

香港特別行政區政府
政府資訊科技總監
辦公室



OFFICE OF THE
GOVERNMENT CHIEF INFORMATION OFFICER
THE GOVERNMENT OF THE HONG KONG
SPECIAL ADMINISTRATIVE REGION

本函檔號 Our Ref.: GCIO 61/61/4/17

來函檔號 Your Ref.:

26 January 2010

Clerk to Panel on Information Technology and Broadcasting
Legislative Council Building
8 Jackson Road, Central
Hong Kong
(Attn: Ms YUE Tin-po)

Dear Ms YUE,

**Information Requested by the Panel on Information Technology and
Broadcasting (ITB Panel) at the Meeting on 14 December 2009**

At the ITB Panel meeting on 14 December 2009, Members commented on the draft Memorandum of Understanding (MOU) documentation comprising a Designation Agreement and an MOU. The Administration was requested to provide supplementary information about the Administration of Internet domain names in Hong Kong.

2. Taking into account the comments of the ITB Panel Members and the Legislative Council Secretariat's legal adviser, the Government and the Hong Kong Internet Registration Corporation Limited (HKIRC) have revised the draft Designation Agreement and the draft MOU as attached at **Annexes A and B**. To facilitate Members' understanding of the revisions, we provide at **Annex C** an explanatory note, which includes our responses to the comments made by Members and the Legislative Council Secretariat's legal adviser in its letter of 10 December 2009 to the Administration. With the input of the HKIRC, the supplementary information requested at the Panel meeting is at **Annex D**.

3. Members may wish to note that the draft MOU documentation was endorsed by the Board of Directors of HKIRC at its meeting on 21 January. Subject to further comments that Members may have on the MOU documentation, HKIRC and the Government will sign it in the first quarter of 2010.

4. I should be grateful if you would kindly convey our response to the Members.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Jeremy Godfrey'.

(Jeremy Godfrey)
Government Chief Information Officer

Encl.

c.c. Mr John Estmond STRICKLAND, GBS, JP,
Chairman, Hong Kong Internet Registration Corporation Limited

Miss Kathleen AU, CEO (Admin)
Communications and Technology Branch
Commence and Economic Development Bureau

Mr Bonny LOO
Assistant Legal Adviser
Legal Service Division, Legislative Council Secretariat

(Draft)
**Designation Agreement
for the Management and Administration of Internet Domain Names
in Hong Kong**

THIS **DESIGNATION AGREEMENT** (this “**Agreement**”) is made in the Hong Kong Special Administrative Region on [*insert date*] by and between:

- (1) **THE GOVERNMENT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION (“HK Government”)**; and
- (2) **HONG KONG INTERNET REGISTRATION CORPORATION LIMITED**, a company incorporated and existing under the laws of Hong Kong with its registered office at Unit 2002-2005, 20/F ING Tower, 308 Des Voeux Road Central, Sheung Wan, the Hong Kong Special Administrative Region (“**HKIRC**”).

(HK Government and HKIRC, each a “**Party**” and collectively, the “**Parties**”).

Recitals

- (i) HKIRC is a not-for-profit company limited by guarantee and not having a share capital incorporated on December 14, 2001.
- (ii) Prior to March 25, 2002, all Internet domain names under .hk country code top-level domain were managed and administered by Joint Universities Computer Centre Limited (“**JUCC**”) through its wholly-owned subsidiary, Hong Kong Domain Name Registration Company Limited (“**HKDNR**”).
- (iii) Pursuant to the Sale and Purchase Agreement dated March 15, 2002 between JUCC and HKIRC, on March 25, 2002, JUCC transferred all the issued shares in HKDNR to HKIRC and relinquished any interest arising from its management and administration of Internet domain names under .hk country code top-level domain (the “**Operational Transfer Date**”).
- (iv) Under an earlier Memorandum of Understanding signed on April 22, 2002 (the “**First Memorandum**”), HK Government designated HKIRC to manage and administer all Internet domain names under .hk country code top-level domain in English or its

equivalents as from the Operational Transfer Date upon the terms and conditions therein.

- (v) Following a review of international good practices on domain name administration and public consultation, HK Government and HKIRC were desirous to restructure the Board of Directors of HKIRC (the “**Board**”), establish a consultative and advisory panel and revise the First Memorandum.
- (vi) Pursuant to the special resolutions of HKIRC passed on August 23, 2008, HKIRC restructured the Board on December 15, 2008.
- (vii) Pursuant to the special resolutions of HKIRC that were passed on August 23, 2008 and took effect on December 15, 2008, a consultative and advisory panel was established on June 17, 2009 in relation to the management and affairs of HKIRC.
- (viii) The Parties have reached an understanding on the arrangements for the management and administration of .hk domain names, as documented in a second Memorandum of Understanding to be signed by the Parties.

NOW THEREFORE, in consideration of the premises and the mutual covenants herein contained, the Parties agree as follows:

1. Definitions

In this Agreement, except where the context otherwise requires:

“domain name registration” means the process through which an individual or organisation obtains a domain name, and which enables the individual or organisation to use that particular domain name for a specified period of time, provided certain conditions are met and payment for services is made;

“domain name system” means a system which helps users to find their way around the Internet and makes using the Internet easier by allowing a familiar string of letters (the "domain name") to be used instead of IP address;

