

## NOMINET (UK)

### OPINION

1. I am asked to advise Nominet UK (Nominet) in relation to two issues; firstly, in relation to the distribution of its profits, as Nominet has accrued substantial trading surpluses in recent years; and, secondly, as to its power to change the price of its services (including the offering of discounts). I am asked to assume, for the purposes of this Opinion, that Nominet will remain a "not for profit" Company.

2. Nominet is a company limited by guarantee incorporated in 1996, which operates as the registry of Internet domains ending ".uk". Its membership is open to all and includes domain name wholesalers and dealers, Internet service providers, web developers and other interested parties. It presently has some 3,000 members.

3. Paragraph 6 of Nominet's Memorandum of Association provides:

*"The income and capital of the Company shall be applied solely towards the promotion of the objects of the Company; and no part of the income or capital shall be paid or transferred, directly or indirectly, to the members of the Company, whether by way of dividend or bonus or otherwise in the form of profit."*

4. Paragraph 9 of its Memorandum of Association provides that, in the event of a winding up or dissolution of Nominet, any surplus shall not be paid to the members but must be either transferred to a successor body with similar objects to those of Nominet, or paid to one or more charitable trusts.

5. The unambiguous effect of paragraph 6 of Nominet's Memorandum of Association is that any distribution by Nominet to its members would be ultra vires and hence void. Any members who had knowingly received any such distribution would be liable to repay them to Nominet. Such distributions being ultra vires Nominet, the payment of them would render the directors of Nominet personally liable for the breach of fiduciary in misapplying Nominet's assets.

6. The following seem to me to be the options available to Nominet in respect of its accumulated surpluses:

- a. charitable donations (permitted explicitly by paragraph 3.12 of the Memorandum);
- b. applying to the Court for a scheme of arrangement allowing a variation of the objects of the company to allow distributions to members;
- c. petitioning for a private Act of Parliament allowing for a variation of the objects of the company to allow distributions to members; and
- d. adopting a deliberate policy of running Nominet at a loss in order to run down the reserves.
- e. retain the surpluses permanently.

7. In my opinion, the options listed in 6 b. and c. above are not realistic. Having regard to the provisions of paragraphs 6 and 9 of the Memorandum, in my view, it would be far from straightforward to persuade either the Court or Parliament to agree to the distribution of accumulated surpluses by Nominet to its members, as that is the basis upon which such persons agreed to become members of Nominet.

8. In view, the Court or Parliament (as the case may be) would require to be satisfied of a very high degree of agreement amongst the membership to change the very basis upon which Nominet was established and its members agreed to become members of it, and there would need to be substantial agreement as to the basis upon which it is proposed the profits would be

shared. Secondly, Nominet would need to show that there was no other option for the accumulated reserves. Charitable donations in a manner that could benefit Nominet's stakeholders more generally are expressly permitted.

9. Whilst the reserves would be diminished if Nominet were to incur losses in the future, there are significant risks in following a strategy of intentionally causing Nominet to operate at a loss. The directors must be mindful of their fiduciary duties to promote the success of Nominet (section 172 Companies Act 2006).

10. As the option of permanently retaining the accumulated surplus is also unrealistic, the most realistic option available to the directors is to make charitable donations, which are expressly permitted by Nominet's memorandum of Association,

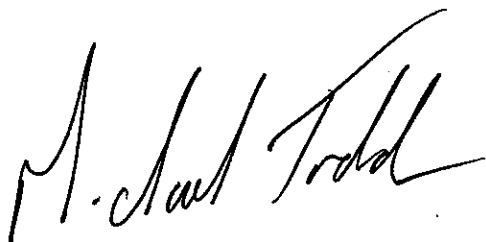
11. Paragraph 19A of Nominet's Articles of Association provides:

“Except as required by law, before making any change to the level of membership subscriptions or registration fees, the Council of Management must consult with the Steering Committee by conducting a ballot. The ballot, which may be carried out by electronic communication or in writing must seek votes for and against each proposed change; and the Council of Managements shall only implement the proposed change if at least seventy-five percent of the votes cast in the ballot are in favour of the proposed change.”

Provided always that the provisions of Article 19A are followed, Nominet does have the option to reduce the future levels of membership subscriptions and domain registration fees. Any retrospective price reduction would, however, fall foul of the provisions of paragraph 6 of the Memorandum of Association and hence be an unlawful distribution.

12. I am asked to consider whether Nominet could apply a discount (whether temporary or otherwise) to the prices it charges for services without

following the procedure set out in paragraph 19A of the Articles of Association. I am firmly of the view that it cannot. An arrangement whereby either membership subscriptions or domain registration fees (or both) are effectively reduced will amount to a change in price in direct contravention of paragraph 19A.

A handwritten signature in black ink, appearing to read "Michael Todd". The signature is written in a cursive, flowing style with a large initial 'M'.

**Michael Todd QC**  
**Erskine Chambers**  
**21 April 2008**