


FIRST DRAFT : FOR DISCUSSION PURPOSES ONLY

UniForum SA

**COMMENTS AND OBSERVATIONS TO THE PROPOSED CHANGES TO EXISTING
MEMORANDUM AND ARTICLES OF ASSOCIATION OF THE .ZA DOMAIN NAME AUTHORITY
(January 2008)**

Item	Existing Document	Proposed Change	Reason for Change	 UniForum SA Comments and Observations
1	Archaic forms of language, or "legalese", are used throughout the existing memorandum and articles. For example, "shall" is used instead of "must" or "will". Also, words such as "thereat" and "whencesoever" are used.	Replace archaic language with ordinary, conversational English.	The use of ordinary, conversational English makes the document accessible to lay people, particularly lay people whose mother tongue is not English.	No Comment
2	Clause 3 of the existing memorandum of association sets out the main object of the company, but does not list all the functions and objects of the company as contemplated in section 65 of the Electronic Communications and Transactions Act, No. 25 of 2002 ("the ECT Act").	Expand the main object of the company, as contained in its memorandum, to include all the functions and objects set out in section 65 of the ECT Act (clause 4 of revised memorandum).	The company is a creature of statute. It is obliged by law to carry out all the functions and objects recorded in the statute. The company's own founding document, namely its memorandum, must completely reflect the company's statutory functions and objects.	No Comment

3	Clause 5.1 of the existing memorandum of the company does not specifically exclude item "s" of schedule 2 to the Companies Act, which schedule sets out the common powers of companies.	Amend the clause of the memorandum dealing with the powers of the company, to specifically exclude the power referred to in item "s" of the second schedule to the Companies Act (clause 6.1 of revised memorandum).	The company is an association not for gain incorporated under section 21 of the Companies Act, as required by section 60(1) of the ECT Act. Section 21 of the Companies Act stipulates that the assets of a section 21 company may not be distributed to anyone, whether members or directors, in the form of dividends or profit-sharing. Item "s" of the second schedule to the Companies Act empowers the company to distribute dividends to shareholders. It is essential that the memorandum of association of every section 21 company expressly excludes this power, in order that the company may comply with the provisions of section 21 of the Companies Act.	No Comment
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4	<p>Clause 5.2.4 of the existing memorandum of the company prohibits the company from paying any remuneration to its directors or officers.</p>	<p>To delete the restriction against paying remuneration to directors and officers and to expressly allow the company to pay reasonable remuneration for services rendered in developing or conducting its activities (clause 6.2.6 of the revised memorandum).</p>	<p>The existing memorandum of the company contradicts section 61(4)(p) of the ECT Act, which specifically contemplates the payment of allowances to directors for attending meetings. Furthermore, it is difficult to understand how the company can expect anyone to assume the burden and responsibility of acting as director, if no remuneration at all is to be paid. In addition, section 21(2)(a) of the Companies Act stipulates that nothing contained in the Companies Act "<i>shall prevent the payment in good faith of reasonable remuneration to any officer or servant of the (company) or to any member thereof in return for any services actually rendered to the (company)</i>".</p>	<p>We agree with the sentiment of this proposed change, although we must direct the Authority's attention to the important provisions of Section 65(5) of the ACT, namely "All directors serve in a part-time and non-executive capacity."</p> <p>As a matter of interest, there are several international organisations where individuals serve on similar boards on a voluntary and unremunerated basis. These include ICANN, ISOC, AFRINIC and PIR. We do however believe that the directors of the Authority should be fairly remunerated for work done in their part-time and non-executive capacities.</p> <p>We believe that the level of remuneration should be nominal so as to ensure that directors remain in a position of objective neutrality in performing their responsibilities as board members. There should be no prospect of conflicting personal financial gain with the best interests of the Authority and the .ZA name space.</p>
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5	The existing memorandum of association does not contain the various restrictions on the powers of the company which must be included, in terms of section 30 of the Income Tax Act, if the company is to have any chance of qualifying for income tax exemption as a public benefit organisation in terms of section 10(1)(cN) of the Income Tax Act.	Include the compulsory provisions of section 30 of the Income Tax Act as clauses 6.3 and 6.4 of the revised memorandum.	It is obviously in the interests of the efficient use of funding for the company to obtain exemption from income tax if this is permitted in law. There are at least reasonable prospects that the company will qualify for income tax exemption as a public benefit organisation in terms of sections 30 and 10(1)(cN) of the Income Tax Act. One of the necessary conditions for so qualifying is the inclusion of the relevant provisions of section 30 of the Income Tax Act in the memorandum of the company.	No Comment
6	Article 3 of the existing articles of association of the company repeats the truncated version of the objects and functions of the company already contained in the existing memorandum of association.	Delete article 3 from the articles of association.	The memorandum of association of a company must contain the material stipulated by the Companies Act; in essence, the name, objects and powers of the company. The purpose of the articles of association is quite different, namely to set out the rules for the governance of the company. It is unnecessary and confusing, and bad practice, to repeat the provisions of the memorandum of association in the articles.	No Comment

