

“Overview of Mexico’s Legislation to Combating Spam”

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Unlike the United States¹, Mexico does not have an independent anti-spam legislation to control and reduce this global problem. However, the *Federal Consumer Protection Law (FCPL)*² contains marketing & advertising rules to control unsolicited commercial messages originated in Mexican territory³. Article 76BIS section VI of the *FCPL*, gives the option to consumers to “opt-out”⁴ of receiving commercial notices and advertisement in transactions carried out through the Internet. Section VII of article 76BIS obliges suppliers⁵ to avoid using sales or advertising strategies that do not provide clear and sufficient information on the services offered to the consumer⁶, and warn suppliers on the marketing practices addresses to vulnerable population, such as children, the elderly and sick people and requires suppliers to incorporate mechanisms that warn when the information will not be apt for such vulnerable population. This practice used to be sanctioned with a fine equivalent of from one and up to two thousand five hundred times taking, as a path, the general minimum wage for the Federal District. The criteria for imposing a fine used to be left up to the discretion of the officials of the Office of the Federal Attorney for Consumer Protection (PROFECO)⁷.

* North American Consumer Project on Electronic Commerce (NACPEC), online: <http://www.nacpec.org>

¹ Controlling the Assault of Non-Solicited Pornography and Marketing Act of December 16, 2003 (*CAN-SPAM Act*), online: <http://www.spamlaws.com/federal/108s877.html>

² The *Decree of May 29, 2000*, which amended three federal statutes, including the *Federal Consumer Protection Law* represented the first step that set forth an anti-spam legal measure in Mexican territory, online: <http://www.firmadigital.gob.mx>. The reform to the *FCPL* largely adopts and reflects the language of the OECD Guidelines For Consumer Protection in the Context of Electronic Commerce, online:

http://www.oecd.org/document/51/0,2340,en_2649_34267_1824435_1_1_1_1.00.html

³ Interestingly, on February 2004, the UK anti-spam & anti-virus company Sophos released a report of twelve countries from which spam messages originate the most. Sophos findings placed Mexico in the tenth place with an average of 1.19% spam messages. See, Sophos, Anti-virus and Anti-spam for Business, “Sophos outs ‘dirty dozen’ spam producing countries”, (26 February, 2004), online: <http://www.sophos.com/spaminfo/articles/dirtydozen.html>

⁴ The *Opt-Out* clause allows consumers to withdraw, at any time, from receiving information on products and services contained in e-mail communications. The *Opt-Out* mechanism is an accepted information marketing practice that prevents consumer protection agencies from asserting fines to marketing and advertising firms for possible acts of misrepresentation. For more detailed information on the *Opt-Out* clause, see OECD, Committee for Information, Computer and Communications Policy “*Background Paper for the OECD Workshop on Spam*”, pp. 18-19 (22 January, 2004), online:

http://www.oecd.org/document/47/0,2340,en_2649_34255_26514927_1_1_1_1.00.html

⁵ *Supplier* is defined in article 1 subsection II of the *FCPL* as “an individual or legal person that periodically offers, distributes, sells, leases or grants the use or benefit of goods, products and services”.

⁶ *Consumer* is defined in article 1 subsection I of the *FCPL* as “an individual or legal person who acquires, realizes or possesses goods, products or services as an ultimate consignee”. The definition also includes the figure of “intermediary consumer” who is “an individual or legal person that acquires, stocks, uses or consumes goods and services with the purpose to include them in methods or process of production, transformation or commercialization or for rendering of services to third parties”.

⁷ PROFECO’s website at: <http://www.profeco.gob.mx/html/ecomercio/ecomercio.htm>

The reform to the *FCPL* of May 29 2000 was innovative since it legally recognized for the first time, the use of electronic means, optical or any other technology in B2C transactions, however, the scope of this reform did not have the expected results as far as anti-spam measures are concerned and in fact, spam claims, as well as misleading Internet marketing and advertising practices under the former law were non existent⁸.

