

**LEGAL OPINION**

**TO**

**THE BOARD OF DIRECTORS  
KENYA NETWORK INFORMATION CENTRE  
(KENIC)**

**ON**

**THE PROPOSED GOVERNANCE MODELS TO ENABLE THE IMPLEMENTATION OF  
LICENSING REQUIREMENT UNDER SECTION 83D OF THE KENYA INFORMATION AND  
COMMUNICATIONS ACT, 2009 (CAP 411A)**

## 1. BACKGROUND

We refer to your letter dated Wednesday, August 21, 2013 in which you laid out the terms of reference for this legal opinion. The said letter provided for the terms of reference as follows:-

“The scope of work will include:

- a) A comparison of the management and governance model of KENIC and its equivalent in Canada, Australia, UK, Brazil, and South Africa. This should also include the current total number of domains in each of these entities and where possible their distribution numbers in .co. or, .ac etc. and any other point of interest in the ccTLDs such as the pricing models or rates.
- b) Laws governing each of the ccTLDs in the comparison in their respective countries.
- c) The Kenyan context of domain uptake highlighting major reasons or explanations why the uptake is very low compared to the nations. This part should include a good estimate of domain numbers registered outside Kenya but are for owners in Kenya, and why Kenyans go for them.
- d) Provide an in-depth analysis of impact, consequences and implications of each of the CCK models that have been proposed as possible ways of transforming KENIC. This analysis should also include examples of successful countries that have adopted each of the models, and succeeded, and those that have failed and reasons for either failure or success.
- e) In view of (a) to (d) above, give a professional point of view on the current bill/law in areas that touch on KENIC in relation to migrating to a license regime for the administration and registration of the DOTKE domain name. Particularly, if it is adopting the best practice.
- f) A summary of the pros and cons for KENIC adopting any of the proposed models and a professional recommendation among those models and the best way forward for KENIC in implementing and moving to the next level.
- g) Litigation possibilities of implementing the Act as proposed on KENIC.
- h) Recommendations on ways of involving all KENIC stakeholders and or having public consultations.

## 2. INTRODUCTION

This opinion is premised on the licensing requirement under the Kenya Information and Communications Act, Cap 411A of the laws of Kenya. Section 83D of the Act provides that no person shall:-

**“(b) Update a repository or administer a sub-domain in the Kenya country top level domain (.KE ccTLD); except in accordance with a license granted under this Act.”**

In the absence of an amendment to this requirement, Communications Commission of Kenya, (hereinafter referred to as CCK) is mandated in law to implement and enforce this licensing requirement as the regulator in the industry. We understand that CCK is in the process of setting up a framework that will enable it enforce this requirement of the law. We have made reference to a report by a committee of CCK in which it discussed various options towards implementing the required law on licensing of second level domains.

We further note that Kenya Network Information Centre, (hereinafter referred to as KENIC) is currently the sole domain name registry responsible for the management and administration of .KE ccTLD as well as second level domain names in Kenya, having received this delegated responsibility from IANA and ICANN through the facilitation of CCK. Under the Memorandum and Articles of Association of KENIC, CCK is the registered member, jointly with Telecommunications Service Providers Association of Kenya, (hereinafter referred to as TESPOK).

It is our understanding that under the ICANN processes, KENIC was qualified as a manager and administrator of the .KE ccTLD because its members i.e TESPOK and CCK represented both government and the internet community in Kenya.

Upon obtaining the delegated responsibility to manage and administer the .KE ccTLD, KENIC has over a period of time, established second level domains which it continues to manage and administer as the registry for the said second level domains. We note that CCK is now mandated under the Kenyan law to regulate the operation of second level domains.

The presence of CCK as a member of KENIC with control in the Board of KENIC has posed a challenge to CCK as it finds itself being the regulator and the regulated at the same time as far as the regulation of second level domain names is concerned..

In implementing the licensing requirements under the Act, we understand that CCK would like to put in place a framework that will *inter alia*:-

- a) Promote efficiency in the registry that administers .KE second level domains.
- b) Enhance the uptake of domain names in Kenya and increase the presence of .KE in the internet domain names space;
- c) Enhance corporate governance principles within the .KE second level domain name registry provider;
- d) Restructure its participation in the domain names registry as a regulator;
- e) Reconstitute the existing institutions in line with the objectives of the law.

It is evident that KENIC may be affected as CCK implements the licensing requirements. This advice is, therefore, rendered to the current Board of KENIC to enable it make recommendations to CCK as stakeholders within the industry that will support the transformation of domain names administration as per the requirements of the Information and Communications Act.

## **2.1 SCOPE**

In this opinion, we have taken into account the requirements of the terms of reference from the Board and will address the issues of concern in the following scope:-

- 1.1.1 Comparative analysis of the governing laws, management and governance models of .KE ccTLD and second level domain names and those of Canada, Australia, United Kingdom, Brazil and South Africa;
- 1.1.2 Factors affecting the uptake of the DOTKE domain name;
- 1.1.3 Legal analysis of the impact, consequences and implications of the proposed governance models to enable the implementation of section 83D of the Information and Communications Act;
- 1.1.4 Recommendations on way forward; and,
- 1.1.5 Conclusion.

## **2.2 APPROACH**

In giving this opinion, we have considered the provisions of:-

- (a) The Constitution of Kenya;
- (b) The Kenya Information and Communications Act, 2009, Cap. 411A of the Laws of Kenya;
- (c) The State Corporations Act, Cap 446 of the Laws of Kenya;
- (d) The Companies Act, Cap. 486 of the Laws of Kenya;
- (e) The Public Procurement and Disposal Act, Cap 412C of the Laws of Kenya;
- (f) The Public Officer Ethics Act, of 2003 ;
- (g) Cabinet Secretary to the Treasury (Incorporation) Act, Cap 101 of the Laws of Kenya;

- (h) Memorandum & Articles of Association of Kenya Network Information Centre;
  - (i) The Memorandum and Articles of NOMINET;
  - (j) The Sponsorship Agreement between ICANN, KENIC and CCK dated 20<sup>th</sup> December 2002;
  - (k) The Report of the CCK Committee Developing a Licence for .KE domain name registry services ;
- and,
- (l) Other relevant materials.

### 3. THE OPINION

#### 3.1 Comparative analysis of the governing laws, management and governance models of .KE ccTLD and second level domain names and those of Canada, Australia, United Kingdom, Brazil and South Africa;

##### 3.1.1 .KE ccTLD and Second Level Domains (SLDs)

In 1993, .KE was delegated by Jon Postel, the Internet pioneer, to Dr. Shem Ochuodho as the Administrative Point of Contact and Randy Bush as the Technical Point of Contact. Over time, the Domain name management and administration on voluntary basis became impractical. Accordingly, there was need to re-delegate the .KE management to a multi-stakeholder organization whose members were drawn from the public, private sector and civil society (Public-Private Partnership) and a not-for-profit entity (KENIC).

KENIC was established through the facilitation of CCK through a broad based consultation process that involved various stakeholders including CCK the Telecommunications Service Providers Association of Kenya (TESPOK), the East Africa Internet Association (EAIA), Kenya Information Society (KIS), and Kenya Education Network (KENET) among other stakeholders.

The result of these consultations was the establishment of KENIC on the 28<sup>th</sup> of October 2002 as a company limited by guarantee without a share capital and a not-for-profit entity where the registered members were CCK who contributed Kenya Shillings Ten Million (Kshs.10,000,000) and TESPOK which provided technical facilitation and sponsored training for the technical staff of KENIC.

Under its memorandum and articles, KENIC is currently the sole company in Kenya mandated to *inter alia*:-

- a) Act as a trustee for the .KE country-code-top-level-domain;
- b) Become the .KE domain administrative contact as well as technical contact;
- c) Administer the .KE ccTLD and its Second Level Domains;
- d) Maintain and promote the operational stability and utility of the .KE ccTLD;

- e) Ensure a cost-effective administration of the .KE ccTLD and its sub-domains;
- f) Notify the Internet Corporation of Names and Numbers (ICANN) of any change to the contact information about the .KE ccTLD;
- g) Provide name service for all .KE and ensure that the database is secure and stable;
- h) Allow ICANN to access .KE zone files and registration data (up to date) continuously maintain a KENIC website at all times with the entire registration information meet all its financial obligations to ICANN comply with all global ICANN Internet policies and help in their development.”<sup>1</sup>

In addition to performing the technical, administrative, and policy-setting functions for the .KE registry, KENIC is required to promote, manage and operate the delegated .KE ccTLD in the interest of the Kenyan Internet community and being mindful of the global Internet community interest in consistent with ICANN policies.

