

COOPERATION PROCEDURE CONCERNING THE TRANSMISSION OF COMPLAINT INFORMATION AND INTELLIGENCE RELEVANT TO THE ENFORCEMENT OF ARTICLE 13 OF THE PRIVACY AND ELECTRONIC COMMUNICATION DIRECTIVE 2002/58/EC, OR ANY OTHER APPLICABLE NATIONAL LAW PERTAINING TO THE USE OF UNSOLICITED ELECTRONIC COMMUNICATIONS

National Authorities,

RECOGNISING:

- that the growth in the amount of unsolicited commercial communications or “spam” has reached worrying proportions and that spam is a problem for many reasons, including invasion of privacy, deception of users of electronic communications, fraudulent practices and extra costs for affected parties, including lost productivity;
- that spam is also increasingly being used in combination with software that supports the gathering of information about a person or organisation without their knowledge and which may subsequently be sent to another entity without the consumer’s consent, or which asserts control over a computer without the consumer’s knowledge;
- that spam can be considered to undermine consumer confidence in electronic communications;
- that in the European Union and the European Economic Area, various National Authorities are involved with the enforcement of the Privacy and Electronic Communication Directive 2002/58/EC as transposed into national law, or any other applicable national law pertaining to the use of unsolicited electronic communications, either in the context of data protection, consumer protection or telecommunications regulation;
- that the European Commission, in its Communication on unsolicited commercial communications or “spam” (COM 2004(28)) called for cooperation among national Authorities on cross-border enforcement;
- that on the initiative of the European Commission, an informal group was created consisting of National Authorities involved with the enforcement of Article 13 of the Privacy and Electronic Communication Directive 2002/58/EC called “the Contact Network of Spam Authorities (CNSA)” and that a list of contact information for enforcement cooperation matters was submitted to the CNSA;
- that in the CNSA, information on current practices is exchanged between National Authorities, including best practices for receiving and handling Complaint information and Intelligence and investigating and countering spam;
- that this Cooperation procedure aims to facilitate the transmission of Complaint information or other relevant Intelligence between National Authorities;
- that Complaint information or other relevant Intelligence that is gathered by a National Authority can only be transmitted to another National Authority if permitted by their respective national law, in particular but not exclusively with regard to enforcement law and policies;
- that this cooperation procedure is agreed by all National Authorities on a voluntary basis;

HAVE AGREED THE FOLLOWING COOPERATION PROCEDURE:

I. Definitions

For the purposes of this Cooperation procedure:

a. Article 13 means:

Article 13 of the Privacy and Electronic Communication directive 2002/58/EC (“the Directive”), which reads as follows:

- “1. The use of automated calling systems without human intervention (automatic calling machines), facsimile machines (fax) or electronic mail for the purposes of direct marketing may only be allowed in respect of subscribers who have given their prior consent.
2. Notwithstanding paragraph 1, where a natural or legal person obtains from its customers their electronic contact details for electronic mail, in the context of the sale of a product or a service, in accordance with Directive 95/46/EC, the same natural or legal person may use these electronic contact details for direct marketing of its own similar products or services provided that customers clearly and distinctly are given the opportunity to object, free of charge and in an easy manner, to such use of electronic contact details when they are collected and on the occasion of each message in case the customer has not initially refused such use.
3. Member States shall take appropriate measures to ensure that, free of charge, unsolicited communications for purposes of direct marketing, in cases other than those referred to in paragraphs 1 and 2, are not allowed either without the consent of the subscribers concerned or in respect of subscribers who do not wish to receive these communications, the choice between these options to be determined by national legislation.
4. In any event, the practice of sending electronic mail for purposes of direct marketing disguising or concealing the identity of the sender on whose behalf the communication is made, or without a valid address to which the recipient may send a request that such communications cease, shall be prohibited.
5. Paragraphs 1 and 3 shall apply to subscribers who are natural persons. Member States shall also ensure, in the framework of Community law and applicable national legislation, that the legitimate interests of subscribers other than natural persons with regard to unsolicited communications are sufficiently protected”;

b. Complaint means:

A complaint concerning a possible Spam violation;

c. Complaint information means:

All information included with the Complaint that pertains to the possible Spam violation and the identity of the Complainant;

d. Complainant means:

A user of electronic communications, either a natural person or a legal person, that files a Complaint with a National Authority;

e. Intelligence means:

