

FOR PUBLICATION



**RESPONSE TO THE DRAFT ELECTRONIC COMMERCE (EC  
DIRECTIVE) REGULATIONS 2002**

**Introduction**

1. Beale and Company is a firm of solicitors based in Covent Garden, London. We provide a range of legal services to clients drawn from a wide range of business sectors. We have built a particular representation in the IT, construction and insurance industries where our skills and experience have long been recognised.

**Unsolicited commercial communications**

2. Regulation 10 of the draft Electronic Commerce (EC Directive) Regulations 2002 (“the Regulations”) states that:

“A service provider shall ensure that any unsolicited commercial communication sent by him by electronic mail, where permitted, is clearly and unambiguously identifiable as such as soon as it is received.”

The Regulation does not prescribe how the requirement for unsolicited commercial communications sent by email to be “clearly and unambiguously identifiable” should be met. The Interim Guidance on the Regulations states that the Government believes that existing industry self-regulation and codes of conduct provide effective protection.

3. Regulation 10 places an obligation on a service provider to identify unsolicited commercial communications, but fails to provide them with any guidance on how to do so. The “industry self-regulation” referred to by the Government is

almost non-existent and is most certainly not adhered to by unscrupulous companies or those outside the self-regulation's jurisdiction.

4. If service providers are compelled to identify unsolicited commercial communications then a standard means of identification should be considered. For example, a service provider could place a simple prefix in the subject line of an email:

“ADV: Two hard back books for the price of one.”

In the aforementioned example, “ADV” standards for advertisement.

### **Hosting**

5. Pursuant to Regulation 19, where an information society service is provided which consists of the storage of information provided by a recipient of the service, the service provider shall not be liable in damages as a result of that storage where:

“(a) upon obtaining such knowledge or awareness the service provider acts expeditiously to remove or to disable access to the information, and

(b) the recipient of the service was not acting under the authority or the control of the service provider.”

The Regulation does not clarify the meaning of the term “control” however, the Interim Guidance contends that this is the same concept as “effective control” in the Defamation Act 1996.

6. The relative protection given to an Internet Service Provider (“ISP”) under section 1 of the Defamation Act 1996 is balanced against the requirement that the ISP takes reasonable care in relation to the publication of the material. It is

therefore vital that further clarification be given concerning what reasonable steps an ISP must take in relation to the publication of material.

## **Conclusion**

7. Beale and Company generally welcomes the draft Regulations whilst still maintaining reservations first raised by the E-Commerce Directive. The Regulations are likely to resolve various problems by creating a framework in which businesses and consumers have clear rights and obligations.
  
8. Recent pricing mistakes by Kodak and Komplett on their respective websites highlight a missed opportunity for closer clarification in relation to the formation and conclusion of electronic contracts. The Regulations are only a timid reaction to a nascent digital economy, and are likely to be overshadowed by rapid future developments.

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**30 April 2002**