Three months after KENIC was incorporated dot KE was re-delegated by ICAAN on the 20<sup>th</sup> of December 2002 to:

- KENIC: As the Administrative Point of Contact from Shem Ochuodho; and,
- KENIC: As the Technical Point of Contact from Randy Bush.

### **Management & Governance**

KENIC, is a company registered by guarantee without share capital. Its members are representatives of government i.e CCK and TESPOK representing the tele-communications service providers. It is the registry for the .KE ccTLD and all second level domains. It is governed by a Board supported by the Chief Executive Officer (CEO) who represents the management arm of the Company. Under the Memorandum and Articles of KENIC, the Board members are drawn from CCK, TESPOK, a representative from the Ministry of Information and Communication Technology and other board members drawn from relevant stakeholders within the internet community in Kenya. This structure of governance is informed by the need to enhance stakeholders’ participation in the governance of KENIC. The CEO also sits on the Board but does not have voting rights.

Under the Memorandum and Articles, board members representing CCK are not eligible to chair the Board. The directors are required to serve a two year term and are eligible for reappointment by their respective organizations. The Memorandum and Articles of KENIC also requires the company to observe all laws of Kenya. It is provided that if the Board makes a resolution which is not consistent to any written law, CCK has the power to overrule, vary or nullify any such resolutions.

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<sup>1</sup> [Online] Available at <http://www.kenic.or.ke/index.php/about-kenic/background> [Assessed 5<sup>th</sup> September, 2013]

It is further provide that upon dissolution or winding up of the Company, the right to administer the .KE ccTLD shall be transferred to CCK.

.KE performance in Africa is rated among the very best, though it has a long way to go compared to the most successful ccTLDs in the world. The second level domain under .KE which are all administered by KENIC include:-

- .co.KE - for Companies
- .or.KE - for Not-for-Profit-Making Organisations or NGO's
- .ne.KE - for Network Devices
- .go.KE - for Government Entities(Requires Supporting Documents)
- .ac.KE - for Institutions of Higher Educations.( Requires Supporting Documents)
- .sc.KE - for Lower and Middle Institutes of Learning. (Requires Supporting Documents)
- .me.KE - for Personal names
- .mobi.KE - for Mobile content
- .info.KE - for Information

### 3.1.2 .CA of CANADA

In 1987, the .CA registry was created by volunteers at the University of British Columbia Vancouver, Canada. In 1997 the Canadian Internet community at their annual conference resolved to “reform the .CA registry, to liberalise registration procedures and improve turnaround time.”<sup>2</sup> The Canadian Domain Name Consultative Committee (CDNCC) was created as a result of the conference to manage and administer the . CA domain following a consultative meeting with members of the Canadian Internet Community. The management structure of CDNCC was composed of representatives from the .CA Committee, the Canadian Internet Society (CISOC), Canadian Association of Internet service Providers (CAIP) and the Federal Government. CDNCC held a consultative meeting and submitted a proposal on 25<sup>th</sup> January, 1998 on ways of reforming the administration of the .CA Internet Top Level Domain (TLD). It was proposed that a new entity should be incorporated to manage the .CA Internet Top Level Domain (TLD). Members of CDNCC were proposed to act as the interim Board of Canadian Internet Registration Authority (CIRA) and participate in the incorporation of CIRA during the transition period. CIRA was proposed by CDNCC to be a not-for-profit Canadian corporation that would be managed by an elected Board to administer the .CA domain registry.<sup>3</sup>

<sup>2</sup> The History of .CA: The Life Story of the Domain that could. [Online] Available at [http://www.opensrs.com/images/elements/registries/ca\\_factsheet1.pdf](http://www.opensrs.com/images/elements/registries/ca_factsheet1.pdf) [Accessed 4<sup>th</sup> September, 2013]

<sup>3</sup> Canadian Domain Name Consultative Committee: Framework for the administration of the .CA domain name system, 15<sup>th</sup> September, 1998. [Online] Available at <http://www.cira.ca/assets/Documents/Publications/CDNCC-report.pdf>

CIRA adopts a single centralised registry system of operating the .CA ccTLD and the respective sub-domains. CIRA certifies or accredits registrars who are the main point of contact for .CA Registrants in the registration and management of their .CA domain names.

We note that Canada's top-level domain, is one of the fastest growing TLDs in the world, ranking fourth among its country code top-level domain (ccTLD) counterparts. We thus conclude that one entity can manage the ccTLD and SLD successfully.

### **CIRA'S Management and Governance**

CIRA was incorporated as a charitable Foundation in December 1998 and on 1<sup>st</sup> December, 2000 it became the official .CA registry. It is a Member-driven organization that has no shareholders; that manages Canada's .CA domain name registry, develops and implements policies that support Canada's Internet community, and represents the .CA registry internationally. Currently the management structure of CIRA is comprised of a twelve (12) member Board of Directors and three (3) Board Advisors who have non-voting rights.<sup>4</sup>

CIRA has adopted an independent, self regulated governance model. This kind of model adopted by a ccTLD registry is independent of government influence and it is not a commercial enterprise. The independent or self regulated model takes on the legal entity of a charitable foundation or a not for profit membership association.<sup>5</sup> According to CIRA's Corporate Plan, the Government of Canada has formally recognized and designated it as the administrator of the .CA domain names.<sup>6</sup> CIRA reports that .CA registrations have increased from 1.4 million in 2010 to 2 million in 2012.<sup>7</sup>

### **3.1.3 .AU OF AUSTRALIA**

The Australian Government formally endorsed .au Domain Administration Limited (auDA) in December 2000, to administer the .au domain space. Subsequently, ICANN recognised auDA as the suitable operator for .au under a Sponsorship Agreement in October 2001.<sup>8</sup> auDA is the policy authority in registration the of Australian domain names. It performs the following roles:-

1. develop and implement domain name policy;
2. license 2LD registry operators;
3. accredit and license registrars;

<sup>4</sup>[Online] Available at <http://www.cira.ca/about-cira/history/> as [Accessed 3<sup>rd</sup> September, 2013]

<sup>5</sup> International Telecommunications Union (2008), *Policy, Business, Technical, and Operational Considerations for the Operation of a ccTLD* (2008). [Online] Available at <http://www.itu.int/ITU-D/cyb/ip/docs/itu-draft-ccTLD-guide.pdf>. [Accessed 3<sup>rd</sup> September, 2013]

<sup>6</sup> CIRA Corporate Plan: Fiscal Year 2013 [Online] Available at <http://www.cira.ca/assets/Documents/Legal/Other/CIRA-Corporate-Plan-FY13.pdf>

<sup>7</sup> Ibid

<sup>8</sup> [Online] Available at <http://www.auda.org.au/about/about-overview/> [Accessed 3<sup>rd</sup> September, 2013]



4. implement consumer safeguards;
5. facilitate .au Dispute Resolution Policy; and
6. represent .au at ICANN and other international fora.<sup>9</sup>

### **Management and Governance**

.au Domain Administration Ltd (auDA) is a company limited by guarantee whose membership is open to all stakeholders of the Australian domain name system. Its membership is divided into two classes as defined by its constitution as follows:-

- i) Supply Class - for domain name industry participants (registry operators, registrars and resellers); and
- ii) Demand Class - for domain name holders (registrants), internet users and the general public.<sup>10</sup>

The auDA is governed by a four member Board elected by each of the supply and demand membership classes. The Board in turn appoints three independent directors. The chief executive is also a board member and has no voting rights.<sup>11</sup> According to a report submitted to the Board of Directors of auDA by Westlake Consulting Limited ('WCL') one regulator described auDA'S Board structure as *"'best practice' for a 'self-regulated industry monopoly.'"*

Australia's domain governance structure is independent, externally regulated. The Government is involvement is limited to policy formation inside the registry as it holds reserve powers in relation to domain names under the *Telecommunications Act 1997*.<sup>12</sup> It also appoints a senior official who acts in the capacity of an 'observer'. Though the observer participates in board meetings he is not a director.