“.hk country code”	means the Hong Kong country code in English, i.e. .hk, or its equivalents in other languages (including, without limitation, .香港), in the country code top-level domain of the Internet domain name system, in connection with the delegation by ICANN of the right to operate the registration of the Hong Kong country code top-level domain;
“.hk domain names”	means all Internet domain names under .hk country code top-level domain of the Internet domain name system;
“HKIRC member”	means a person admitted to membership of HKIRC by the Board and whose name appears on the Register of Members for the time being;
“Hong Kong”	means the Hong Kong Special Administrative Region;
“ICANN”	means the Internet Corporation for Assigned Names and Numbers;
“intellectual property rights”	means patents, trade marks, service marks, trade names, design rights, copyright, domain names, database rights, rights in know-how, new inventions, designs or processes and other intellectual property rights of whatever nature and wheresoever arising, whether now known or hereafter created, and in each case whether registered or unregistered and including applications for the grant of any such rights;
“person”	means such person as defined in the Interpretation and General Clauses Ordinance (Cap 1), association, organisation, body, or HK Government;
“registrant”	means a person that has entered into registration agreement with HKIRC for .hk domain names;
“registrar”	means a person which has entered into an agreement with a registry concerning the right to submit applications and notifications of amendments to the registry on behalf of applicants for and holders of domain names under country code top-level domains;
“registry”	means a person which, as designated by the relevant government or public authority and by agreement with the international administrator of top-level domains, is entitled to assign domain names under country code

“subsidiary” top-level domains;
has the meaning ascribed to it in Section 2 of the Companies Ordinance (Cap 32) and any modifications thereto.

2. Designation

- 2.1 HK Government reconfirms the exclusive designation of HKIRC, and HKIRC reconfirms its acceptance of HK Government’s designation, to manage and administer .hk domain names, subject to the terms herein.
- 2.2 HK Government and HKIRC agree that upon the execution of this Agreement, the First Memorandum shall expire and become void.

3. Management and Administration of Domain Names

- 3.1 The duties of HKIRC in managing and administering .hk domain names shall be as follows:
- (a) Providing services of domain name registration and conversion of domain names into IP addresses, and services incidental or related to services in respect of .hk domain names;
 - (b) Operating and maintaining a stable, secure and interoperable domain name system which abides by the policies and technical requirements laid down by ICANN;
 - (c) Establishing and maintaining an alert mechanism which will inform HK Government promptly of the following:
 - (i) serious or prolonged disruption of domain name system operation for .hk domain names and of domain name registration services, and
 - (ii) incident leading to a failure on the part of HKIRC to perform duties in accordance with the terms set out in this Agreement;
 - (d) Establishing and maintaining complaint handling process to provide for conciliation or redress of grievances arising from domain name registration service and other services provided by HKIRC;
 - (e) Establishing and maintaining domain name dispute resolution process, with

reference to industry practice such as ICANN's Uniform Domain Name Dispute Resolution Policy; and

(f) Liaising with national and international bodies on issues relating to the development and administration of domain name system.

3.2 In discharging its duties in managing and administering .hk domain names, HKIRC shall not restrict the rights of any persons under the laws of Hong Kong of freedom of speech, of publication, of communication and of religious belief, and shall comply with the laws of Hong Kong related to privacy including without limitation the Personal Data (Privacy) Ordinance (Cap 486).

4. Intellectual Property Rights

4.1 Any claim by HKIRC of intellectual property rights in or to the .hk country code and .hk domain names and in all expressions of information and data relating to, in connection with, or arising from the management and administration of .hk domain names shall not impede any possible future change of registry of .hk domain names or termination of the designation under this Agreement.

5. Contracting with Third Parties

5.1 HKIRC may enter into a written agreement with third party(ies) (the “**third party contractor(s)**”) to perform the duties in managing and administering .hk domain names, as long as HKIRC remains responsible for all duties under this Agreement to the same extent as if those duties were performed by HKIRC.

5.2 HKIRC shall ensure that the third party contractor meets the technical qualifications and requirements set forth by ICANN from time to time if the duties performed by the third party contractor are related to the registry operation of Internet domain names. HKIRC shall also meet requirements set forth by ICANN for the arrangement of such third party contractor.

5.3 In the written agreement between HKIRC and the third party contractor, HKIRC shall ensure that the terms of the written agreement are consistent with, and include duties at least as onerous on the third party contractor as, those imposed on HKIRC in this Agreement.

6. No Assignment of this Agreement

6.1 HKIRC shall not assign this Agreement and any rights and obligations under this Agreement to any person unless HKIRC obtains prior written consent of HK Government.

7. Termination

7.1 Upon occurrence of any of the following events, HK Government may at its sole discretion terminate this Agreement by giving ninety (90) days prior written notice to HKIRC:

- (a) Failure by HKIRC to remedy a breach of the Agreement (if capable of remedy) within 90 days of the Government giving notice to HKIRC requiring them to remedy such a breach.
- (b) Failure by HKIRC to make reasonable arrangements to prevent recurrence of a breach of the Agreement within 90 days of the Government giving notice to HKIRC requiring them to make such arrangements.
- (c) The levying of any distress or execution against HKIRC or the making by it of any composition or arrangement with its creditors or if HKIRC shall pass a resolution, or the court shall make an order that HKIRC be wound up otherwise than for the purposes of reconstruction or amalgamation, or if a receiver or manager on behalf of a creditor shall be appointed, or if circumstances shall arise which entitle a court or a creditor to appoint a receiver or manager or which entitle the court otherwise than for the purposes of amalgamation or reconstruction to make a winding up order;
- (d) Finding by a court of law of offering or giving any advantage, gratuity, commission, bonus, discount, bribe or loan of any sort or in any form whether directly or indirectly by HKIRC or its agents (including third party contractors), directors or employees to any agent or employee of HK Government; and
- (e) Conviction by a court of law of a director or officer of HKIRC of any serious dishonesty or other serious offences which, in HK Government's reasonable opinion, could adversely affect HKIRC's capacity to manage and administer .hk domain names.