7	<p>The existing articles 4 to 8 of the company have the effect of preventing the company from admitting organisations or juristic persons as members; in effect, only natural people may be admitted as members.</p>	<p>Amend the provisions of the articles relating to membership to permit the company to admit both juristic persons and natural people as members (see article 2.4 of revised articles).</p>	<p>In terms of the Companies Act and the common law, both natural people and juristic persons are entitled to be members of a company. Section 60(2) of the ECT Act expressly contemplates that natural people will be members of the company. However, the ECT Act does not expressly or impliedly exclude juristic persons from becoming members. The rules of statutory interpretation dictate that statutes be read and interpreted so that, as far as possible, they are consistent and not contradictory. Applying this rule would lead one to an interpretation that the ECT Act, as read with the Companies Act, does not limit membership of the company to natural people. To the extent that the articles of the company conflict with this interpretation, they must be amended.</p>	<p>We have no objection, but as a point of interest:</p> <p>With reference to Section 60(3) of the Act, namely: <u>"For the purpose of the incorporation of the Authority a person representing the Minister and the members of Namespace ZA as at the date of application for incorporation must be deemed to be members of the Authority."</u></p> <p>UniForum SA, a section 21 company, was a member of NameSpace ZA at the time of incorporation of the Authority and as such was (is) also a member of the Authority. This factually means that the Authority currently has, or has at some stage had, at least one juristic person as a member.</p>
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8	<p>The existing articles of association of the company do not stipulate that membership will be automatically forfeited if members no longer meet the qualifying criteria set out in section 60(2) of the ECT Act, or no longer participate actively in the affairs of the company.</p>	<p>The provisions of the articles dealing with termination of membership be changed to provide that members who are natural persons, and who no longer comply with the criteria stipulated in section 60(2) of the ECT Act, automatically lose their membership; so, too, any member who fails, without apology, to attend one general meeting or, whether or not the member apologises, fails to attend two consecutive general meetings (article 3 of revised articles).</p>	<p>Section 60(2) of the ECT Act states that all citizens and permanent residents of South Africa are eligible for membership of the company. This means that the company has a potentially vast membership. As required by the Companies Act, the articles of association of the company oblige the company to have minimum quorums for general meetings, to send notices in a variety of ways to members on a number of issues, and to send copies of the annual financial statements of the company to all members. If the company has a large membership, complying with these provisions is very expensive. If there is a significant body of members who no longer comply with the criteria stipulated in the ECT Act, or who are no longer interested in participating in the affairs of the company, it constitutes unnecessary and wasteful expenditure (as contemplated in the Public Finance Management Act) for the company to expend its resources on sending notices and financial statements to such people. It is therefore imperative, for the efficient and cost-effective functioning of the company, for the articles to stipulate that the membership of people who no</p>	<p>We object to this proposed change. The Authority should consider the following:</p> <ul style="list-style-type: none"> a) It is reasonable to assume that not all members have the capacity, due to financial, time and/or other constraints, to participate in every aspect of the Authority, including the attendance of meetings. This does however not mean that those 'in-active' members cannot provide a valuable contribution to the Authority from time-to-time, especially with the introduction of various means to promote participation, such as discussion lists, video and audio conferencing etc. b) It is also reasonable to assume that certain 'inactive' members may raise their activity, depending on the subject matter under discussion (debate). Members may therefore be dormant for extended periods of time until they believe it is necessary to participate on a particular matter. c) Being a member of the Authority, whether active or not, enables a member to be aware, by official notification, of any proposed changes within the .ZA name space. This benefit alone may be cause enough for anyone to consider retaining their membership, irrespective if they elect to attend and participate in meetings or not.
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			longer actively participate in the affairs of the company, or who no longer show any interest in its affairs, is automatically terminated.	
9	Article 5.4 of the existing articles empowers the directors to " <i>terminate the membership of a member if in the reasonable discretion of the directors it is inimical to the interests of the company that the member should continue as a member of the company</i> ".	To amend the articles to permit both the directors and a general meeting of the members of the company to terminate the membership of any person if, in their entire discretion, this is in the interests of the company; on condition that no such resolution can be taken unless the member concerned has been given a reasonable opportunity to hear and respond to the reasons for the proposed termination (articles 2.5 to 2.8 of revised articles).	Even in the case of active members of the company, it is imperative, for the efficient functioning of the company, for the directors and members to have the power to remove as member a person or organisation who/which is, by obstructive or destructive conduct, harming the interests of the company. It is important that this be an unqualified discretion, not fettered by concepts such as reasonableness, as in the existing article 5.4. However, the rules of natural justice would require the directors or members to give the member concerned a hearing or at least a reasonable opportunity to be heard, before taking the decision to terminate membership.	<p>We do not agree with this provision, either in its existing form or as proposed.</p> <p>a) We believe that it is important for members to have the opportunity to raise their concerns, objections and/or comments in an open and transparent process, without fear of reprisal or prejudice. If anything we believe that the removal of a member should be a matter for the membership as a whole to consider at an AGM or special meeting.</p> <p>b) We do not believe that the Act allows for the unilateral removal of members. This assumption is supported by the wording of section 60(2), namely: "All citizens and permanent residents of the Republic are eligible for membership of the Authority and <u>must be registered as members upon application</u> and on payment of a nominal fee to cover the cost of registration of membership <u>and without having to comply with any formality.</u>" The implication of this is that expelled members can simply re-apply for membership, which membership cannot be refused.</p> <p>c) Other than the express qualifying criteria mentioned in Section 60(2), there are no further qualifications that a member must comply with i.e. such as being a fit and proper person. It therefore seems that the qualifying criteria for membership has intentionally been kept to an absolute minimum so as to allow the widest possible access to all citizens.</p>