.au Domain Administration Ltd (auDA) is the policy authority and industry self-regulatory body for the .au domain space.<sup>13</sup> The Australian ccTLD administrator's policy provides for separate, competing registry operators and to this effect the day-to-day operation of the .au registry technical facility was tendered out by auDA but the outcome of the tender process in 2002, 2005 and 2009 has resulted in a single registry operator, AusRegistry, providing registry services for all open sub-domains as opposed to licensing multiple registry operators. The model has worked well for Australia with approximately 2,730,027 domains registered under the .au<sup>14</sup> and in our view, this strengthens the rationale for adopting a single and centralised registry for the .KE ccTLD and the

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<sup>9</sup>Ibid

<sup>10</sup> Ibid

<sup>11</sup> Westlake Consulting Limited ('WCL') In association with Argo Pacific Pty Limited; Independent Review of the Governance of .au (November 2011) [Online] Available at <http://www.auda.org.au/pdf/wcl-report-final.pdf> [Accessed 3<sup>rd</sup> September, 2013]

<sup>12</sup> Supra Note 6

<sup>13</sup> <http://www.auda.org.au/about/about-overview/> ( Accessed on 7<sup>th</sup> September, 2013)

<sup>14</sup> <http://www.ausregistry.com.au/> ( Accessed on 7<sup>th</sup> September, 2013)

SLD. Australia has various second level domain names including .COM.au, .NET.au, .ID.au, .ORG.au and .ASN.au *inter alia*.

### 3.1.4 .UK OF UNITED KINGDOM

The .uk domain name registrations were managed by a voluntary group called the Naming Committee prior to Nominet's Foundation (hereafter referred to as "Nominet").<sup>15</sup> Nominet is a not-for-profit membership company limited by guarantee established in 1996. It is responsible for the smooth operation of the top level domain (TLD) in the UK. Nominet's membership is comprised of registrars who act as members but they have no rights to share in the company profits.<sup>16</sup> The management of the .gov.uk and ac.uk has been delegated to United Kingdom Education and Research Networking Association (UKERNA).<sup>17</sup>

#### Management and Governance

Nominet being a private, public purpose company has approximately 3,000 members as opposed to shareholders. It is not a governing or regulatory body, but provides a public service for the .uk, .wales and .cymru namespaces. NOMINET is responsible for the smooth operation of the top level domain (TLD) .uk. NOMINET manages some of the second level domains and delegates the management of the others.

The Second Level domains managed by NOMINET are: Co.uk , Ltd.uk, Me.uk, Net.uk , Org.uk, Plc.uk and Sch.uk. Second Level domains whose management has been delegated<sup>18</sup>are

- ac.uk - For academic establishments such as universities and is managed by UKERNA(UK)
- gov.uk - For government bodies and is managed by UKENRNA(UK)
- mod.uk - For UK Armed Forces
- nhs.uk - For National Health Services Organisations.

The structure of NOMINET reflects the fact that as a private, public purpose company, it has open membership and not shareholders and it does not pay dividends. Any organization with an interest in the internet can become a member by paying a subscription fee. Members have voting rights and may enjoy access to privileges such as reduced costs in domain name registration and renewal fees.

The members of NOMINET contribute to the running of the company by:

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<sup>15</sup> [Online] Available at <http://www.nominet.org.uk/whoweare/whatwedo/history>

<sup>16</sup> Ibid

<sup>17</sup> ICANN: Internet Governance (2007) [Online] Available at <http://archive.icann.org/en/announcements/post-paper-internet-governance.pdf> [Accessed 4<sup>th</sup> September, 2013]

<sup>18</sup> [Online] Available at <http://www.nominet.org.uk/whoweare/whatwedo/history>

- voting at Annual General Meetings;
- electing non-executive Directors to the Board; and,
- participating in discussion groups and sharing views on how NOMINET should operate.

The Board of NOMINET is comprised of up to three executive directors appointed by the Board, three non-executive directors appointed by the Board and four elected non-executive directors. Of the four elected non-executive directors, two (or one if there are less than three in office) periodically stand down and are subject to re-appointment by election of the Members.

The policy processes of NOMINET allow stakeholders to play a central role and focus on issues that are important to them through specially convened Issue Groups which are well-balanced so that they are able provide a range of views, expertise and recommendations to the NOMINET Board. This model adopted by UK has also been lauded as very successful and best practice for a self regulated public purpose company.

### 3.1.5 .BR OF BRAZIL

.BR is the ccTLD associated with Brazil. The Brazilian Network Information Centre – NIC.br was created to implement the decisions and projects designed by the Brazilian Internet Steering Committee – CGI.br, which is responsible for the coordination and integration of all Internet service initiatives in the country.<sup>19</sup>The Inter-ministerial Ordinance 147 of May 31st, 1995 created the Steering Committee whose members were appointed by Inter-ministerial Ordinance 183 of July 3rd, 1995. The Ordinance was later amended by succeeding Ordinances.<sup>20</sup>

NIC.br is the executive arm of the CGI.br. Its mission involves certain rights and obligations, which include:

- a) registering and maintaining .BR domain names, as well as allocating Autonomous System Numbers (ASN) and IPv4 or IPv6 addresses in the country through REGISTRO.br;
- b) handling and responding to computer security incidents involving networks connected to the Brazilian Internet, which are activities to be carried out by CERT.br;
- c) projects that support and improve the network infrastructure in the country, such as the direct interconnection between networks (PTT.br) and the distribution of the Brazilian Official Time (NTP.br). These projects are the responsibility of CEPTRON.br;
- d) producing and publishing indicators, statistics and strategic information on the development of the Brazilian Internet, under the responsibility of CETIC.br;

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<sup>19</sup> NIC.br -Brazilian Network Information centre [Online] Available at <http://www.nic.br/english/about/nicbr.htm> [Accessed 4<sup>th</sup> September, 2013]

<sup>20</sup> [Online] Available at <http://www.cgi.br/english/about/history.htm>[Accessed 4<sup>th</sup> September, 2013]

- e) promoting studies and recommending procedures, norms and technical and operational standards that will improve network and Internet service security, as well as ensure its increased and adequate use by society, as established by the W3C.br; and,
- f) Providing technical and operational support to LACNIC, the Internet Address Registry for Latin America and the Caribbean.

A local contact is required for any registration. Registrations of domain names with Portuguese characters are also accepted. We note that Brazil has a total number of 66 second level domains based on various categories. However, many users of .BR register in the .com.br second level domain category which has over 90% of all registered domains. The .jus.br for judiciary and .b.br for banks have mandatory DNSSEC.

.BR ccTLD is the most common Portuguese language web site suffix, surpassing all other Portuguese speaking countries.

### **Management and Governance**

The NIC.br is currently composed of four Centers, four councils, and hosts W3C Brazil office.

The bodies responsible for the administration of NIC.br are:

#### *- The General Assembly*

The General Assembly is composed of the founding members, both special and honorary, and is the supreme authority with powers to deliberate, having the final say on any matters concerning NIC.br.

#### *- The Administrative Board*

The Administrative Board is the body which administrates NIC.br and is composed of seven members: three from the government, chosen by the General Assembly among Government members, and their respective substitutes, and four from the private sector, appointed by the CGI.br.

#### *- The Audit Committee*

It is responsible for the fiscal and financial auditing of NIC.br. It is comprised of 3 incumbent members.

#### *- The Executive Board*

The Executive Board is the body responsible for the executive administration of NIC.br, and is responsible for the compliance with the legislation in force, the Charter, the Internal Regulations and the resolutions of the Administrative Board. Periodically, the executive directors join the Administrative Board of NIC.br to report on the status of internal operations.

We note that the registry operator of .BR is a department of NIC.br known as REGISTRO.br. We further note that we were unable to confirm the governance model of REGISTRO.br because all the information we were able to access was in a language we could not comprehend.

### 3.1.6 SOUTH AFRICA

In the year 1991 the administration of .za in South Africa was delegated to Uninet, an academic project which came to an end in the year 2000. Thereafter, the South African chapter of the Internet Society (ISOC-ZA) set out to create a new administrative organisation, which led to the drafting of a set of policies and processes for the management of the domain name. The Electronic Communications and Transactions Act, No. 25 of 2002 (ECT Act) section 50 establishes the .za Domain Name Authority.<sup>21</sup> ICANN approved the re-delegation of the .za ccTLD from Uninet to the .ZA Domain Name Authority in December, 2004. The role of the .za Domain Name Authority is to manage and administer the .za domain system, licence and regulate registries and registrars and develop policy for the South African domain namespace.<sup>22</sup>

#### Management and Governance

The Electronic Communications and Transactions Act section 62(2) of the ECT Act requires the Minister of Communications subsequent to a rigorous selection and nomination process to the Board of Directors of the .za Domain Name Authority.<sup>23</sup>

*“Chapter X of the Electronic Communications and Transactions Act provides for the establishment of .za DNA. Below are the duties.*

*“65.(1) The Authority must*

- (b) administer and manage the .za domain name space;*
- (c) comply with international best practice in the administration of the .za domain name space;*
- (d) license and regulate registries;*
- (e) license and regulate registrars for the respective registries;”<sup>24</sup>*

The governance structure of .za Domain Name Authority is that it is controlled by government. The .za Domain Name Authority is established as a statutory body as per the provisions of the Electronic Communications and Transactions Act. According to the Government Gazette of the Republic of South

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<sup>21</sup> No. 25 of 2002: Electronic Communications and Transactions Act, 2002.