- 7.2 Notwithstanding anything provided under this Agreement, HK Government may at any time terminate this Agreement without giving any cause by giving HKIRC twelve (12) months prior written notice of such termination.
- 7.3 HKIRC may at any time terminate this Agreement by giving HK Government twenty-four (24) months prior written notice of such termination to allow HK Government to make the necessary arrangements to designate another person to manage and administer .hk domain names and for that other person to take over from HKIRC the management and administration of .hk domain names.
- 7.4 Upon termination of this Agreement all rights and duties of the Parties shall automatically terminate except for such rights of actions as shall have accrued prior thereto and any duties which expressly or by implication are intended to come into or continue in force on or after such termination.
- 7.5 The provisions of Clauses 4 and 8 shall survive the termination of this Agreement (howsoever occasioned) and shall continue in full force and effect notwithstanding such termination.
- 7.6 Notwithstanding anything provided under this Agreement, upon termination of this Agreement the exclusive designation of HKIRC to manage and administer the .hk domain names shall be forthwith terminated. If HK Government or HKIRC gives notice to terminate this Agreement pursuant to this Clause, HK Government may designate any other person to manage and administer the .hk domain names (“the new designated person”) without making any compensation to HKIRC.

8. HKIRC’s Duties after Termination Notice

- 8.1 If HK Government or HKIRC gives notice to terminate this Agreement pursuant to Clause 7, HKIRC shall transfer and assign to the new designated person within the time specified by HK Government at HKIRC’s own costs and expenses and without seeking compensation from HK Government and the new designated person:
- (a) all assets and properties of HKIRC which are necessary for provision of part of or all services of domain name registration and conversion of domain names into IP addresses, and services incidental or related to services in respect of .hk domain names (including without limitation its ownership of property of hardware and

software and its ownership of all its subsidiaries which provide part of or all services of domain name registration and conversion of domain names into IP addresses, and services incidental or related to services in respect of .hk domain names),

- (b) all licences of software, documentation, data and information, present and future intellectual property rights in or to the .hk country code and .hk domain names and in all expressions of information and data relating to, in connection with, or arising from the management and administration of .hk domain names which are necessary for provision of part of or all services of domain name registration and conversion of domain names into IP addresses, and services incidental or related to services in respect of .hk domain names; and
- (c) all intellectual property rights and any rights under agreements with third party contractors which are necessary for provision of part of or all services of domain name registration and conversion of domain names into IP addresses, and services incidental or related to services in respect of .hk domain names.

8.2 If HK Government or HKIRC gives notice to terminate this Agreement pursuant to Clause 7, HKIRC shall, within the time specified by HK Government, consult HK Government and the new designated person, develop and deliver to HK Government and the new designated person a transition plan which ensures that the new designated person could take over the management and administration of .hk domain names from HKIRC and that there will not be any failure or disruption in provision of services of domain name registration and conversion of domain names into IP addresses and services incidental or related to services in respect of .hk domain names to registrants and users of .hk domain names. The transition plan shall include without limitation an arrangement, which preserves the rights of registrants under their registration agreements and complies with the privacy laws including without limitation the Personal Data (Privacy) Ordinance (Cap 486) and with other applicable laws in force in Hong Kong, for the transfer of registrants and their identities and other information to the new designated person. The transition plan shall also include arrangements for refunding registrants who elect not to be transferred to the new designated person any amount of money which they have pre-paid for services which have not been provided to them. HKIRC shall execute the transition plan to ensure that there is no failure or disruption in provision of services of domain name registration and conversion of domain names into IP addresses and services incidental or related to services in respect of .hk domain names to the registrants and users of .hk domain names.

- 8.3 HKIRC shall, within the time specified by HK Government, assign without consideration all rights, titles and interests in and to the mark .hk or its equivalents in other languages (including, without limitation, 香港) (the “.hk mark”) to the new designated person and cease to use or have any right in or to the .hk mark, including, if HKIRC has registered or applied to register in its name the .hk mark with the Hong Kong Trade Marks Registry or other trade marks registries, the relevant rights in or to the .hk mark.
- 8.4 If HKIRC does not have the right to assign or novate any licences or contracts with third party contractors, HKIRC shall, at its own costs and expenses, use its best endeavours to procure the assignment or novation of such licences and contracts for the benefits of the new designated person.
- 8.5 Following the termination of this Agreement pursuant to Clause 7, if there remains, after the satisfaction of all HKIRC’s debts and liabilities, any property whatsoever, the same shall not be paid to or distributed among the HKIRC members but shall be given or transferred to the new designated person.

9. **Notices**

- 9.1 All notices to or by the respective Parties hereto shall be in writing and shall be deemed to have been duly given when delivered by hand, posted by recorded delivery post or sent by confirmed email to the Party to which such notice is required to be given under this Agreement addressed as follows:

HKIRC:

CONTACT:

EMAIL:

HK Government:

CONTACT:

EMAIL:

or to such other address or email address as each Party hereto may hereafter specify to the other in writing.

9.2 Notices delivered by hand shall be deemed received the first working day following such delivery or sending. Notices sent by email must be confirmed to have been received. Notices posted by recorded delivery post shall be deemed received on the second working day following posting.

10. Waiver

10.1 Failure or neglect by HK Government to enforce at any time any of the provisions hereof shall not be construed nor shall be deemed to be a waiver of HK Government's rights hereunder nor in any way affect the validity of the whole or any part of this Agreement nor prejudice HK Government's rights to take subsequent action.

11. Severability

11.1 In the event that any of these terms, conditions or provisions shall be determined by a court of competent jurisdiction in Hong Kong to be invalid, unlawful or unenforceable to any extent, such term, condition or provision shall to that extent be severed from the remaining terms, conditions and provisions which shall continue to be valid to the fullest extent permitted by law.

12. Governing Law

12.1 The validity, interpretation and implementation of this Agreement shall be governed by the laws of Hong Kong, and disputes arising from this Agreement shall be determined by a court of competent jurisdiction in Hong Kong.