In February 4, 2004, the Ministry of Economics (*Secretaría de Economía*) with the input and support of PROFECO, published a Decree in Mexico's Diario Oficial de la Federación (*Decree of February 4, 2004*) that contains amendments and reforms to the *FCPL*. This reform reinforced the legal regime for marketing & advertising practices and anti-spam measures for both environments, offline and online and provide PROFECO with better enforcement tools and mechanisms against misleading and deceptive marketing practices –including those carried out through Internet- in Mexican territory. The *Decree of February 4, 2004* introduced the reform to six articles and an addition to one new article and one paragraph. The reforms are the following:

Marketing and Advertising Information for Consumers

“Article 16. Retailers and companies that use consumer information for marketing and advertising purposes are obliged to inform those consumers at no cost if they keep information about them. If such information exists, retailers and companies must make it available at the request of the consumer or his representative and companies must also inform consumers if any of their personal data has been shared with third parties, as well as informing them as to the identity of such third parties and the recommendations carried out.

The response to any request shall be granted within the next thirty days of initial filing.

In case of ambiguity or inaccuracy in the consumer's information, the consumer shall point it out to the supplier or company, which shall make the corrections that the consumer request with good reason and inform of such corrections to third parties whose information has handed over within a term of thirty days from the date of the consumer request.

For purposes of this law, it is understood by marketing and advertising purposes the offering and promotion of goods, products or services to consumers”.

Information Disclosures and Opt-Out Clause

“Article 17. Commercial messages or advertising sent to consumers should indicate the name, address, telephone and, where applicable, the e-mail address of the provider, and of the business that sends the publicity on behalf of providers and the name of PROFECO.

⁸ See Velasco, Cristos *“Where Does Mexico Stand on Internet Policy”* Mexico: Internet Legislation, Two Views. Inter-American Trade Report. Second Part Volume 11 number 2 National Law Centre for Inter-American Free Trade, pp. 3-4, (February 2004), online: http://www.nacpec.org/en/links/acad_pubs.html

The consumer will demand directly from specific providers and businesses using its information for marketing or advertising purposes, that he does not wish to be bothered at home, or at work, e-mail or any other means in order to offer goods, products or services and not to receive advertising. Likewise, the consumer will be entitled to inform providers or businesses using its information for marketing or advertising purposes, at any moment, that his/her personal data must not be transmitted or shared with third parties, unless that transmission is determined by a judicial authority”.

Information Purpose and Consumer’s Public Registry for Personal Data

“Article 18. It is strictly forbidden to use information with purposes other than credit or marketing for companies dedicated to credit and marketing research and its clients.

The Procuraduría could develop, where applicable, a consumers’ public registry, which would list those not wishing their personal data to be used for marketing or advertising purposes. Consumers could notify the Procuraduría by letter or e-mail of its inscription request to the said registry, which would be at no cost”⁹.

“Article 18 BIS. It is forbidden for providers and businesses as well as its customers that use consumers’ information for marketing or advertising purposes to use the information related to consumers for purposes other than those of marketing or advertising, as well as sending advertising to consumers that have expressly requested not to receive it or that are subscribed to the registry referred to in the aforementioned article. Providers that are the object of advertising are solidary responsible for the management of consumers’ information when such advertising is sent through third parties”.

Electronic Complaint Filing

The first paragraph of article 99 of the *FCPL* allows consumer to launch complaints before PROFECO, including those arising from false or misleading advertising practices contained in unsolicited commercial messages by using telephone, electronic or any other viable means.

Penalties and Fines

Articles 126, 127, 128, and 128BIS of the *FCPL* contained economic fines expressed in Mexican pesos and such articles provide penalties for non-compliance with the law and the regulation from an amount of \$150.00 to a maximum of \$2,520,000 Mexican pesos, depending on the circumstances and the gravity of the case concerned. Article 129 allows PROFECO to impose fines up to the double of the amounts established in the afore-mentioned articles in case of backsliding¹⁰ and even imprisonment of up to thirty-six hours.

⁹ According to transitory article fourth of the *Decree of February 4, 2004*; article 18 of the *FCPL* shall be in full effect nine months after the publication of such Decree, which was scheduled to occur in November 3, 2004. However, PROFECO has not made any public announcements regarding the creation of the Consumer’s Public Registry.