<sup>22</sup> .zadna[Online] Available at <http://www.zadna.org.za/za-domains.html> [Accessed 4<sup>th</sup> September, 2013]

<sup>23</sup> Supra Note 21

<sup>24</sup> No. 25 of 2002: Electronic Communications and Transactions Act, 2002. [Online] Available at <http://www.zadna.org.za/mandate.html>[Accessed 4<sup>th</sup> September, 2013]

Africa, the Minister of Communication issued a notice providing that the .za Domain Name Authority shall assume responsibility of the .za domain space.

Below is a List of the available second Level Domain's according to (South Africa).<sup>25</sup>

SECOND LEVEL DOMAINS	USE	ADMINISTRATOR
.ac.za	Academic and tertiary societies	Duncan Martin, Tertiary Education Network (TENET)
.co.za	Commercial, general use	Leadership
.edu.za	For distance learning institutions	UniForum SA(ZACR)
.gov.za	Government	Theuns Laubscher, ICG
.law.za	Legal firms	Sean White, Sean Greven, Karl Hohls, SITA
.mil.za	Military institutions	Law Society of the Cape of Good Hope
.org.za	Non-commercial	Mike Jensen
.school.za	Schools in South Africa	Internet Solutions SchoolNet SA
.nom.za	Personal names	Department of Defence
.city.za	Official representatives of local government structures, municipalities, local business chambers and local tourism boards	Pieter Geldenhuys, UNISA Graduate School of Business

At present, different .ZA sub-domains are administered by different organisations. The history of this scenario is that by the time the .ZA Domain Name Authority (ZADNA) was formed, the administration of all second level domains except NET.ZA had been delegated to entities separate from the top-level .ZA administrator ZADNA. The delegated entities include organisations, companies and individuals. ZADNA currently administers the za zone file only. Second level domain administrators administer zone files for their specific domains. Each of these administrators operates the database for that SLD and provides the related registry services and to a significant extent also determines policy for these sub-domains<sup>26</sup>.

### **Impact, consequences and implications of sub domains being administered by different licensees**

<sup>25</sup> [Online] Available at <http://internet.org.za/slds.html> [Accessed 4<sup>th</sup> September, 2013]

<sup>26</sup> Public Discussion Document .ZA Domain Name Policy and Administration Published by the .za Domain Name Authority 12th September 2005 (accessed from [www.zadna.org.za/documents/zadna\\_discuss\\_120905.pdf](http://www.zadna.org.za/documents/zadna_discuss_120905.pdf) on 4/9/13)

- One consequence of the many different administrators is that the registration interface and technical requirements differ from sub-domain to sub-domain.
- The time taken to process or update a domain also varies significantly between these SLDs.
- Having multiple registry operators to some extent is viewed as creating a more competitive environment for domain name services. However, since most second-level domains have a specific purpose, or are intended for a specific type of registrant, registry operators administering different sub-domains do not actually compete directly with each other. Evidence of this is the lack of meaningful competition between the current administrators of second-level domains.
- The South African experience shows that the model has been a success so far.<sup>27</sup> One of the considerations for the continued status quo is the large number of domain names. For example Uniform SA (ZACR) the .co.za administrator, boasts of 871,938 registered domains.<sup>28</sup> In comparison, domain uptake in Kenya is still low thus the prevailing state of our market would not favour the fragmentation of the sub-domains as the same would not make commercial sense. Further, the concept of competition between the SLD administrators has been found not to add much value in South Africa. The single centralised registry for the .KE ccTLD and the sub domains would therefore work better for Kenya.

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<sup>27</sup> The Africa Domain Name Industry Award 2013 an Award panel, sponsored by ICANN in partnership with AfTLD and ISOC Africa saw the Best Registry awarded to ZACR and ZADNA for the ccTLD ".ZA"  
<https://registry.net.za/content.php?gen=1&contentid=86&title=The%20Africa%20DNS%20Industry%20Award>(Accessed on 9/9/13)

<sup>28</sup> As at 7th September, 2013 available at <https://registry.net.za/> (Accessed on 7th September, 2013)

COMPARATIVE ANALYSIS SUMMARY

ccTLD	ccTLD REPOSITORY ENTITY STRUCTURE	GOVERNANCE	MANAGEMENT OF THE SECOND LEVEL DOMAIN
<b>.KE</b>	<p>Kenya Network Information Centre (KENIC)</p> <p>A not-for-profit Company limited by guarantee</p> <p><b>Membership</b> is made up of Communication Commission of Kenya and Telecommunication Service Providers Association of Kenya (TESPOK)</p>	<p>KENIC board members are drawn from the Government, the private sector, the academia, and the civil society within the internet community</p>	<p>second level domain under .KE which are all administered by KENIC.</p>
<b>.za</b>	<p>.za Domain Name Authority (.zaDNA)</p> <p>A not-for-profit Public Company</p> <p><b>Membership</b> is open to Citizens and residents of South Africa</p>	<p>.zaDNA Board of Directors is appointed under The Electronic Communications and Transactions Act by the nomination panel which issues a public call for nominations and the successful candidates are appointed by the Minister</p>	<p>.ZA sub-domains are administered by different organisations. The delegated entities include organisations, companies and individuals</p>
<b>.au</b>	<p>.au Domain Administration Limited (auDA)</p> <p>A company limited by guarantee</p> <p><b>Membership</b> is open to all stakeholders of the Australian domain name system.</p>	<p>auDA is governed by a four member Board elected by each of the supply and demand membership classes. The Board in turn appoints three independent directors. The chief executive is also a board member and has no voting rights</p>	<p>auDA policy provides for separate, competing registry operators but a tendering process led to a single registry operator who is licensed. As such, Australia has a centralized registry system</p>



<b>.uk</b>	<p>.uk Nominet</p> <p>A not-for-profit company limited by guarantee</p> <p><b>Membership</b> is open to all stakeholders including Registrars</p>	<p>NOMINET up to Four Board of Directors may be elected by the Members and the Board then appoints up to three Executive Directors</p>	<p>NOMINET manages some of the second level domains and delegates the management of the other organizations e.g UKERNA.</p>
<b>.br</b>	<p>NIC.br</p> <p>A not-for-profit organization</p> <p><b>Membership</b> is comprised of the General Assembly which is composed of founding members and the Administrative Council which is composed of representatives from Government and private sector , the Audit Committee and the Executive Board</p>	<p>NIC.br</p> <p>The General Assembly elects seven members and seven alternatives to be Board of Directors. Of the seven members of the Board three are chosen from among the representatives of the Federal Government CGI.br and their alternatives, and four of the components of civil society and their respective alternates</p>	<p>The Brazilian domain name registry is operated by Registro.br This registry adopts a centralised system as all domain names are registered through Registro.br</p>

## 3.2 FACTORS AFFECTING THE UPTAKE OF THE DOTKE DOMAIN NAME

.KE faces stiff competition from the gTLDs which largely impact the uptake of the .KE domain names. The number of domain name registration for gTLDs in Kenya by July 2009 was estimated to be 17,000 while that of dot ke was estimated at 11,569.<sup>29</sup> Domains registered under .KE by 4th September, 2013 stands at 29,365.<sup>30</sup> It is notable that there is a 35 percent increase in the number of dot ke domain names between 2010 and 2011 however to date a significant number of Kenyans still opt to go for gTLD names over and above the dot KE because of various factors which will be discussed below.<sup>31</sup>

### 3.2.1 Factors contributing to the higher Uptake of the gTLDs as compared dot KE

Despite the management of dot ke ccTLD being carried out by a not-for-profit organization and despite significant decrease in cost of the domain name, a significant number of Kenyans still opt to go for gTLD<sup>32</sup> because of various factors which include:

### 3.2.2 Cost considerations

Though the cost of registering a domain has decreased over the years from 2003, it still remains comparatively high to other (generic top level domains) gTLDs such as .com or .org, therefore, making gTLDs the more economically favourable option for potential domain name registrants. The cost has been cited by a section of the local internet community as the reason behind domain seekers opting for other domain names instead of the dot ke domain.<sup>33</sup> On average annual costs of registering a co.KE, .or.KE, .ne.KE is Kshs 2000 +VAT; .me.KE, .go.KE, .ac.KE, .sc.KE is Ksh. 500 + VAT; .mobi.KE, info.KE at Ksh. 1000 +VAT while for equivalent gTLDs annual costs amounts to an average of, Ksh 1,000. The gTLDs are therefore the more economical option. Furthermore, gTLDs adds more value to registrars because the registrars sell all domains names at the same price in Kenya but are able to make a higher profit margin through the sale of the gTLDs.