10	The existing articles of association do not set out the rights of members at all.	Include provision in the articles which summarise the rights of members, such as the right to attend, speak and vote at general meetings, and to receive copies of the annual financial statements of the company, etc.	Although the Companies Act does set out the rights of members of a company, most lay people will not read, and do not have access to, the Companies Act. At most lay members of the company will have access to its articles of association. It is therefore important, to enable those people to enforce their rights, to record those rights in the articles of association.	We believe there may be a benefit of leaving these provisions within the Companies Act and not incorporating them in the articles of association. In this regard it may be useful to allow the rights of members to evolve with prevailing legislation such as the Companies Act, and that by incorporating them into the articles of association we may be limiting this.
11	Article 16 of the existing articles sets out in detail the process to be followed in appointing directors of the company, reproducing the provisions of section 62 of the ECT Act.	Delete the detailed reproduction of the provisions of section 62 of the ECT Act, and replace it with a simple statement that the directors are appointed by the Minister in compliance with the provisions of section 62.	The Minister alone has the power to appoint directors in terms of section 62 of the ECT Act. Neither the company, nor its members, nor its directors, play any role in the appointment process. It is therefore unnecessary to burden an already lengthy document (namely the articles of association) with material drawn from the ECT Act, which cannot be acted on by any member or director.	No Comment
12	The existing articles do not stipulate which people have the right to convene a general meeting of members.	Include a provision permitting the chairperson, any two directors, or any 10 members to convene a general meeting of members (article 9.2 of the revised articles).	A general meeting of members is the forum at which key decisions are taken concerning the company and its governance. It is essential that the articles stipulate who is entitled to convene a general meeting. For example, if the directors are not administering the company correctly, and the members wish to vote them out of office, the articles must	No Comment