13. Miscellaneous

13.1 This Agreement shall become effective upon execution.

13.2 Except as otherwise provided herein, no addition to, amendment to, or modification of, this Agreement shall be effective unless it is in writing and signed by, and on behalf of, both Parties.

13.3 This Agreement shall be binding upon, and shall inure to the benefit of, the Parties hereto and their respective successors and permitted assigns.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed by their respective duly authorized representatives as of the date first above written.

**THE GOVERNMENT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION**

By: _____

Name:

Title: Government Chief Information Officer

HONG KONG INTERNET REGISTRATION CORPORATION LIMITED

By: _____

Name:

Title: Chairman

(Draft)
**Memorandum of Understanding
for the Management and Administration of Internet Domain Names
in Hong Kong**

- (1) **THE GOVERNMENT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION (“HK Government”)**, and
- (2) **HONG KONG INTERNET REGISTRATION CORPORATION LIMITED**, a company incorporated and existing under the laws of Hong Kong with its registered office at Unit 2002-2005, 20/F ING Tower, 308 Des Voeux Road Central, Sheung Wan, the Hong Kong Special Administrative Region (“**HKIRC**”),
hereinafter each referred to as a “**Party**”, and collectively to as the “**Parties**”,

RECOGNISING that under the Designation Agreement for the Management and Administration of Internet Domain Names in Hong Kong signed by the Parties on [*insert date*] (the “**Designation Agreement**”), HK Government reconfirms the exclusive designation of HKIRC, and HKIRC reconfirms its acceptance of HK Government’s designation, to manage and administer .hk domain names, subject to the terms therein,

HAVE REACHED THE FOLLOWING UNDERSTANDING:

1. Definitions

In this Memorandum of Understanding (the “Memorandum”), except where the context otherwise requires:

“Board” means the Board of Directors of HKIRC;

“domain name registration” means the process through which an individual or organisation obtains a domain name, and which enables the individual or organisation to use that particular domain name for a specified period of time, provided certain conditions are met and payment for services is made;

“domain name system” means a system which helps users to find their way

	around the Internet and makes using the Internet easier by allowing a familiar string of letters (the "domain name") to be used instead of IP address;
“.hk country code”	means the Hong Kong country code in English, i.e. .hk, or its equivalents in other languages (including, without limitation, .香港), in the country code top-level domain of the Internet domain name system, in connection with the delegation by ICANN of the right to operate the registration of the Hong Kong country code top-level domain;
“.hk domain names”	means all Internet domain names under .hk country code top-level domain of the Internet domain name system;
“HKIRC member”	means a person admitted to membership of HKIRC by the Board and whose name appears on the Register of Members for the time being;
“Hong Kong”	means the Hong Kong Special Administrative Region;
“ICANN”	means the Internet Corporation for Assigned Names and Numbers;
“intellectual property rights”	means patents, trade marks, service marks, trade names, design rights, copyright, domain names, database rights, rights in know-how, new inventions, designs or processes and other intellectual property rights of whatever nature and wheresoever arising, whether now known or hereafter created, and in each case whether registered or unregistered and including applications for the grant of any such rights;
“person”	means such person as defined in the Interpretation and General Clauses Ordinance (Cap 1), association, organisation, body, or HK Government;
“registrant”	means a person that has entered into registration agreement with HKIRC for .hk domain names;
“registrar”	means a person which has entered into an agreement with a registry concerning the right to submit applications and notifications of amendments to the registry on behalf of applicants for and holders of domain names under country code top-level domains;
“registry”	means a person which, as designated by the relevant

government or public authority and by agreement with the international administrator of top-level domains, is entitled to assign domain names under country code top-level domains;

“subsidiary” has the meaning ascribed to it in Section 2 of the Companies Ordinance (Cap 32) and any modifications thereto.

2. Principles of Management and Administration

2.1 HKIRC will adopt the following principles in managing and administering .hk domain names in the public interest:

- (a) **Independence:** HKIRC shall operate independently of HK Government in managing and administering .hk domain names. HKIRC shall act, and be able to demonstrate that it acts, in the interests of the Internet community in Hong Kong and the global Internet community, without undue interference by any single group of stakeholders or by HK Government.
- (b) **World-class standards:** HKIRC shall perform all activities in connection with the domain name system and registration service in good quality, security, stability and reliability.
- (c) **Competition:** HKIRC shall support competition and consumer choice in the sourcing of .hk domain name holders and managing .hk domain name registration.
- (d) **Stakeholder involvement:** HKIRC shall ensure that balanced attention will be given to the interests of all stakeholders in the Internet community in Hong Kong when making decisions in connection with the domain name system and registration service.
- (e) **Transparency:** HKIRC shall conduct its activities in an open and transparent manner that ensures wide public access to all relevant information.
- (f) **Future orientation:** HKIRC shall seek to be innovative in the provision of new services, and to anticipate and respond flexibly to new technological and market developments which may impact domain name sourcing, registration and usage.
- (g) **Protection of rights of individuals and organisations:** HKIRC shall uphold the rights of data privacy and of freedom of speech, of publication, of communication and of religious belief in accordance with the laws in force in Hong Kong in its

management and administration of .hk domain names.