¹⁰ Backsliding occurs when the same infringer commits two or more violations of the same legal provision during a year term from the day the first violation occurred. Article 130 *FCPL*.

In order to determine penalties, PROFECO shall utilize the provisions of the *FCPL* and its Regulation and must assess the gravity of the infraction and consider the following elements: (i) the loss caused to the consumer or to society in general; (ii) the intentional nature of the violation; (iii) whether it is a case of recurrence; and (iv) the economic condition of the infringer. Also, PROFECO should consider the general facts of the violation in order to obtain the elements that may allow PROFECO to express the motive and reasons to assess the amount of the penalty.

Do-Not Spam Registry

Article 18 of the *FCPL* gives PROFECO the authority to create a public registry - similar to the FTC Do-Not E-Mail Registry¹¹ - from November 2004 for Mexican consumers who do not want their personal information to be used for marketing and advertising purposes or shared with third parties.

In view of the outcome of the Federal Trade Commission (FTC) Report of June 2004, where the FTC finally decided not to adopt a Do Not Spam Registry¹², it would be very unlikely that PROFECO decides to adopt a consumers' public registry for multiple reasons. First, PROFECO would have to spend a great deal of financial and human resources if it wants to implement and oversight the said registry in an efficient and continuous fashion. Second, even when PROFECO had the financial and human resources to implement the said registry, it would not possibly create desirable results among the Mexican marketing and advertising industry. Third, it would also be very unlikely that consumers signed up for such registry since a large number of them are wary about having their data used and handled by government authorities. Another factor why the consumers' registry would not be feasible is because the Internet penetration and use in Mexico, particularly among consumers, yet remains very low¹³.

Anti-Spam Law Draft Initiative in Mexican Congress

In November 2004, the Commission of Science and Technology of the Mexican House of Representatives (Comisión de Ciencia y Tecnología de la Cámara de Diputados) introduced a draft

¹¹ Federal Trade Commission, "*National Do Not Email Registry. A Report to Congress*", (June 2004), online: <http://www.ftc.gov/bcp/online/edcams/spam/reports.htm>

¹² *Supra* note 11.

¹³ According to information from Mexico's National Institute of Statistics, Geography and Informatics (INEGI), until May 2004, Mexico has 16.2 million Internet users 26 percent of which use e-mail communications, 26 percent use the Internet for research, 17 percent chat online and 14 per cent used education services, online at: <http://lac.derechos.apc.org/cnoticias.shtml?x=20562>

decree initiative that seeks to regulate and criminalize anti-spam conduct in the Mexican Republic. The decree initiative seeks to amend three federal statutes: Federal Criminal Code (Código Penal Federal); Federal Consumer Protection Law (Ley Federal de Protección al Consumidor) and the Code of Commerce (Código de Comercio).

Within the scope of the Federal Criminal Code, the draft decree contains provisions seeking to impose imprisonment of up to five years and economic fines to individuals that: (i) transmit data messages in a massive fashion through the use of systems and informatics equipment to any destination, addresses or electronic locations without having obtained the previous consent of the addressee; (ii) transmit messages that purport to create confusion, error or misleading of data messages regarding the origin or issuance of such data message addressed to an addressee or telecommunications, Internet and e-mail services providers; (iii) falsify the heading of any data messages and transmit massive data messages through third parties; (iv) harvest e-mail addresses, domain names or through a combination of both; and (v) illegitimately and falsely use IP Addresses to transmit and reproduce data messages in a massive fashion.

For the imposition of a criminal punishment, the Judge would have to consider factors such as: (i) the seriousness of the crime pursuant criteria like the volume and nature of transmitted data messages, the volume of e-mail accounts, domain names and IP addresses and damage caused to third parties; (ii) the commission of criminal conducts in violation of computing programs, informatics equipment or data messages; (iii) the patrimonial conditions; (iv) backsliding; and (v) the benefit obtained directly or indirectly or through third parties.