			provide a mechanism whereby the members can convene a general meeting even if the directors fail or refuse to do so.	
13	The existing articles do not contain the provisions of section 61(4)(f) of the ECT Act regarding the preparation by the board of directors of an annual business plan for the company.	Include the provisions of that section in the revised articles (new articles 10.4 and 16.3), and compel the board to circulate that annual business plan for consideration by the members at the AGM.	Because it is unlikely that the directors or members of the company will refer regularly to the ECT Act or other applicable legislation, it is important to include in the memorandum and articles of association all the obligations of the company, or its directors or members, stipulated in that legislation. Furthermore, it is appropriate that, given the importance of the document, the annual business plan prepared by the board be considered and debated at the members' AGM.	No Comment
14	Article 41 of the existing articles stipulates that a quorum for a general meeting of members is 10% of the members, or 30 members, whichever is the lower.	Replace that article with a new article (revised article 11.2) stipulating that a quorum for a general meeting is 7 members.	If the quorum for a general meeting is set at too high a number, the company will be hamstrung in carrying out its activities. The company must be confident of being able to attract a quorum of members to every general meeting, in order to transact its business. It is believed that 7 members is an appropriate number in this regard.	<p>We do not agree with this proposed change and would rather suggest that the current quorum provisions are retained and additional, more proactive measures are implemented to ensure that a quorum is present at a particular meeting. The Authority should, amongst others, provide for remote participation of members.</p> <p>Furthermore, we believe that it is preferable that a wide spectrum of interests and views are present at any significant decision. Limiting the quorum to 7 members could be counter intuitive to this.</p>

15	Although the existing articles (at articles 45 to 50) contain provisions relating to the voting procedures at general meetings, they do not set out expressly certain essential information, such as who is entitled to demand a secret ballot. Also, existing article 49 gives the chairperson, in the event of an equality of votes, a second or casting vote.	Replace existing articles with new article 11, which repeats much of what is contained in the existing articles, but also stipulates expressly who may demand a secret ballot at a general meeting, and that (at article 12) the chairperson will not be entitled to a second or casting vote.	It is obviously essential that the members understand who has the power to demand a secret ballot on any matter arising at a general meeting. Also, I am opposed in principle to second or casting votes: if the members are evenly split on a particular draft resolution, it is better, in my view, to redraft the resolution in such a way as to obtain significant majority support, rather than leave half the members unhappy with the resolution by the exercise of a casting vote in the hands of the chairperson.	No Comment
16	The existing articles of the company do not permit the members of the company to adopt a resolution except at a general meeting; the existing articles do not permit the members to adopt a valid resolution simply by signing a draft resolution which has been circulated.	Include new article 11.6 to permit members of the company to adopt a valid resolution without convening a general meeting, by having two-thirds of the members sign the resolution.	Convening a general meeting is a time-consuming and expensive process. If the company needs a member's resolution urgently on an important matter, or on a comparatively minor matter which does not justify the convening of a general meeting, it is appropriate that the company be able to do so by having the appropriate resolution signed by a clear majority of the members (in our case, two-thirds of the members). This provides for efficiency and convenience. Naturally, in any case where the Companies Act stipulates that a formal general meeting must be convened, the company will have to do this,	Subject to our comments in paragraph 14 above, we believe that a special meeting of members should be arranged and that a resolution should be adopted on a 2/3 majority vote.