All information, testimony, statements, documents or copies thereof, or other items, that are lawfully obtained in anticipation of or during the course of an investigation or proceeding under the National Authorities’ respective national law regarding a particular, possible Spam violation;

f. National Authority means:

Any organisation designated by a Member State of the European Union or the European Economic Area to enforce Article 13 as transposed into national law, or any other applicable national law pertaining to the use of unsolicited electronic communications, that has signed this Cooperation procedure on a voluntary basis;

g. Spam violation means:

Conduct prohibited by Article 13 as transposed into national law or prohibited by any other applicable national law pertaining to the use of unsolicited electronic communications;

II. Scope of the Cooperation procedure

1. The Cooperation procedure is to facilitate the transmission of Complaint information and Intelligence between National Authorities for the purpose of countering cross-border Spam violations to the extent permitted by National Authorities' respective national law.

III. Receiving Complaint information and Intelligence¹

2. When receiving and handling Complaints and Intelligence the National Authority receiving the Complaints should use its best efforts to verify the possible grounds for involvement of other National Authorities. This includes the verification of whether the Complainant is a natural person or a legal person.
3. The National Authority that considers the transmission of Complaint information that includes information identifying the Complainant to another National Authority, informs every Complainant, or requires consent to do so.²
4. The National Authority that obtains Complaint information or Intelligence about a possible Spam violation in the jurisdiction of another National Authority, handles this information in such a way that it can be shared with the other National Authority.

IV. Transmission of Complaint information and Intelligence

5. In case the National Authority estimates that the transmission of Complaint information and/or Intelligence is necessary in view of the seriousness or the number of Complaints received, that National Authority shall transmit this Complaint information and/ or Intelligence as soon as possible to the National Authority that is competent for the Spam violation(s). This transmission of Complaint information takes place via an appropriate and secure communication interface.
6. If permitted by national law, in particular but not exclusively with regard to enforcement law and policies, the transmitting National Authority identifies the Complainant and the full content³ of the Complaint.
7. If permitted by national law and necessary for the purpose of the Cooperation procedure, National Authorities shall inform other National Authorities of Complaint(s) information and Intelligence transmitted under Section IV as much as possible.

¹ A flowchart depicting the connection between Sections III, IV and V, is included as an Appendix to this Cooperation procedure.

² Whichever is in accordance with the National Authorities respective national law.

³ Including header and message body (if possible: source code) information.

V. Treatment of Complaint information and Intelligence by the receiving National Authority

8. The National Authority that received Complaint information from another National Authority shall use its best efforts to treat the Complaint according to the same criteria that it applies in its national context.
9. The National Authority that has received Complaints and/or Intelligence from another National Authority informs that National Authority about the action taken with regard to the Complaints and/or Intelligence.
10. A National Authority that cannot deal with Complaint information and/or Intelligence transmitted by another National Authority, either consults with that National Authority whether mutual assistance can be rendered, or informs that National Authority on the grounds for not acting on the transmission.
11. The National Authority that initially received the Complaint informs the Complainant on an individual basis, if so required under national law.

VI. Changes affecting cooperation under this procedure

12. In the event of a significant modification to a National Authority's applicable national law, this National Authority should use its best efforts to consult with the other National Authorities promptly and, if possible, prior to the entry into force of such enactments.
13. National Authorities should provide other National Authorities with written notice before ending their cooperation under this Cooperation procedure. However, prior to ending their cooperation, each National Authority should use its best efforts to consult with the other National Authorities.

VII. Confidentiality

14. Under this Cooperation procedure, National Authorities maintain the confidentiality of any Complaint information and Intelligence transmitted to them in confidence by the other National Authorities under this Cooperation procedure. Confidentiality of Complaint information and Intelligence shall be maintained by each National Authority.
15. On withdrawal from this Cooperation procedure, the National Authorities maintain the confidentiality of any Complaint information and Intelligence communicated to them in confidence by the other National Authorities under this Cooperation procedure prior to its cessation, and delete any confidential Intelligence obtained from the other National Authorities in accordance with applicable national law.

VIII. Review of the Cooperation procedure

16. The Cooperation procedure will be reviewed on a periodical basis to determine whether it should be amended.

IX. Legal effect of the Cooperation procedure

17. This Cooperation procedure cannot, nor does it intend to, create binding obligations under national or international law.

APPENDIX: Flowchart