3. Openness and Transparency

3.1 HKIRC will operate in an open and transparent manner, including -

- (a) Maintaining a Consultative and Advisory Panel (“CAP”) as required by HKIRC’s Memorandum and Articles of Association Article 47A;
- (b) Consulting the CAP on matters where HKIRC may have to make decisions and where the consequences of such decisions are of legitimate public interest, including domain name registration rules and pricing;
- (c) Giving attention to advice given by the CAP, whether solicited or unsolicited. Where the Board decides not to follow such advice and where so asked by the CAP or any HKIRC member, HKIRC will provide a written explanation of its reasons to the CAP and HKIRC members without unreasonable delay;
- (d) Developing and publishing, following consultation with the CAP, policies and rules for domain name registration including such matters as:
 - (i) Eligibility for licensing of .hk domain names including general principles and procedures for the application and registration of .hk domain names,
 - (ii) Measures to preserve the legitimate interest of registrants and users of .hk domain names and ensure their satisfaction,
 - (iii) Conditions of use of .hk domain names, and policies and procedures for cancellation of registration for breach of conditions of use,
 - (iv) Rules and procedures for modification, change and transfer of .hk domain names,
 - (v) Permitted formats of .hk domain names, and
 - (vi) Reserved .hk domain names;
- (e) Publishing its policies about openness and transparency in the governance and operations of HKIRC and its subsidiaries including policies about disclosure of information related to the following:
 - (i) Statistics of .hk domain names (including total number of registrations by domain name category at each month end, and the new, renewed, and discontinued registrations during the month by domain name category),
 - (ii) Incidents of refused registration applications and suspended or cancelled registrations, with reasons (but not revealing the names of the involved

- parties),
 - (iii) Incidents of complaints or disputes,
 - (iv) Audited financial reports of HKIRC, and
 - (v) Use of retained profits and maintenance of reserves of HKIRC.
- (f) Developing and publishing, following consultation with the CAP, the policies or guidelines for members of the Board and members of the CAP to consult stakeholders in general and with specific interest groups on matters of HKIRC.

4. Strategic Plan

4.1 HKIRC will develop and publish, following consultation with the CAP, a rolling strategic plan for the next three years within three months from the beginning of each financial year of HKIRC. The first rolling strategic plan shall include the plan to:

- (a) Broaden the base for participating in the governance of HKIRC by promoting membership of HKIRC members and streamlining the process for admitting an HKIRC member; and
- (b) Following market analysis, financial implication assessment and consultation with stakeholders via the CAP, determine whether and, if appropriate, how a “Registry/Registrar” model shall be introduced, whereby (i) appropriate bodies may provide .hk users with registrar services on an equal competitive basis and (ii) Internet Service Providers may provide a complete service to their customers removing the necessity for those customers also to have to interact with HKIRC.

5. Assuring Performance

5.1 HKIRC will introduce measures to assure that HKIRC is discharging its duties under this Memorandum. Such measures shall include monitoring system performance and compiling system performance statistics in respect of those performance indicators stipulated in a document of system performance monitoring and measurement, which is to be updated following consultation with the CAP. System performance statistics shall include domain name system service availability and performance statistics of registration servers and servers hosting HKIRC’s website.

6. Relationship with Government

- 6.1 HKIRC will operate independently of HK Government. If HK Government wishes to express its views on the strategy or policy of HKIRC or other matters within the terms of reference of the CAP, it will communicate those views either (a) through the CAP by virtue of the HK Government's representative on the CAP or (b) in writing addressed to the Chairman of the Board.
- 6.2 HKIRC will provide, quarterly within one month after the end of each quarter, HK Government with (i) information described above under Clause 5.1, (ii) financial reports and (iii) reports of human resource issues.
- 6.3 HKIRC will submit, within three months after the end of each financial year, an annual report to HK Government confirming that HKIRC has abided by its obligations under this Memorandum.
- 6.4 HK Government will have the right to commission an independent audit of HKIRC's compliance with the terms of this Memorandum and HKIRC will cooperate with this audit.
- 6.5 HKIRC will cooperate with HK Government in connection with any formal review of the Designation Agreement and this Memorandum that the HK Government wishes to conduct or commission.
- 6.6 It is recognised that HK Government may wish to communicate with HKIRC on the following or similar matters. Where the matter is strictly non controversial and will not involve significant consumption of HKIRC resources, HK Government may communicate in writing or by other appropriate means directly with the Chief Executive Officer (or his/her designate) of HKIRC. Where these conditions do not apply, HK Government will in the first instance communicate with the Chairman of the Board.
- (a) Providing HK Government with the information it needs in order to report to the Legislative Council on issues relating to the management and administration of .hk domain names;
 - (b) Coordinating the position to be taken by HK Government and HKIRC in ICANN forums in which they participate;
 - (c) Providing input for discussions between HK Government and other interested parties on current and future Internet policy issues;

- (d) Liaising on certain operational issues including but not limited to incident or crime investigation, prevention of phishing and spamming, complaints from the public and consumer related matters; and
- (e) Liaising on matters of mutual interest related to the industry, including but not limited to partnership or participation in industry events.

7. Dispute

- 7.1 In the event that either Party is of the view that the other Party has acted in a manner inconsistent with the provisions of this Memorandum, the Party may give written notice to the other of that view. Such notice will be made public by the Parties.
- 7.2 Upon receipt of the notice by that other Party, the Parties will consult together for the purpose of agreeing a resolution of the matter and will publish a record of the resolution once it is agreed.
- 7.3 If either Party wishes to resolve the dispute by entering into mediation, the other Party shall not unreasonably refuse to take part in it and shall participate in it in good faith.
- 7.4 Each Party recognises that if no agreement can be reached, then this would be a factor to be considered by each Party in deciding whether to give a notice of termination of the Designation Agreement.

8. Miscellaneous

- 8.1 This Memorandum will become effective upon its execution and will terminate upon termination of the Designation Agreement (howsoever occasioned).
- 8.2 This Memorandum may be amended at any time by written mutual consent of the Parties.
- 8.3 This Memorandum does not create any legally-binding obligation on either Party,

SIGNED in the Hong Kong on [date] in duplicate.