			and cannot in such a case rely on a signed resolution.	
17	The existing articles of the company do not permit the directors themselves to remove from office a director who is disinterested or disruptive.	Include a new article (article 14.5) to permit a two-thirds majority of the directors to remove one of their number from office, if they believe this to be in the best interests of the company, after offering that director a reasonable opportunity to hear and respond to the reasons for removal.	The ECT Act does not authorise the Minister to remove a troublesome or inefficient director. It is important, for the efficient functioning of the board of directors, for the board to have the power to remove from office a director who is hampering its effective functioning. Obviously, if the board removes a director in terms of new article 14.5, the Minister will appoint a replacement in terms of the ECT Act.	We believe that this right should be reserved to the members only based on the criteria listed in paragraph 16 above, namely a 2/3 majority vote.
18	The existing articles do not address the situation where the Minister, for whatever reason, fails to appoint new or replacement directors when the terms of office of the current directors are drawing to a close.	Include new article 14.2 which obliges the board of directors, when any vacancy arises, to notify the Minister in writing, and request the Minister to appoint a replacement. As long as the directors do so, even if the Minister fails to appoint a replacement, and even if this failure reduces the number of directors in office to less than the statutory minimum of 9 (section 62(a) of the ECT Act), the remaining members will be entitled to continue operating as such, their acts and decisions being valid, as long as there are at least 5 directors in office.	It could easily occur that the Minister, through pressure of other work, or by being out of the country, is not able to appoint new directors of the company as soon as the terms of office of the existing directors terminate. If this occurred, the company would be without any, or its full complement of 9, directors. Unless the articles deal with this situation, it would mean that the company would be hamstrung, being unable to operate at all. Hence the new article 14.2 providing for the continuation in office of the directors whose terms of office are ending, until the Minister appoints replacements, as long	We recommend that provision be made, compelling the board of directors to copy the members on any such notice sent to the minister.

			as they notify the Minister and request the Minister to appoint replacements.	
19	Existing article 20 provides for the rotation of directors, but does not do so adequately. For example, it does not stipulate with enough precision when a period of rotation commences or ends; this is a recipe for confusion. Furthermore, it obliges almost half the board of directors to resign at every period of rotation; this will rob the board of directors of vital experience and continuity, and will hamper its effectiveness.	<p>Replace existing article 20 with new article 14.3 providing for the following :</p> <ul style="list-style-type: none"> • Chairperson appointed for 4 years. • The remaining 8 directors to be appointed for 4 years, subject to the rotation provision set out below. (Existing article 20 provides for a period of appointment of only 3 years for directors other than the chairperson.) • The period of rotation of office of directors is fixed with reference to the AGM, creating the certainty lacking in the existing article 20. • Two of the 8 directors must resign at each AGM (instead of the 4 provided for in the existing article 20). • The longest serving directors must retire. • A retiring director will be eligible for re- 	<p>The ECT Act is silent as to how long the chairperson and the directors serve as such. The articles must therefore deal with this. They must do so in a manner which allows for rotation of directors, but does not result in the board :</p> <ul style="list-style-type: none"> • Losing too many experienced members at one time; or • Having less than the 9 members required by the ECT Act. 	<p>We have no objection to this proposed change</p> <p>The following must however be considered:</p> <ol style="list-style-type: none"> a) Whilst the retention of skills and experience is important at board level, we believe it is even more important at management (staff) level. b) The board, not having any executive responsibilities itself, should be able to comfortably manage the influx, rotation and initiation of new inexperienced directors. c) The need for a stable and experienced board must be balanced against the need to introduce new board members with fresh perspectives and strategic philosophies. The board's skills and experience base should remain as dynamic as possible, and we believe this can be achieved through the regular and responsible rotation of board members.

