other EU and Iberoamerican institutions in cooperation.

III: Requests for Assistance

- A. Requests by the AEPD should be addressed to: Associate Director, International Division of Consumer Protection, FTC. Requests by the FTC should be addressed to the Director of the AEPD.
- B. Requests should include, as appropriate:
1. if known, the identification of the Persons subject to any investigation or proceeding;
 2. a general description of the subject matter and nature of any investigation or proceeding to which the Request relates;
 3. where applicable: a description of the Evidence sought; the identity and location of any Person who is to be served with process; a description of the action that the Requesting Participant is requesting that the Requested Participant take; a description of procedural or evidentiary requirements bearing on the manner in which the Requesting Participant desires the Request to be executed;

4. requirements, if any, for confidential treatment of the Request or its contents; and
 5. any other information that the Requesting Participant believes would be helpful in facilitating review or execution of a Request.
- C. The Participants intend to consult with each other regarding a Request in order to work out details regarding the manner and timing of carrying out the Request.

IV: Limitations on Assistance

- A. Consistent with its national laws, international obligations, enforcement policies and other important interests, a Participant should use best efforts to provide assistance in response to a Request. The Requested Participant may decline to provide assistance.
- B. Notwithstanding any other provision of this Memorandum, a Participant should not communicate information to the other Participant if such communication is prohibited by the laws of the Participant possessing the information or would be incompatible with that Participant's important interests.
- C. The determination as to whether to grant a Request in whole or in part rests with the Associate Director, Division of International Consumer Protection, in the case of the FTC, and with the Director of the AEPD in the case of the AEPD.

V: Confidentiality

- A. Unless otherwise decided by the Participants, each Participant should, to the fullest extent possible and consistent with its laws, use its best efforts to maintain the confidentiality of any information communicated to it in confidence by another Participant under this Memorandum.
- B. The Requesting Participant may, however, subject to Section IV, communicate such confidential information to other law enforcement agencies within its jurisdiction (having first obtained assurances that best efforts will be used to ensure the maintenance of confidentiality) for the purpose of enforcement against Spam Violations; any such onward sharing of information with other agencies is subject to the consent of the Requested Participant.

- C. The Requesting Participant should oppose, to the fullest extent possible consistent with its laws, any application by a third party for disclosure of such confidential information, subject to consultation with the Requested Participant.
- D. Consultations pursuant to Sections II and III of this Memorandum and other communications between the Participants in relation thereto should be deemed to be confidential, unless otherwise decided by the Participants.
- E. Nothing in this Memorandum prevents disclosure to third parties if such disclosure is required by the law of the Requesting Participant. The Requesting Participant should use its best efforts to notify the Requested Participant at least ten days in advance of any such proposed disclosure, or, if such notice cannot be given, then as promptly as possible.

VI: Changes in Commercial Email Laws

In the event of a significant modification to the Commercial Email Laws of a Participant's country, the Participants should use their best efforts to consult promptly, and, if possible, prior to the entry into force of such enactments, to determine whether this Memorandum should be amended.

VII: Return of Evidence

The Requesting Participant should use its best efforts to keep shared Evidence until the conclusion of the investigation or proceeding specified in the Request and should use its best efforts to return such Evidence at that time if the Requested Participant makes a written request for the retention and return of such Evidence at the time the Evidence is shared.

VIII: Costs

Unless otherwise decided by the Participants, the Requested Participant should pay all costs of executing a Request. When the costs of providing or obtaining information under this Memorandum are substantial, the Requested Participant may require the Requesting Participant to undertake to pay those costs as a condition of proceeding with the Request. In such an event the Participants intend to consult on the issue at the request of either Participant.

IX: Duration of Cooperation

- A. This Memorandum will come into effect on the date of signature.
- B. Assistance under this Memorandum should be available in investigations or proceedings concerning Spam Violations occurring before as well as after this Memorandum takes effect.
- C. A Participant should endeavor to provide the other Participant with 30 days written notice before ending its cooperation under this Memorandum. However, prior to ending this Memorandum, each Participant should use its best efforts to consult with the other Participant.
- D. On cessation of this Memorandum, the Participants should use their best efforts, in accordance with Paragraph V, to maintain the confidentiality of any Request and Evidence communicated to them in confidence by the other Participant under this Memorandum prior to its termination; and to return, in accordance with the provisions of Paragraph VII, any Evidence obtained from the other Participant under this Memorandum.

X: Review of Memorandum

The Participants intend to consult and review the Memorandum on an annual basis regarding the cooperation, coordination and enforcement assistance undertaken between the Participants for the prior 12-month period.

XI: Legal Effect

Nothing in this Memorandum is intended to:

- A. Create binding obligations under international law or under the domestic laws of the Participants.
- B. Prevent a Participant from seeking assistance from or providing assistance to another Participant pursuant to other agreements, treaties, arrangements, or practices.
- C. Give rise to a right on the part of any private person to obtain, suppress, or exclude any Evidence; rather this Memorandum is intended to be used solely for the purpose of law enforcement assistance between the Participants.
- D. Compel a Person to provide Evidence in violation of any legally applicable right, privilege, or restriction.

- E. Affect any right of a Participant to seek Evidence on a lawful basis from a Person located in the territory of the other Participant, nor is it intended to preclude any such Person from voluntarily providing legally obtained Evidence to a Participant.

Approved on this _____ day of _____ 2005, in duplicate

Deborah P. Majoras
Chairman
U.S. Federal Trade Commission

Jose Luis Piñar Mañas
Director
Agencia Española de Protección de
Datos