**THE GOVERNMENT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION**

By: _____

Name:

Title: Government Chief Information Officer

HONG KONG INTERNET REGISTRATION CORPORATION LIMITED

By: _____

Name:

Title: Chairman

Explanatory Note on the Changes in the Draft MOU Documentation

- (a) Changes in response to the comments of the ITB Panel and Legal Adviser of the Legislative Council Secretariat

Comments of ITB Panel and Legal Adviser of LegCo Secretariat	Changes made by the HKIRC and the Government
(i) Draft Designation Agreement	
<p>Recital (vii) The word "was" should be inserted between "that" and "passed" in the first line.</p>	<p>The word "were" is inserted in Recital (vii) accordingly.</p>
<p>Clause 1 The definition of ".hk country code" refers to "the Hong Kong country code in English, i.e., .hk, or its equivalents in other languages". As paragraph 15 of the Paper states that Hong Kong Internet Registration Corporation Limited (HKIRC) has submitted an application for the Chinese language country code top level domain for Hong Kong, i.e., ".香港", the Administration may wish to amend the definition by adding the expression "(including, without limitation, .香港)" after the words "other languages".</p>	<p>The definition of ".hk country code" in Clause 1 is amended accordingly.</p>
<p>Clause 3.1 The word "administrating" in the first line should be changed to "administering".</p>	<p>Clause 3.1 is amended accordingly. Clause 5.1 is also amended similarly.</p>
<p>Clause 3.1 According to paragraph 8 of the Paper, the draft Agreement imposes "a legally-enforceable duty on the part of HKIRC to ... establish and maintain a complaint handling process to provide for conciliation or redress of grievances arising from domain name registration service", which "will help to uphold the principles in managing and administering '.hk' domain names in the</p>	<p>New Clause 3.2 is added.</p> <ul style="list-style-type: none"> • Instead of repeating in Clause 3.2 all the principles which are already set out in the MOU as suggested by the LegCo's legal adviser, only the major concern is added, i.e. the rights of freedom of speech, publication, etc., because this can be expressed in more specific language for it to be legally enforceable. Other

<p>Comments of ITB Panel and Legal Adviser of LegCo Secretariat</p>	<p>Changes made by the HKIRC and the Government</p>
<p>public interest, including in particular upholding the rights of freedom of speech, of publication, of communication and of religious belief in accordance with the laws in force in Hong Kong". While Clause 3.1(d) of the draft Agreement requires HKIRC to establish and maintain a complaint handling process, there is no requirement that such complaint handling process must have regard to the principles referred to in paragraph 8 of the Paper. Those principles are only set out in Clause 2.1 of the draft MOU which, by Clause 8.3, specifically provides that the MOU does not create any legally-binding obligations on either party. The Administration may wish to consider including in Clause 3 of the draft Agreement a provision to the effect that HKIRC must have regard to the principles set out in Clause 2.1 of the draft MOU in managing and administering the .hk domain names.</p> <p>Members commented that data privacy should be safeguarded.</p>	<p>principles such as “World-class standards” and “Competition” could not be conveniently expressed in legally binding language.</p> <ul style="list-style-type: none"> • The phrase “not restrict” is used in Clause 3.2 instead of the word “uphold” used in the MOU in order to make this clause certain, specific and enforceable. If the word “uphold” is used, it is uncertain what HKIRC should do to uphold the rights mentioned. • The rights of “data privacy” are also covered in Clause 3.2 to make it explicit that HKIRC has a duty to respect the privacy of any persons including the registrants.
<p>Clause 7.1 In paragraph (a), the word "him" before "of any composition" should be replaced by "it" as the possessive pronoun "its" is used in the context of "creditors" in the same paragraph.</p>	<p>Clause 7.1(c) (original Clause 7.1(a)) is amended accordingly.</p>
<p>Clause 7.1 Apart from the circumstances identified in paragraphs (a) and (b) of Clause 7.1, the Administration may wish to consider including other terminating events including, for example:</p>	<ul style="list-style-type: none"> • Clauses 7.1(a) and (b) are added to include more terminating events, namely, failure to remedy a breach of the Agreement and failure to prevent recurrence of a breach.

<p>Comments of ITB Panel and Legal Adviser of LegCo Secretariat</p>	<p>Changes made by the HKIRC and the Government</p>
<ul style="list-style-type: none"> • the conviction of a director or officer of HKIRC of any dishonesty or other serious offences which, in the Administration's opinion, could adversely affect HKIRC's capacity to manage and administer .hk domain names; and/or • the failure by the parties to resolve a dispute pursuant to the procedures under Clause 7 of the draft MOU. 	<ul style="list-style-type: none"> • Clause 7.1(d) (original Clause 7.1(b)) is fine-tuned to improve clarity. • With regard to conviction of a director or officer of HKIRC of dishonesty or offences, a new Clause 7.1(e) is added accordingly with some fine-tuning in wording. • We consider in case of failure to reach agreement over a dispute, the route to the termination of the Agreement should be Clause 7.2 instead of Clause 7.1. Clause 7.1 mainly deals with matters related to breach of the Agreement, winding up and findings of contravention of law. Therefore the suggested terminating event is not added under Clause 7.1, whereas Clauses 7.2 and 7.3 provide for termination without cause to cover the situation.
<p>Clause 7.3</p> <p>The phrase "what HK Government considers to be sufficient prior notice" may be too vague. We suggest that the clause provides for a more certain notice period (e.g., 12 months) which should be sufficient to allow the Government to make the necessary arrangements to designate another person to take over from HKIRC the management and administration of .hk domain names.</p>	<p>Clause 7.3 is amended to provide for a more certain notice period of twenty-four months. It is noted that this notice period is different from that in Clause 7.2 (i.e. twelve months), because in the case of HKIRC initiating the termination, HK Government is not able to make the necessary preparation before serving the termination notice, and based on experience twenty-four months is a reasonable timeframe.</p>
<p>Clause 8.2</p> <p>For the sake of clarity, we suggest that the first sentence be recast as follows: "Within</p>	<ul style="list-style-type: none"> • The first sentence of Clause 8.2 is amended to this effect and to fine-tune the wording further to