		<p>appointment, but only for 2 consecutive terms of office (this limitation is not included in the existing article 20).</p> <ul style="list-style-type: none"> Neither the chairperson nor any other director will be compelled to retire compulsorily if the Minister, for whatever reason, has not appointed a replacement upon or immediately before that retirement. (This provision is not included in the existing article 20.) 		
20	Existing article 24 obliges the board to establish 3 committees, and to ensure that such committees meet at least 4 times each year.	<p>Replace existing article 24 with new article 16.1.4 which</p> <ul style="list-style-type: none"> Obliges the board to establish only one committee, namely the management committee referred to specifically in section 61(4)(d) of the ECT Act. Permits the board to create such other committees as it sees fit, and to delegate powers and assign duties to such committees in the board's entire discretion, subject to 	Although the ECT Act empowers the board to create committees, it obliges the board to create only one, namely a management committee. The articles should not go further than the ECT Act. The changing circumstances in which the company operates may, and probably will, necessitate changes to committee structures from time to time, involving the creation of new committees, and the dissolution of existing committees. The articles must give the board the flexibility to create and disband committees as is necessary. Also, it may not be	No Comment

		<p>the proviso that the board will not be divested of any such power or duty by virtue of its delegation or assignment (a proviso not included in the existing article 24).</p> <ul style="list-style-type: none"> Does not oblige the board to ensure that any committee meets any minimum number of times each year. 	<p>appropriate, in any particular circumstance, to oblige a committee to meet more than, say, once or twice a year. The articles should not contain a provision obliging committees to meeting 4 times each year; if the board takes a different decision concerning a particular committee, this means that the board must initiate the time-consuming and expensive process of amending the articles of association.</p>	
21	<p>Annexure A to the existing articles sets out, in considerable detail, the criteria and procedures for the establishment and dis-establishment of second level domains, and for delegation to such domains.</p>	<p>Delete annexure A from the articles, and include new article 16.9 obliging the board to determine procedures and criteria from time to time for the establishment and dis-establishment of second level domains, and for delegation to such domains.</p>	<p>Section 61(4)(k) of the ECT Act stipulates that the memorandum and articles of association of the company must <i>"provide for the procedures and criteria for the establishment and dis-establishment of second level domains and for delegations to such domains"</i>. The ECT Act does not state that the memorandum or articles must <u>contain</u> those procedures and criteria, simply that the memorandum or articles must <u>provide for</u> those procedures and criteria. Given the rapid pace of change in the whole area of electronic communication, it is highly likely that the abovementioned procedures and criteria will have to be amended or adapted on a regular basis. If those procedures and criteria</p>	<p>We agree with this proposed changed, subject to the criteria that the establishment and/or change of any procedures or criteria relating to the establishment, dis-establishment and/or delegation of second level domains be presented to the membership for approval on a 2/3 majority basis.</p>

			are contained in the articles themselves, the articles will have to be formally amended, at considerable expense, every time the procedures or criteria are changed. This is cumbersome and ineffective. Far better simply to oblige the board, under the articles, to develop the required procedures and criteria, and amend them from time to time.	
22	The existing article 30 states that, if the number of directors is reduced below the number fixed by the existing articles as the minimum quorum, the continuing directors may act only with the permission of the Minister.	Delete existing article 30, and replace with new article 14.2, the terms of which are described in item 18 above.	The existing article 30 allocates to the Minister a power which is not given to the Minister in terms of the ECT Act. As a matter of law, the Minister can exercise only such powers as are given to him/her by an act of Parliament. The stipulation in the existing article 30 is therefore not lawful. Furthermore, the key number is not the quorum of directors, but rather the number of directors in office, as stipulated under the ECT Act. The new article 14.2 has been drafted with reference to that number, rather than the quorum of directors.	No Comment
23	Existing article 60 empowers, but does not oblige, the board to appoint a CEO.	Include new article 23 which obliges the board to appoint a CEO.	In sections 63 and 66, the ECT Act makes it clear that the board must appoint a CEO and that, if the CEO is at any time unable to perform his or her functions, an acting CEO must	No Comment