### 3.2.3 Perceptions on Global Appeal

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<sup>29</sup> Kennedy Waweru & Dr.Maurice Sakwa, *Kenya's Country Code Top Level Domain; Policy Factors In Domain Structure That Hamper Its Uptake And Use Within The Local Internet Community*, International Journal of Humanities and Social Science Vol. 2 No. 14 [Special Issue - July 2012] [www.ijhssnet.com/journals/Vol\\_2\\_No\\_14\\_Special\\_Issue.../24.pdf](http://www.ijhssnet.com/journals/Vol_2_No_14_Special_Issue.../24.pdf) ( Data obtained from Zooknic, 2009, History of gTLD domain name growth. [Online] Available at: <http://zooknic.com/Domains/counts.html> (accessed on 1/10/2009))

<sup>30</sup> Registered Domains per TLD - Wed Sep 04 16:48:47 EAT 2013

<http://www.kenic.or.ke/index.php/component/jevents/day.listevents/2013/08/21/->

<sup>31</sup> Recent data on estimated domains on g TLD is not available.

<sup>32</sup> Ibid.

<sup>33</sup> Supra 26.

There are perception misgivings that gTLDs are better by being “international” than local domains and also that the local domains are prone to government interference.

### **3.2.4 Difficulty in Registration**

Research shows that .go.KE and .sc.KE second level domain has been noted to be the main domain names in which some difficulty has been encountered in registration.<sup>34</sup> This difficulty in registering under .go.KE has been attributed to the slow processing of necessary documents at Government Information Technology Services (GITS) and bureaucracy in getting necessary documentations from the government.<sup>35</sup> For example a large number of Primary and Secondary schools are registered under .com instead of the .sc.KE since the later entails a long process which may be delayed as the school awaits to receive a Certificate of Registration from the Government which may take up to six months despite the school being in existence for many years. It is however important to note at this juncture that .sc.KE is cheaper than .com nonetheless the tedious process makes the schools prefer .com.<sup>36</sup>

Government related organisations are noted to fail to renew their annual registration thus many registered domains have consequently lapsed. This has been particularly prevalent in municipal and county councils (as they were previously). For example the number of Government domain names (.go.KE) was 344 as at 2010 but this dropped by -10.2% to 309 in 2011. The recommendation to cure this is that this function can be tasked to an internal government department (e.g., eGovernment Directorate) to oversee on behalf of various departments and ministries the renewal of the domain. This role as a services provider would complement the overall government ICT strategy to have shared services and infrastructure.<sup>37</sup>

### **3.2.5 Restriction on local presence**

The dot KE domain name is currently only available to persons or organisations with a physical presence in Kenya. gTLD are “homeless” in nature which makes them attractive for registrants out of the country. There are however proposals to open up dot ke domain for global registration<sup>38</sup>.

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<sup>34</sup> Supra 32.

<sup>35</sup> Supra 32.

<sup>36</sup> Kenya ICT Board: ICT Monitoring and Evaluation Indicators (Phase II, 2012)( Julisha ICT Survey report released by the Kenya ICT Board in Nairobi)

<sup>37</sup> Ibid.

<sup>38</sup> <http://www.dot.co.ke/kefaq.php> (accessed on 4th September 2013)

### 3.2.6 Unavailability of resellers in other jurisdictions

KENIC only accredits local registrars for purposes of selling of domain names within the .KE space. Further, noting that .KE is restricted to local presence, there are no cross border initiatives to advance the course of .KE as compared to the gTLDs.

### 3.2.7 Social, Economic and Political Considerations

Though ICT is growing fast in Kenya, many Kenyans are still unaware as far as the benefits of ICT are concerned. As such, many Kenyans are not aware that the .KE is a national resource which could drive a lot of economic benefits for the country. There is need to create more awareness to enable us tap the revenue lost to gTLDs. Dot KE is a national resource which Brands Kenya in the global internet platform. The content generated by Kenyan residents and organizations under the gTLD lacks the Kenyan footprint which compromises Kenya's visibility on this global platform. Kenya has witnessed an increase in internet users to 17.38 million from less than 10 million in 2011. <sup>39</sup> This means that .KE should reposition itself to leverage this opportunity and ensure that our ccTLD is the preferred choice.

We note that need to create awareness on the importance of ICT and the benefits of embracing it through awareness campaigns and capacity building initiatives aimed at increasing adoption and to underscore the importance of ICT.<sup>40</sup> In countries such as Canada, ICT has provided for a strong internet economy which in 2010 accounted for 3% of the Canadian Gross Domestic Product (GDP) amounting to \$49 Billion. The Canadians are also renowned as digital leaders in terms of usage at an average of 45 hours per week per user. The Canadian government has also invested in ICT and digital innovation which saw it introduce the video enabling broadband technology. It is no wonder that Canada was able to double its domain names past the one million mark in just four years.

Further, the costs of accessing the internet is still high thus the internet is still not affordable to many Kenyans. There is therefore need to Improve ICT Infrastructure and Lower Costs of Connectivity which will increase ICT uptake among businesses and investment in hardware, software, and services and consequently increase domain uptake.<sup>41</sup> A significant Percentage of the population has no Internet Access. As at 2011 it was estimated that internet access stood at 36.3%. <sup>42</sup> There is also a high device costs of computers and mobile phone devices that can access the internet. This largely affects the low income earners. Economic growth will therefore enable more citizens to afford ICT

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<sup>39</sup> Supra 39.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

services. The lower cost of devices (handsets and laptops) either via operator or government subsidies or through natural market competition will bring ICT devices within reach of more consumers and consequently influence a higher uptake of Domains.<sup>43</sup>

We also note that in Kenya we experience unreliable and limited electricity supply thus hampering access to ICT.

Moreover, many Kenyans do not have the sense of pride or patriotism for .KE. A study carried out in South Africa revealed that fifty percent of the interviewees chose .za for their online presence due to their patriotism and loyalty to South Africa. The affordability of .za only came second.<sup>44</sup> This experience shows that there is need to create awareness that underpinning of the dot ke is the need to take pride of the Kenyan identity. The German experience is that there is a majority uptake of the German ccTLD with over 10 million names registered in .de, due to a combination of factors which include, policies by the registry that have been largely unrestricted and a strong level of internet use in Germany with comparatively low prices. The .de adoption and recognition in Germany stands at 90% of the total domain name market in Germany and little registrations from outside Germany.<sup>45</sup> We also note that in Canada, there is a strong perception that Canadians should support fellow Canadians hence most business prefer the .CA as opposed to other domain names. The Canadian .CA is largely viewed by its users as safe, secure and trusted. In Kenya, we are yet to get to this level of patriotism and awareness as far as the uptake of .KE is concerned.

### **3.2.8 Lack of Incentives for Registrars**

We have also found that the uptake of .KE is further hampered by the lack of incentives from the registry to registrars. As such, registrars in Kenya do not have reasons to sell .KE over the other competing gTLDs. We thus recommend the need to develop incentives which will encourage registrars to register .KE over the gTLDs.

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<sup>43</sup> Ibid.

<sup>44</sup> Lists.kictanet.or.KE/pipermail/kictanet/2010-march/008848.htm( accessed on September 3<sup>rd</sup> 2013)

<sup>45</sup> Supra 32 (Directorate for Science, Technology and Industry 2006, Evolution in the management of country code top level domain names)

### 3.3 Legal analysis of the impact, consequences and implications of the proposed governance models to enable the implementation of section 83D of the Information and Communications Act

The current .KE registry was established in 2002 through a consultative multi stakeholder process as already discussed herein above. At the time of its establishment, the Communication and Information Act, originally enacted in 1998 did not have the licensing requirements. In 2009, there was a detailed amendment to the Act which put in place mechanisms for the development and regulation of ICT including e-commerce. The Kenya Information and Communication Act<sup>46</sup> provides under Section 83D no person shall:-

“ (b) update a repository or administer a sub-domain in the Kenya country top level domain (.KE ccTLD); except in accordance with a licence granted under this Act.”

It further provides under Section 83F that:

*“the Commission may, upon application in the prescribed manner and subject to such conditions as it may deem necessary, grant licences under this section authorizing a person to administer a sub-domain in the country code top-level domain”*

Since the enactment of the law as regards licensing of second level domain registries, CCK has not put in place the relevant mechanisms to enable the implementation of the statute. It is therefore important that CCK assumes its responsibility as the regulator to ensure that the .KE registry is operated within the confines of law.