<p>Comments of ITB Panel and Legal Adviser of LegCo Secretariat</p>	<p>Changes made by the HKIRC and the Government</p>
<p>three months from the date of the notice of termination of this Agreement, HKIRC shall, in consultation with HK Government and such person ('the new designee') as HK Government may designate to take over from HKIRC the management and administration of .hk domain names, develop and deliver to HK Government and the new designee a transition plan to the satisfaction of HK Government and the new designee."</p> <p>Members commented that data privacy should be safeguarded and opt-out from the transfer to the new designated person should be provided to registrants.</p>	<p>improve clarity and certainty.</p> <ul style="list-style-type: none"> • The second sentence of Clause 8.2 is amended to incorporate ITB Panel Members' comment. The revised Clause gives public the confidence that the transition will be handled with due regard to registrant's privacy. • A new third sentence of Clause 8.2 is also added to ensure that the transition plan would include arrangements for refunding the opt-out registrants for any pre-paid services not yet provided to them.
<p>Clause 8.3 All references to "the mark .hk" should be substituted by "the mark .hk or its equivalents in other languages (including, without limitation, .香港)".</p>	<p>Clause 8.3 is amended accordingly.</p>
<p>Clause 10.1 The expression "competent authority" is not defined. Subject to the Administration's decision as regards dispute resolution (see our comments on Clause 11.1 below), the Administration may wish to clarify the meaning of "competent authority", i.e., a court of competent jurisdiction, an arbitral tribunal, etc.</p>	<p>Clause 11.1 (original Clause 10.1) is amended to replace "competent authority" with "a court of competent jurisdiction in Hong Kong".</p>
<p>Clause 11.1 While selecting Hong Kong law as the governing law, the clause is silent as to jurisdiction. The Administration may wish to specify whether disputes are to be</p>	<p>Clause 12.1 (original Clause 11.1) is amended to specify that disputes shall be determined by a court of competent jurisdiction in Hong Kong.</p>

Comments of ITB Panel and Legal Adviser of LegCo Secretariat	Changes made by the HKIRC and the Government
determined by the Hong Kong courts or referred to arbitration.	
<p>Clause 12.2</p> <p>The word "to" should be inserted after "addition". We also note that the comma which appears after "behalf" has been misplaced: It should appear after the word "of" in the context of "on behalf of".</p>	<p>Clause 13.2 (original Clause 12.2) is amended accordingly.</p>
<p>Clause 12.3</p> <p>There should be a comma after the expression "and shall inure to the benefit of".</p>	<p>Clause 13.3 (original Clause 12.3) is amended accordingly.</p>
(ii) Draft MOU	
<p>Clause 1</p> <p>The definition of ".hk country code" should be amended by adding the expression "(including, without limitation, .香港)" after the words "other languages" .</p>	<p>The definition of ".hk country code" in Clause 1 is amended accordingly.</p>
<p>Clause 2.1(g)</p> <p>Members commented that data privacy should be safeguarded.</p>	<p>Clause 2.1(g) is amended to cover "data privacy" as one of the rights to be upheld.</p>
<p>Clause 3.1(b)</p> <p>Members commented that clause(s) about pricing should be included as appropriate in the MOU documentation.</p>	<p>We consider that the setting of price should be a matter for the HKIRC to determine following consultation with its CAP. Clause 3.1(b) is therefore amended to explicitly include, among others, pricing as matters that HKIRC needs to consult the CAP.</p>
<p>Clause 4.1</p> <p>It is unclear how often (e.g., annually) or when (e.g., no later than 3 months before the beginning of each year) HKIRC is required to develop and publish a rolling plan for the next three years.</p>	<p>Clause 4.1 is amended to specify that HKIRC is required to develop and publish the plan "within three months from the beginning of each financial year of HKIRC".</p>
<p>Clause 6.2</p> <p>The Clause does not say how often (e.g., quarterly) and when (e.g., within one</p>	<p>Clause 6.2 is amended to specify the requirements more clearly: "HKIRC will provide, quarterly within one month after</p>

<p>Comments of ITB Panel and Legal Adviser of LegCo Secretariat</p>	<p>Changes made by the HKIRC and the Government</p>
<p>month after the end of each quarter) HKIRC is required to provide HK Government with system performance statistics under Clause 5.1 and reports of human resource issues. It is also not clear when (e.g., within one month after the end of each quarter) the quarterly financial reports are to be provided to HK Government.</p>	<p>the end of each quarter, HK Government with (i) information described above under Clause 5.1, (ii) financial reports and (iii) reports of human resource issues.”</p>
<p>Clause 6.3 Again, it is not clear when (e.g., within 3 months after the end of each year) HKIRC is required to submit the annual report on its compliance with its obligations under the MOU.</p>	<p>Clause 6.3 is amended to specify the requirements more clearly: “HKIRC will submit, within three months after the end of each financial year, an annual report to HK Government confirming that HKIRC has abided by its obligations under this Memorandum.</p>
<p>Clause 6.6 The word "by" should be inserted before the expression "other appropriate means".</p>	<p>Clause 6.6 is amended accordingly.</p>
<p>Clause 7 All references to "parties" and "party" should be capitalized. Please refer to the reference to "Party" and "Parties" in the preamble of the draft MOU. The same comment also applies to Clause 8.3.</p>	<p>Clauses 7 and 8.3 are amended accordingly.</p>

- (b) Other changes for the purpose of improving clarity, certainty and readability of the MOU documentation