			be appointed. It is imperative that these obligations be included expressly in the articles, as has been done in new article 23.	
24	<p>The existing articles set out certain obligations of the board and the company, as contained in the ECT Act. However, the existing articles do not expressly include certain very important obligations of the company under the ECT Act, including :</p> <ul style="list-style-type: none"> • The obligation to submit to the Minister a statement of proposed income and expenditure before the beginning of each financial year. • The obligation to deliver a narrative report to the Minister within 3 months after the end of each financial year. 	<p>Include a new article 16 which sets out not only all the powers of the board of directors, but also all the obligations of the directors under the ECT Act.</p>	<p>As I have already indicated, it is unlikely that the directors and officers of the company will refer regularly to the ECT Act itself. It is therefore important to include in the articles, which they are far more likely to have regular reference to, all the obligations of the company and its board of directors.</p>	<p>The Authority is again reminded that the board of directors is appointed on a part-time and non-executive basis (Section 65(5) of the ACT). In light of this it is clear that the board has a particular function, where that function is not the day-to-day management of the Authority.</p> <p>We believe that the board is intended to provide strategic direction to the Authority, and in particular to matters relating to policy. The board must therefore be wary not to become too involved in the day-to-day management of the Authority as this function should remain with the staff of the Authority.</p>
25	<p>The existing article 18 permits the payment to directors of reasonable expenses, and an allowance for attending meetings, but specifically prohibits them from receiving any other remuneration in respect of the performance of their duties on behalf of the company.</p>	<p>Replace existing article 18 with new article 15, which permits the payment to directors not only of expenses and an allowance for attending meetings, but also makes it clear that :</p> <ul style="list-style-type: none"> • If directors perform work or services on behalf of the company outside of their non- 	<p>The existing article 18 is unnecessarily restrictive. The ECT Act does not expressly or impliedly prohibit the directors from receiving, apart from expenses and an allowance, any other remuneration from the company. It may well be that it is appropriate for the company to make use of particular experience or expertise of a director on a</p>	<p>We refer you to our comments under paragraphs 4 and 24 above.</p>

		<p>executive duties, they will be entitled to reasonable remuneration for such work.</p> <ul style="list-style-type: none"> • Directors will, as contemplated in the Companies Act, be entitled to contract directly or indirectly with the company, on condition that full disclosure is made in the manner contemplated in the Companies Act. 	<p>fee-paying basis. All that is required in such a case is that the remuneration paid to the director be disclosed to the board, and that it be reasonable, as contemplated in the Companies Act and the Income Tax Act; this is what the new article 15 stipulates, as read together with clauses 6 and 7 of the memorandum of association of the company.</p>	
26	<p>The existing articles 81 to 83 indemnify the directors not only against the customary risks and claims, but also against :</p> <ul style="list-style-type: none"> • Costs they may incur in defending civil or criminal proceedings in which it is alleged that they have conducted the business of the company fraudulently or recklessly. • Any claims made against them in the case of them defaming a third party. 	<p>Include a new article 26 which states only the customary indemnity for the directors of the company, and omits the unusual indemnities included in the present articles.</p>	<p>It is almost unheard of for a company to indemnify its directors against the cost of legal proceedings brought against them in which is alleged reckless or fraudulent conduct. I have certainly never encountered such a provision in the articles of any public or non-profit company. If the company ever paid such fees or costs on behalf of any director, the Minister would have considerable difficulty justifying such costs to Parliament in terms of the Public Finance Management Act. If such proceedings are brought against directors, and the directors are ultimately successful, it will be for the court, if appropriate, to direct</p>	No Comment

			<p>the unsuccessful parties to those proceedings to pay the costs. It is entirely inappropriate for the company to assume blanket liability in this regard. It is also entirely inappropriate for the company to indemnify the directors against damages they may be liable for as a result of defamatory utterances. Again, I cannot see how the Minister could justify such payments under the Public Finance Management Act.</p>	
27	Existing article 84 repeats the prohibition against distribution of income and property of the company which is already contained in clause 7 of the memorandum.	Delete existing article 84.	It is unnecessary and burdensome to repeat in the articles of association material already included in the memorandum.	No Comment
28	Existing articles 87 to 90 set out in some detail procedures and material relating to certain appeal mechanisms, and certain dispute and arbitration procedures.	Rewrite the relevant articles, to create new article 16, obliging the company to determine, from time to time appeal mechanisms and arbitration procedures as required by the ECT Act, but not setting out such mechanisms and procedures in the articles themselves.	Sections 61(4)(i) and (l) stipulate that the memorandum and articles of association of the company must " <i>provide for the determination through arbitration</i> " of certain disputes, and must " <i>provide for appeal mechanisms</i> ". Experience or changing circumstances will almost certainly mean that such arbitration provisions and appeal mechanisms will have to be altered from time to time. If those procedures and mechanisms are enshrined in the articles, any change will require expensive and time-	We agree with this proposed changed, subject to the criteria that the establishment and/or change of any appeal mechanisms be presented to the membership for approval on a 2/3 majority basis.