We are aware that CCK is currently in the process of creating a framework for the implementation of the law and we have made reference to the CCK report by the committee developing a licence for the .KE domain name registry services which highlights the on the following scenarios:-

- a) Maintaining the status quo
- b) Licensing of the dot ke sub-domains and creating a .KE registry
- c) Delegated regulation (mobile number portability approach).<sup>47</sup>

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<sup>46</sup> Cap 411A Laws of Kenya

<sup>47</sup> Report of the committee developing a licence for dot ke domain name registry services, 22<sup>nd</sup> to 24<sup>th</sup> May, 2013, Sawela Lodge, Naivasha.

### 3.3.1 Maintaining the status quo

Maintain the status quo means that matters will continue to be handled in the manner that they are currently being handled by KENIC. This scenario mean that CCK will not issue a license as required in law. The status quo can only be maintained legally if the licensing requirements under the Information and Communication Commission are repealed. In the event of repeal in law, Kenya will have lost the opportunity to test the wisdom behind the licensing requirements and CCK will have failed to offer the regulatory oversight in the manner in which the second level ccTLDs are managed and operated in Kenya. CCK will also continue with its membership in KENIC and participate in the Board of KENIC and therefore, CCK will not effectively offer the regulatory oversight required for management and administration of second level domain names as envisaged in the law. It is important that the regulator maintains independence from its licensee in order to enhance and retain ICT stakeholders' confidence and this opportunity will be lost if the status quo remains. For the avoidance of doubt, maintaining the status quo will amount to a continued breach of the law by CCK as the mandated regulator because it allows KENIC to administer second level domain names without a license. The status quo can only be maintained if the National Assembly is petitioned to amend the law.

### 3.3.2 Licensing the dot ke sub domains and agreeing on where the dot ke country code top level domain (dot KE ccTLD) name registry rests.

The Kenya Information and Communication Act<sup>48</sup> provides under Section 83F that:

*“the Commission may, upon application in the prescribed manner and subject to such conditions as it may deem necessary, grant licences under this section authorizing a person to administer a sub-domain in the country code top-level domain”*

This provision requires that administrators of sub domains (Second Level Domains) in Kenya are licensed in accordance with industry requirements as provided by CCK. Further, The Kenya Information and Communications (Electronic Certification and Domain Name Administration) Regulations, 2010 provides the rules to govern the administration of sub-domains in the ccTLD.

The current .KE registry administers nine second level domains in Kenya. This is because the KENIC registry was already administering the second level domains by the time the licensing requirements were put in place. Accordingly, Kenya adopted the single, centralised registry whereby KENIC is mandated by CCK to administer the operation of the .KE ccTLD and its Second Level Domain (SLD) as a trustee for the Government of Kenya akin to .CA registry. KENIC works in conjunction with

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<sup>48</sup> Cap 411A Laws of Kenya

accredited Registrars. Any person interested in registering Domain names in Kenya under any of the SLD approaches the accredited Registrars who may be an individual, company or organization who in turn registers the domain names on behalf of the actual domain name owner.

The law requires CCK to license the administrators of the .KE sub domains. CCK being a registered member of the KENIC registry finds itself unable to license KENIC as the second level domains administrator. We note however that KENIC currently operates second level domain, albeit without a license. This is largely attributed to the fact that CCK cannot issue a license to KENIC being a key member of KENIC as it would be a regulator, regulating itself. This scenario is against the principles set out under the Information and Communications Act which required CCK to give regulatory oversight.

Accordingly, the only options available for the licensing of the SLD operators are for CCK to resign from KENIC (in the manner we shall discuss below) to enable it license KENIC as the second level domains registry or to withdraw from KENIC its functions as regards second level domains and transfer these functions to licensed entities through a tender process as proposed. In the event CCK licenses other entities to operate the second level domains currently under KENIC, it is possible that TESPOK may raise objections, noting that it is a key stakeholder in KENIC which may raise a lot of concerns for the users of .KE and may lead to extensive migrations to the generic domain names. The disruption of the KENIC registry and licensing various entities to manage the second level domain names in a fragmented approach may therefore be counterproductive and against the government efforts to consolidate the ICT related functions. We also opine that fragmentation of second level domain names registry operators is concerned will lead to a disjointed voice as far as second level domain names registry operations are concerned which may limit the trust of .KE users in relation to efficiency, governance and security is concerned

We also agree with the view of CCK that in view of the low uptake of .KE domain names, fragmentation of the administration of the .KE SLD will not make a commercial business sense and may, in fact, stifle the growth of second level domain names. We however note that the fragmented second level domain registries works well for South Africa where .ZA SLDs are managed by different individuals, companies and institutions which are sector specific as previously discussed herein.

This approach would be beneficial if players within certain sectors would take up the administration of their second level domain names and actively participate in the growth of domain names within their sectors. On the flipside, where the licensed entities become unable to penetrate their sectors due to various reasons, the growth of .KE within such sectors would be completely diminished.



**Possible challenges and impacts of fragmented registries for SLD operators**

- One consequence of the many different administrators is that the registration interface and technical requirements differ from sub-domain to sub-domain.
- The time taken to process or update a domain also may vary significantly between these SLDs registries.
- Having multiple registry operators to some extent is viewed as creating a more competitive environment for domain name services. However, since most second-level domains have a specific purpose, or are intended for a specific type of registrant, registry operators administering different sub-domains do not actually compete directly with each other. Evidence of this is the lack of meaningful competition between the current administrators of second-level domains.
- Stakeholder and government participation will also be fragmented with very limited impact especially where the SLDs operators are fully private.

**Legal Implications where CCK resigns or withdraws from KENIC**

Under the Memorandum and Articles of KENIC, CCK and TESPOK are the registered members. Accordingly, in the event CCK resigns as a member of KENIC, KENIC would either be wound up and all assets of the company would revert to CCK as a trustee on behalf of the Government of Kenya as provided in the Memorandum and Articles of KENIC or TESPOK would seize the opportunity to co-opt an additional member to KENIC and continue with KENIC as a going concern, with the necessary amendments of the memorandum and articles of the Company. A scenario where CCK is rooting for winding up of KENIC and TESPOK is rooting for the survival of KENIC may lead to disruption of KENIC activities and may not offer a smooth transition into the licensing framework. TESPOK and other stakeholders may also sue CCK if they are of the opinion that the winding up of KENIC has been conducted in an unfair manner.

We note that under the Sponsorship Agreement<sup>49</sup> KENIC is officially recognised by ICANN and Internet Assigned Numbers Authority (IANA) as the Sponsoring Organization and manager of the delegated .KE ccTLD during the term of the Agreement. CCK is also recognised as the Governmental Authority<sup>50</sup>. Accordingly, in the event KENIC is wound up due to the exit of CCK, the Sponsorship Agreement would also be invalid in law and would stand terminated because KENIC would fail to exist as per the requirements of the law. It is important to note that KENIC is required to give a six months termination notice to ICANN. Accordingly, if the Board considers winding up of KENIC as the way forward, the six months notice should issue to ICANN. We also note that where KENIC

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<sup>49</sup> Clause 2.9 of the Sponsorship Agreement read together with Clause 3.1.

<sup>50</sup> Governmental Authority is defined in the Agreement as the Government of Kenya, as represented by the Communication Commission of Kenya.

remains valid as a company upon the resignation of CCK, the Agreement with ICANN will remain valid and KENIC may then object to a re-delegation process at ICANN.

The effects of termination under the Sponsorship Agreement is that CCK would then have to commence the process of re-delegation of the .KE ccTLD at ICANN to enable the recognition of another entity as the administrator and manager of the .KE ccTLD. KENIC is not allowed under the Agreement to challenge the manner or result of selection of its successor. KENIC is also required to ensure the transfer of all relevant DNS and registry data to the successor.

Noting that CCK and TESPOK are trustees for this national resource, it would be careless/reckless to wind up KENIC and hand over the management of the ccTLD and the SLDs currently under KENIC to a different entity in a bid process. The process of transition would have to conform to the principles set out in the Constitution as regards good governance, integrity, transparency and accountability. CCK is a trustee for the national resource known as .KE and as such, it must also comply to the provisions of Public Officers Ethics Act of 2003<sup>51</sup>, which requires that public officers carry out their duties in accordance with the law and further, requires public officers to take all reasonable steps to ensure that property that is entrusted to their care is adequately protected and not misused or misappropriated.

The transfer of the assets currently held by KENIC including the SLDs and the .KE ccTLD which is a national resource to licensed entity should conform to all relevant laws.