Within the scope of the *FCPL*, the draft initiative seeks to add three new paragraphs and one subsection in order to: (i) prohibit the transmission of data messages with marketing and advertising purposes not containing a reply function to a valid and active e-mail address that allow the addressee to be excluded from the distribution list of the originator; (ii) prohibit the transmission of data messages with marketing and advertising purposes containing false and misleading headings that lead to commit an error or create confusion on the addressee regarding the origin and destiny of data messages; and (iii) prohibit suppliers from sending data messages without having previously obtain an express request or authorization of the consumer (*opt-in*); and (iv) include as an obligation that the originator of data messages includes clear and contrasting statements in the heading of data messages containing sexual content.

Within the sphere of Commerce, the draft initiative seeks to add a new article to the Code of Commerce prohibiting the creation, design and use of automated mechanisms to send unsolicited commercial messages or e-mail communications to other e-mail users or to facilitate the transmission of data messages to third parties.

It is important to point out that this law initiative is only a draft initiative that has not been yet submitted for public consultation among the various stakeholders and it also needs to meet the preliminary constitutional test and approval of other commissions of the Mexican House of Representatives. Thus, the provisions of this law initiative may possibly change during the course of 2005.

Final Comments

Mexico's legal framework to combating spam is adequate enough to avoid misleading and deceptive information practices through the Internet and to discourage spamming operations in Mexican territory. However, spam is a global problem and does not rest on having a good piece of legislation to tackle it effectively.

Mexico's priority should be to continue cooperating with international organizations that are currently working on spam policy issues and where Mexico is a member, like for example the ITU and the OECD at the multilateral level, and APEC at the regional level. It would also be important that Mexico continues to be proactive at the national level to reduce the amount of spam that Mexican consumers receive on a daily basis. One relevant aspect that spam represents is the difficulty of enforcing national laws and prosecute spammers in national territories since most of them are located in other jurisdictions. Therefore, it is a priority that Mexico through PROFECO enters into mutual cooperation agreements with consumer and enforcement agencies of other countries that set forth adequate mechanisms to enforce anti-spam laws, and should also continue collaborating with global enforcement networks like the International Consumer Protection Enforcement Network (ICPEN)¹⁴.

¹⁴ The ICPEN is an international network consisting mainly of law enforcement authorities and consumer protection agencies from thirty-one countries, most of which are members of the OECD. Mexico through PROFECO is part of this network since 2001. The mandate of the ICPEN is to facilitate practical action to prevent and redress deceptive marketing practices on the Internet; to share information connected with cross-border commercial transactions that may affect consumer interests; and to encourage international cooperation among law enforcement authorities and agencies, online: <http://www.icpen.org/>

Another important step that Mexico should undertake in order to combat spam effectively, is to devise national awareness programs and consumer education campaigns in collaboration with government authorities, private sector, civil society and the academia in order to not only illustrate and educate consumers about the problems of spam but particularly to avoid identity theft problems like accessing phishing and spoofing websites.

Last but not least, Mexico should follow the examples of other countries and create a national Anti-Spam Task Force composed of technical, legal and academic expertise that serves as a point of contact with similar groups and taskforces located in other countries, as well as with international organizations working on this issue in order to mutually help and cooperate in enforcing anti-spam legislation more effectively. The Anti-Spam Task Force could be formed with the auspices of Mexico's Cybercrime Task Force (Delitos Cibernéticos DC-México)¹⁵ and we are confident that such Task-Force would have the prospect to play an important role at both levels, national and international.

¹⁵ Delitos Cibernéticos México ("DC-México") is a multidisciplinary ad-hoc task force initially formed in 2001 by the Ministry of Public Security. DC-Mexico is currently formed of various entities and agencies of the Federal Executive branch like PROFECO, the Public Policy Development Office of the President's Office; the Ministry of Communications and Transports; the Legislative Branch; State Governments, academic institutions, telecommunications companies and ISP's, corporate chambers & associations and NGO's. The purpose of DC-México is to prevent and combat cybercrime in the Mexican Republic, online. <http://www.ssp.gob.mx/application?pageid=pcibernetica>