			<p>consuming amendments to the articles. Far better to oblige the directors, by resolution of the board, to develop and amend such procedures and mechanisms from time to time. The wording of the ECT Act does not compel the company to set out those mechanisms and procedures in the articles themselves, but only to provide for their creation. This is dealt with in new articles 16.10 and 16.11.</p>	
29	<p>Although the existing articles do not express themselves on this point, they seem to imply that any resolution of the board of directors will be passed if it is approved by a simple majority.</p>	<p>Include a new article 19.6 which obliges the board to make every effort to reach consensus on all questions but that, if consensus cannot be reached, the resolution must be passed by a majority of two-thirds of the directors.</p>	<p>The company is a statutory body dealing with public funds, and regulating intellectual property and other rights of national importance. In the circumstances it is appropriate that all decisions of the company (which are made through its board of directors) be supported by a comfortable majority of those directors. It will not assist the harmonious and effective functioning of the company if significant numbers of any of its directors are opposed to resolutions adopted by the board.</p>	No Comment.

30	Existing article 29 empowers the board of directors to adopt a resolution by signing a written document, rather than by convening a formal meeting. The existing articles do not, however, expressly permit the directors to conduct their discussions and meetings by way of electronic communication, telephone conferences, etc.	Include new articles 19.8 and 19.9, authorising the directors to adopt valid resolutions by having them signed by a majority of two-thirds of the directors, and authorising the board to hold meetings making use of modern communication technology, such as video conferences, telephone conferences, etc.	The directors of the company will be scattered around the country. It will be very expensive for the company to hold regular formal meetings of the board of directors; the cost in air fares will be very high. It may well be possible for the company to conduct certain of the business of its board of directors by way of telephone conferences or video conferences, etc.	We agree with this proposed change and would urge the Authority to extend same to the AGM and other membership meetings.
31	The existing articles do not permit the company to distribute copies of the annual financial statements in electronic form.	Include new article 22 which permits the company, if permission has been given by any particular member, to deliver a copy of the annual financial statements of the company to that member in electronic form, rather than by the more expensive and cumbersome method of sending a copy by post.	Under the Companies Act, every public company (including section 21 companies) is required, before the AGM, to forward copies of the annual financial statements to all members. In the case of our company, with a potentially large membership, significant costs could be involved in printing many copies of the annual financials, and sending them by post. It is therefore important that the articles include the provision contained in the Companies Act, whereby copies of the annual financials can be sent electronically.	No Comment
32	Existing articles 71 to 79 deal with the giving of notices to members, directors and others. The existing articles do not expressly stipulate that notice can be given by e-mail or fax.	Include new article 25 which permits the delivery of notices by e-mail and fax.	It is expensive and time-consuming for a company with a large membership to give notice of meetings by ordinary post. It is cheaper and more convenient to give notices by e-mail or fax, in cases where	No Comment

			members have access to such means of communication. There is nothing in the Companies Act which prohibits a company from giving notice of meetings in this way.	
33	The existing articles do not contain many of the provisions required by the Nonprofit Organisations Act, 1997, for section 21 companies wishing to apply for registration as nonprofit organisations under that Act.	Include new article 27 setting out all the compulsory provisions of the Nonprofit Organisations Act.	If the company applies for and obtains income tax exemption in terms of sections 30 and 10(1)(cN) of the Income Tax Act, it would be compulsory for the company to apply for and obtain registration as a nonprofit organisation under the Nonprofit Organisations Act. That Act stipulates that certain provisions must be contained in the founding document of a nonprofit organisation. Hence the inclusion of new article 27.	No Comment.