We advice that for CCK to exit KENIC without the collapse of KENIC, at least one other entity would have to be incorporated as a member of KENIC to enable it operate in the absence of CCK. Accordingly, it would require that the memorandum and articles of KENIC be amended to restructure KENIC through the following options:-

- a) Convert KENIC into a private company limited by shares with the shareholders being CCK and TESPOK, the shareholding to be arrived upon based on contribution to KENIC. Thereafter, CCK would then transfer its shares to such entities as CCK shall appoint through a consultative process with the stakeholders. This process should conform to stakeholder participation requirements. Accordingly, there needs to be consultation forums held before a new entity is licensed to operate .KE CCTLD and the related second level domain names. This will in turn convert KENIC to a company limited by shares and we hereby caution that this is not the most preferred governance approach as far as the management of ccTLDs and related second level domains is concerned.

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<sup>51</sup> Section 10 and 15.

- b) Introduce the Cabinet Secretary to the Treasury which is a body Corporate under the Cabinet Secretary to the Treasury (Incorporation) Act, Cap 101 of the Laws of Kenya or any other authorized government institution to be a member of KENIC ( in replacement of CCK) jointly with TESPOK, and or any other organization, through an open membership approach discussed below. CCK would thereafter offer the regulatory oversight from outside KENIC. In this regard, the memorandum and articles of KENIC would still require amendment to enable the restructuring of KENIC as well as make provision for such governance principles as may be relevant. This is our opinion is the best approach under the circumstances as it is more inclusive and devoid of controversy.
- c) Establish a new entity in the form of a statutory corporation and license it as SLD operator. However, we note that the current goodwill and gains made under KENIC will be lost if a new entity is established and licensed to manage second level domains. We also note that TESPOK, being a key stakeholder in KENIC that is currently mandated to manage second level domains is likely to object to a transfer of the existing second level domains to a third party, a tussle which may result in legal suits and may end up giving .KE a negative publicity and limit its growth.

### **3.3.3 Delegated Regulation (Mobile Number Portability approach)**

This involves either:-

1. A tender for delegated responsibility and bid for the licence of the dot ke domain and thereafter the prospective licensees bid for KENIC as a going concern; or
2. A tender for the administration and operation of the dot ke domain. CCK to delegate the .KE ccTLD and KENIC to the winning bidder.

In the second alternative, the winner of the bid for the licence to administrate and operate the dot ke will be handed over the .KE ccTLD and the related SLDs.

We note that in Australia, a tendering process was attempted three times which eventually led to a central registry for operating the .AU ccTLD together with its second level domains. From our review of management of ccTLDs in other jurisdictions, we note that the most preferred approach as far as the corporate structure of the ccTLD registries are concerned is not for profit entity, mostly registered as companies limited by guarantee or trusts. The only point of departure in the various countries is the governance models as far as the appointment of the Board of Directors is concerned. Certain jurisdictions elect board members from the industry stakeholders, while other jurisdictions prefer to have the board members appointed by government authorities. As such, the organizations which are invited in the tender process should meet certain governance requirements and the tender process should ensure that the objectives of the licensing framework are achieved. Below are our recommendations on the factors which the regulator should consider in the tender process.

## 4. RECOMMENDATIONS ON LICENSING

### 4.1 Meaning and Justification for Licensing

The verb license or grant license means to give permission. The noun license, refers to that permission as well as to the document recording that permission. A license may be granted by a party ("licensor") to another party ("licensee") as an element of an agreement between those parties. In particular, a license may be issued by authorities, to allow an activity that would otherwise be forbidden or regulate the performance of an activity. It may require paying a fee and/or proving a capability. The requirement may also serve to keep the authorities informed on a type of activity, and to give them the opportunity to set conditions and limitations. A licensor may grant a license under laws to authorize a use for a particular time frame, within a particular territory and with set conditions.

### 4.2 Licensing of .KE second level domains registry operator(s)

.KE is a national resource that should be operated in a manner that promotes its penetration in the domain names space and the interest of the stakeholders in Kenya. The law is clear that the operation of second level domain names registry under the .KE ccTLD, should only be done in accordance with a license. We recommend that CCK should not fragment the operation of second level domain names registry, but retain it under one basket for the reasons we have outlined above.

Whereas the registry that will be licensed to manage and administer .KE second level domains may operate as monopoly in Kenya, it will be in competition with other registries managing other gTLDs and ccTLDs all over the world. Among the gTLDs .COM is the market share leader, accounting for roughly 43% of all online addresses. Among the ccTLDs, .UK, .FR, .CA and .DE are experiencing the fastest growth as they have increased in popularity and are trusted as far as efficiency is concerned. We have also found that .DE ccTLD domain associated with Germany has the most addresses and is second only to .COM worldwide in total registrations. We also note that there .TK domain associated with a tiny territory called Tokelau in the South Pacific which has become a major player with over 10 million registered domains because the .TK registry provides domain names free to anyone, regardless of place of residence. Other ccTLDs also act like gTLD. The .CO for example is open for registration by anyone. While this practice opens the world market to ccTLDs, their distribution goes beyond the national borders for where it was delegated. We note, therefore, that whereas technically, only the .KE registry and its second level domains are operated in Kenya, the .KE registry is not necessarily a domain name monopoly in Kenya as far as the business of domain names is concerned because there is plenty of choice for the users.

It is the choice provided by other ccTLDs and gTLDs in Kenya, which, to an extent, limits the uptake of the .KE domain names in Kenya. As such, even where regulatory oversight is necessary through the process of licensing, we advise that this should be done in a manner that does not stifle the penetration of .KE, especially because the regulator is not mandated to regulate the competition that .KE faces. With the growth and introduction of new TLDs and ccTLDs, the internet market in essence provides consumers, including Kenyans with more choice and, therefore, more competition for .KE. The regulation should not give undue advantage to the competition that .KE faces, and needs to create more room for .KE to leverage against its competition. We thus recommend that the licensing framework should also leave room for self regulation as is expedient.

From our research we note that CIRA, which manages .CA and its related second level domains is not heavily regulated by government. It is a member driven organization registered as a charitable foundation i.e. not for profit organization. The Board of directors of CIRA are elected from among the members. The Board also has advisors who have no voting rights. Accordingly, CIRA has adopted an independent and self regulating governance model. We also note that Australia adopted an open membership where membership of auDA, registered as a company limited by guarantee is open in two categories, supply class (registry operators, registrars and resellers) and demand class (registrants; internet users and the general public). auDA is a policy authority and industry self regulated body for the .au domain space. Other jurisdictions such as United Kingdom also have similar models. Based on the foregoing, we advise that as far as the licensing requirements are concerned, the best practices in the world, is that ccTLDs and their second level domains are managed through a central registry, by institutions recognized by government and registered as private public and not for profit organizations. This is particularly certain for registries that manage .UK, .CA, .AU .DE inter alia, which are some of the most successful ccTLDs. We recommend that in implementing the licensing framework, the same approach should be maintained. We also note that some of the very successful registries are not heavily regulated by government but are self regulating policy institutions recognised by their governments.

ccTLDs serve as a national identifier which is certainly the case for .CA, which has seen a steady growth among the Canadian organizations. Unlike .TK or .CO ccTLDs, there is Canadian presence required to register. As such, Canadians believe that working with a .CA registrant is supporting a Canadian and gives assurance that a person is doing business in a safe, secure and trusted environment. This support for fellow Canadians has led to massive registrations of .CA in the last few years. We believe that the same Kenyan presence obtains for registration under .KE.

We advise that the regulation of .KE, being a national identifier, by way of licensing should be done to achieve the following:-

**a) Registry Efficiency**

Noting that the .KE registry faces competition, which may stifle its growth if certain measures are not taken, the licensing should achieve efficiency. The licensing framework should ensure that the licensed organizations mandated to register and administer second level ccTLDs meet certain technical requirements e.g. servers with particular specifications, registrar automation technology, robust business continuity and disaster recovery plans and technologies, particularly to ensure that there is zero downtime, sound dispute resolution policies *inter alia*. In the domain names industry, we have noted that the key factor of success is reliability and efficiency. The licensed institution should also have such staff with technical competence to ensure the performance and quality service to the .KE users. As such, the licensing requirement should provide for the minimum standards which will promote efficiency. The upshot is that the .KE will quickly gain popularity as a reliable domain and Kenyans will be proud to do business with the .KE brand.