(i) Draft Designation Agreement
<p><u>Recital (v) and (vi):</u> The term “Board” is defined at an earlier location in the Agreement.</p>
<p><u>Recital (viii):</u> The recital is amended to make it clear that the Agreement will be signed before the MOU is signed, although the intention is to sign both documents on the same day.</p>
<p><u>Clause 1:</u> The definition of “Hong Kong” is added that applies to the provisions in the Agreement. The definitions of “domain name registration” and “registrant” are amended to improve clarity. The definition of “subsidiary” is amended to align with the format used in other places in the Agreement.</p>
<p><u>Clauses 6.1, 7.6, 8.1, and 8.5 (original Clause 8.6):</u> These clauses are amended to improve clarify.</p>
<p><u>Clause 8.4:</u> The word “the new designated person” is used that is defined in Clause 7.6.</p>
<p><u>Original Clause 8.5:</u> It is removed because it is redundant with the revised Clause 7.6.</p>
<p><u>New Clause 9:</u> It is added to give certainty as to what constitutes a notice and when it is deemed to be delivered and received.</p>
(ii) Draft MOU
<p><u>Clause 1:</u> The definitions “Board” and “Hong Kong” are added that apply to the provisions in the Memorandum. The definitions of “domain name registration” and “registrant” are amended to improve clarity.</p>

The definition of “subsidiary” is amended to align with the format used in other places in the Memorandum.

Clause 2.1(c):

To improve clarity, Clause 2.1(c) is amended as follows: “Competition: HKIRC shall support competition and consumer choice in the sourcing of .hk domain name holders **and managing .hk domain name registration.**”

Clause 3.1(c):

To use the defined term “HKIRC member”.

Clauses 6.1 and 6.6:

To use the defined term “Board”.

Clauses 6.3 and 6.4:

To use the defined term “Memorandum”.

Clause 7.3:

In order to provide an optional intermediate step that could help resolve the dispute before considering termination by either Party, new Clause 7.3 is added as follows:

“If either Party wishes to resolve the dispute by entering into mediation, the other Party shall not unreasonably refuse to take part in it and shall participate in it in good faith.”

Clause 8.1:

This clause is amended to make it clear that the Agreement and the MOU will be signed respectively.

**Information Supplied on the Administration of
Internet Domain Names in Hong Kong
Arising from the ITB Panel Meeting on 14 December 2009**

- (a) Measures to be put in place in the event of a termination of the Designation Agreement to safeguard privacy and protect personal data in the handing over of such data to the new designee, and the mechanism for registrants to opt out of the service of the new designee and retrieve their personal data**

In order to safeguard privacy and protect personal data in the transfer upon termination of the Designation Agreement, Clause 8.2 of the revised draft Designation Agreement requires HKIRC to develop a transition plan which includes an arrangement, which preserves the rights of registrants under their registration agreements and complies with the privacy laws including without limitation the Personal Data (Privacy) Ordinance (Cap 486) (the “**PDPO**”) and with other applicable laws in force in Hong Kong, for the transfer of registrants and their identities and other information to the new designated person. The transition plan shall also include arrangements for refunding registrants who elect not to be transferred to the new designated person any amount of money which they have pre-paid for services which have not been provided to them.

According to HKIRC, in order to comply with Clause 8.2 of the revised draft Designation Agreement, the company will put in place the following arrangements in its transition plan and execute it in the event of the termination of the Designation Agreement:

- After the giving of termination notice by either the Government or HKIRC and well before the effective date of termination, HKIRC will communicate with all the registrants of .hk domain names about the termination and that the management and administration functions of .hk domain names will be transferred to a new designated person.

- The registrants will be provided with the new registration agreement to be agreed with the new designated person, for their reference and consideration of the transfer to the new designated person. *(Note: The new registration agreement will be prepared by the new designated person and attached in the communication.)* The registrants will be given sufficient time to consider and decide on whether to be transferred to the new designated person.
 - If a registrant elects to be transferred to the new designated person, the transfer will involve handling over of the registrant's identity and other information, in accordance with the laws of Hong Kong related to privacy including the PDPO, that is necessary for the smooth and continued management of the registrant's registered domain name.
 - If a registrant elects not to be transferred within a specified period of time. HKIRC will then follow up with the registrant to arrange the termination of its registered domain names, and arrange the refund to the registrant of any amount of money which the registrants have pre-paid for services which have not been provided to them. HKIRC will also ensure that the registration information (including personal data) of the registrant will not be passed to the new designated person during the transfer, and will handle such information in accordance with the laws of Hong Kong related to privacy including the PDPO.
- (b) To provide a definition of the “competent authority” in Clause 10.1 of the draft Designation Agreement, as well as a written response to the comments raised by the Legal Services Department of the Legislative Council Secretariat as contained in LC Paper No. CB(1)656/09-10(01) before finalizing and executing the Designation Agreement and the Memorandum of Understanding (MOU)**

The reference to “any competent authority” in Clause 10.1 has been changed to “a court of competent jurisdiction in Hong Kong” in the revised

draft Designation Agreement (now Clause 11.1).

As mentioned in the covering letter, the Government and HKIRC have taken into account the comments of the ITB Panel Members and Legislative Council's legal adviser and revised the draft Designation Agreement and the draft MOU as attached at **Annexes A and B**. To facilitate Members' appreciation of the revisions, we provide **at Annex C** an explanatory note on the revisions.

- (c) To convey to the Board of Directors of HKIRC the Members' concern about the level of subscription fees and charges, and the use of the company's income/surplus**

The Government has conveyed the Members' concern about the level of subscription fees and the use of the company's income/surplus to HKIRC. Nevertheless, we would like to emphasise that these are company policy matters which shall be determined by HKIRC in an open and transparent manner following consultation with the Consultative and Advisory Panel (CAP). Therefore we also encourage stakeholders and members of the public who have views on the matters express the same to HKIRC either through its Board of Directors or the CAP.

**Office of the Government Chief Information Officer
Commerce and Economic Development Bureau
January 2010**