**b) Enhance corporate governance principles within the registry**

**Central Registry or Fragmented Registry**

As we have noted, the most preferred governance model for the management of ccTLDs and second level domains from our research is that most jurisdictions which are very successful have a centralized registry for the management of the ccTLDs and second level domains. Accordingly, we recommend the centralized approach. Fragmentation of the management and administration of second level domains in Kenya may not make business sense for investors and may not necessarily lead to the growth of domain names in Kenya. We have found that South Africa is not necessarily as successful as the other registries which have a centralized system, despite its early advancement in ICT. The .ZA Domain Name Authority (.zaDNA) only administers and manages the .ZA namespace. This includes developing policy and procedures for .ZA and the licensing of .ZA registries and registrars. We note however, that whereas South Africa has different registries for the second level domains, there are stakeholders in South Africa who feel that they should operate under a centralized system. Accordingly, there is currently a moratorium on new domains until .zaDNA finalizes the .ZA policies and regulations. We thus, opine that there may be challenges with the fragmented approach on second level domain registries.

**Structure of Organization**

From our research, we have found that domain names registries in some of the successful jurisdictions are instructions private public purpose organizations registered as companies limited by guarantee without a share capital or trusts which are operated on a not for profit basis. Noting the

key factor that .KE gives a Kenyan identity, it is our opinion that the administration and management of .KE second level domains should vest in organization which is operated on a not for profit basis and is private public purpose in nature.

The drive for profits in organizations with share capital may not be a factor that will enhance the growth of domain names in Kenya. From our study, we note that there are myriad other factors which need addressed to enhance the uptake of domain names. As such, it is our opinion that private companies with share capital, if licensed to manage the second level domains may not necessarily grow domain names.

### **Membership of Organization**

From our research, we note that most institutions which act as registries for ccTLDs and their related second level domains operate on an open membership approach. The members are not entitled to dividends as they are not shareholders. In Australia, we see there are two categories of members representing the supply class and demand class. In Canada, CIRA is open to various members from the internet community. The same is obtaining in the United Kingdom where there are over 3000 registered members including registrars. The key principle that should be achieved under the licensing framework is that the members are not entitled to profits and the licensed organization should be open to relevant organizations who will add value in the growth of .KE. These members should be equal members with voting rights.

### **Appointment of the Boards**

We note that the appointment of board members among the registry operators of most ccTLDs who also manage second level domains have different approaches.

In the Australia, auDA is governed by four member board, elected by each of the supply class members and demand class members. The Board in-turn appoints three independent directors who are board members. The CEO is also a board member but without voting rights. This Australian model has been described as the best practice for a self regulated industry monopoly.

In Canada, the Board of CIRA consists of 12 Board members appointed from the members and 3 Board of Advisors. The Board Advisors include CIRA's President and CEO, a representative of the Government of Canada, and John Demco, who helped establish the .CA domain and CIRA.

The Board of NOMINET is comprised of up to three executive directors appointed by the Board, three non-executive directors appointed by the Board and four elected non-executive directors. Of the

four elected non-executive directors, two (or one if there are less than three in office) periodically stand down and are subject to re-appointment by election of the Members.

Taking the above into consideration, we propose that for sound governance, the board of the organization licensed to manage and administer the .KE and its related sub domains should:-

- Have a maximum of 4 non executive members being representatives of registered members of the organization;
- Have a minimum of 1 non executive members appointed on an annual basis during the AGM (with voting rights);
- Have at least 1 Advisory member who have no voting rights – such a member may be a person who has played a critical role in the development of the domain name space in Kenya or penetration of ICT in Kenya.
- The CEO of the Organization, with no voting rights.

**c) Enhance the growth and uptake of .KE domain names**

The licensed institution vested with the administration and management of .KE and its second level domains should primarily account for the growth of .KE It is our view that such an institution should, not only be efficient, but also be able to differentiate its product offering through enhanced marketing activities that stand out in the market place. Accordingly, the licensing framework may put in place requirements which ensure that there is proof of a robust marketing fund and programmes which will ensure that .KE is aggressively marketed.

We also note that in view of the competition from other ccTLDs and gTLDs, registries will have to compete for shelf space with registrars, as registrars will definitely expand their product line. This will result in a fundamental upheaval in the relationships between registrars and registries which may also result in greater innovation for the consumers benefit. As such, the licensing framework may also ensure that the .KE registry creates incentives for registrars to give .KE products prominence and leverage in Kenya. Such incentives may include financial incentives like increased support to enhance registrar efficiency, price reductions depending on the registrars out puts.

**5. RECOMMENDED WAY FORWARD FOR KENIC**

We note that CCK has proposed to wind up KENIC, assume the assets of KENIC and license the operations of the .KE ccTLD and its related second level domains. It is our opinion that the decision to wind up KENIC should be interrogated against the possibility of success of the fragmented second level domain registries in the long run. As we have indicated, the factors that limit the uptake of .KE domain in Kenya may not necessarily be resolved by several private entities or a single private entity licensed to



operate second level domains, but rather, through a broad multi stakeholder consultation and cooperation.

Currently, KENIC is the only organization in Kenya that is best placed in promoting .KE advertising programmes and enhancing proactive public relations and social media activities. KENIC is rich in history and should be given the opportunity to take .KE to greater heights. Whereas the growth of domains has been upward, in the past one year, we note that KENIC has been able to double the registered domains. We believe that we will continue to witness similar trends as the online citizens of Kenya continue to grow, and with as government continues to invest more in ICT. A similar phenomena was witnessed in Canada where it took 21 years for .CA to hit the one million mark in registered domain names, and it only took 4 years to hit the 2 million mark (in Nov 2012). We, therefore, advice that the KENIC goodwill should not be lost when CCK implements the licensing requirement.

We believe that KENIC fits this bill in as far as it is a private public company registered by guarantee and a not for profit entity. As far as governance is concerned, we recommend an amendment to the memorandum and articles to include the recommendations we have made as far as the membership and governance structures are concerned in the licensing requirements.

We believe that in the event KENIC improves on its governance structures as recommended above, it may best be suited for the license envisaged through a tender process. We urge the board members to engage with stakeholders with a view to upgrading KENIC as a licensed registry for .KE and its related ccTLDs.

For an increased uptake in .KE, there needs to be consultation with the other government institutions responsible for the registration of organizations to create a framework whereby the requirement to have a .KE domain name for certain types of organizations is embedded in law. This, in our view, may not necessarily be achieved by a private entity undertaking the .KE business for profit, and it would be almost impossible for Parliament to create laws that mostly benefit private entities.

We thus advice the board of KENIC to:-

- a) Hold discussions with the current registered members with a view to upgrading KENIC as the licensed registry in Kenya for the .KE ccTLD (as it is recognized by ICANN) and the related second level domains;
- b) Commence negotiations with CCK on modalities through which CCK can resign from KENIC without the winding up processes as recommended herein;

- c) Following a) above, put in place the necessary governance structures by amending the Memorandum and Articles to ensure that there is open stakeholder participation through an open membership framework at a fee, and enhance governance principles on appointment of board members as proposed above.
- d) Put in place structures that will ensure KENIC is efficient as far as technology and human capital is concerned;
- e) Ensure that the .KE downtime is reduced to zero percent in the next few months;
- f) Put in place incentives for registrars;
- g) Put in place a robust marketing plan;
- h) Commence negotiations with CCK for purposes of enabling KENIC obtain the licence.
- i) Following agreement on b) and h) above, CCK should resign from KENIC and issue KENIC with a licence.

We also note that the other option is to maintain the status quo and petition parliament to amend the licensing requirement under the Information and Communications Act. The greatest limitation to this option is that CCK will not have taken the opportunity to test the wisdom of the licensing requirement in law. In the event that the same is adopted, we still advice that the Board of KENIC should consider restructuring KENIC to enable it operate more efficiently and with enhanced corporate governance structures to enable the penetration of .KE in the internet space.

## 6. BENEFIT

This opinion is limited to the matters stated herein and does not extend to and is not deemed to be extended by implication to any other matter.

This opinion speaks only as of its date and is given solely for the benefit of **THE BOARD OF DIRECTORS OF KENYA NETWORK INFORMATION CENTRE** in connection with the matters herein.

7. CONCLUSION

We trust that we have understood your instructions correctly as set out above and if not, please clarify and we shall revise our opinion accordingly. Assuming, however, that we understood your instructions properly, we trust that this advice covers the issues raised but if you require any clarification or further assistance, please do not hesitate to contact us.

DATED THIS 4<sup>TH</sup> DAY OF OCTOBER, 2013

Yours faithfully

For: Sichangi Partners Advocates

Josephine KOGWENO-MBORI  
City Centre Branch- Branch Managing Partner  
[jkogweno@sichangi.com](mailto:jkogweno@sichangi.com)