

Reconsideration Request Form

Version of 11 April 2013

1. Requester Information

Name: Merck KGaA
Representative: Dr. Torsten Bettinger
Address: Contact Information Redacted

Email:

Phone Number (optional): Contact Information
Redacted

2. Request for Reconsideration of (check one only):

Board action

3. Description of specific action you are seeking to have reconsidered.

The present Reconsideration Request concerns an inappropriate decision taken by the New gTLD Program Committee, which acts on behalf of the ICANN Board with regard to new gTLD matters. As stated in the Board's resolution of April 10, 2012: "[...] Board hereby delegates to the Board New gTLD Program Committee all legal and decision making authority of the Board relating to the New gTLD Program (for the round of the Program, which commenced in January 2012 and for the related Applicant Guidebook that applies to this current round) as set forth in its Charter..." Thus, the decisions of the NGPC may be properly considered actions of the ICANN Board.

On July 13, 2013, the NGPC issued a resolution which, in part, recommended that a retroactive "discretionary" standard should be imposed on DSRPs in evaluating the

timeliness of specific submissions in the context of new gTLD dispute procedures. As stated by the NGPC:

“In the interest of fairness and reasonableness, and after a review of the Ombudsman reports, the NGPC has determined that it is appropriate for the NGPC to ask the DRSPs, in light of the circumstances presented by the Ombudsman, to reconsider their strict adherence to the deadlines set forth in the Applicant Guidebook and *apply reasonable judgment* in such matters. Taking this action will have a positive impact on ICANN's accountability to the community, as it is appropriate to review of all applicable circumstances when taking decisions that have significant impact on participants within ICANN.”

As may be clearly noted from the above quotation, the NGPC made this ruling on the basis of the ombudsman's reports. The ombudsman, however, acted improperly and in manifest violation of due process in preparing these “reports,” and thus the NGPC's decision cannot have been made in light of the full and complete set of relevant facts. Moreover, it is herein challenged that ICANN (including through its ombudsman and the NGPC) lacks jurisdiction to oversee, appeal or challenge the procedural decisions taken by its properly-appointed DSRPs, as nothing in the Guidebook, the ICANN Bylaws, or otherwise grants it such authority.

Although the NGPC ruling discusses only two cases which may be affected by its ruling (those involving the strings .AXIS and .GAY), there is in fact a third case which was intentionally kept under the radar to prevent detection by the relevant respondent (Merck

KGaA), whose rights have been intentionally harmed by the actions herein described. This third case, concerning the applied-for TLD .MERCK, is far more dramatically affected by the NGPC ruling. In the .GAY situation, the dispute in question concerned a typographical error committed by a provider (in entering the email address of an objector incorrectly when sending a deficiency notice). Indeed, the NGPC's remedy, ordering a complete review of the matter on the basis of an entirely different evaluation standard is unnecessary to address an issue this minor. The second case concerns the late filing of a response, which is not provided for under the Guidebook. That said, the majority of other, tradition domain name dispute mechanisms provide for some leeway in the acceptance of responses (for example, paragraph 5(e) of the UDRP), due to the tight timelines under which respondents are placed in ADR matters. Thus, although inappropriate, there is perhaps some slight precedence for the NGPC's actions in this regard.

The same cannot be said for the impact of the NGPC's ruling with regard to the .MERCK dispute. In this case, the prospective Objector (Merck & Co.) elected to wait until the very last second of the filing deadline (notwithstanding the nine months it had to prepare its materials for submission), to transmit its materials to the ICC. It sent no email communications to the ICC prior to the running of the deadline, and indeed its eventual submissions were not transmitted until ten and eleven minutes past the close of the objection period (thus well past the ICANN-mandated "grace period" of four minutes and fifty-nine seconds). Unlike in the .AXIS situation, concerning a late-filed response, the text of the Applicant Guidebook expressly and affirmatively prevents the imposition of a

“discretionary” standard with regard to the acceptance of untimely objections. As stated in Article 7(a) of the New gTLD Dispute Resolution Procedure: “[a]ny Objection to a proposed new gTLD must be filed before the published closing date for the Objection Filing period.” Thus, the NGPC’s ruling, with regard to the .MERCCK dispute, is in direct contravention with published ICANN policy, to which all other prospective objectors were bound. Merck & Co. appears to be the only objector who stands to benefit from this improper, post-facto change to the Guidebook’s tenets. Accordingly, the NGPC’s actions constitute a breach of the Core Values established in Article 2 of the ICANN Bylaws, which include the requirement to make “decisions by applying documented policies neutrally and objectively, with integrity and fairness.” As discussed in more detail below, the NGPC’s actions are additionally in violation of the requirement that all policy development mechanisms be undertaken in an “open and transparent” manner, to “ensure that those entities most affected can assist in the policy development process,” as set out in point 7 of Bylaw’s Core Values.

The NGPC’s ruling was reached on the basis of the ombudsman’s reports. However, the ombudsman did not undertake a thorough assessment of the situation in this case, and indeed affirmatively prevented the respondent in the .MERCCK action from participating in the (apparently extensive!) discussions between his office, members of the ICANN Board and the objector, and from presenting any arguments or evidence on its own behalf. As the respondent to the action in dispute, the respondent (Merck KGaA) had an inalienable and absolute right to be heard in any communications between the ICANN ombudsman and opposing counsel. Principles of natural justice dictate that where a

party, who legal rights are in issue in a given dispute, must be properly joined to those proceedings. In this case, the ombudsman went to great lengths to ensure that Merck KGaA was denied its right to be heard, and issued its recommendations to the NGPC on the basis of unilateral communications with only one side of controversial dispute.

Background Information About the Parties

Before entering into a discussion of the ombudsman's actions which led to the issuance of the NGPC's ruling, it may be helpful for the Governance Board to be provided with a very brief summary of the history of the parties and the nature of their dispute.

The parties involved in the underlying dispute are Merck & Co., a US pharmaceuticals concern which was formerly a subsidiary of the respondent, whose attorneys (either via inexcusable negligence or a strategic attempt to gain additional time to prepare their materials), and Merck KGaA, the world's oldest pharmaceutical company and the former parent of the objector. Both parties have filed for numerous TLDs, and are currently engaged in several LRO actions. The two LRO actions (as well as a string confusion objection regarding an unrelated string) filed by Merck & Co. against Merck KGaA have been dismissed as unfounded. Merck KGaA is still awaiting the results of its three LRO actions filed against Merck & Co. (and anticipates a positive outcome on the basis of the majority holding in *Del Monte Corporation v. Del Monte International GmbH*, LRO Case No. LRO2013-0001), as well as its two Community Based Objections against Merck & Co. before the ICC. Both parties have filed for the .MERCK TLD, and currently the companies exercise their rights in the "Merck" trademark under a reciprocal

use agreement, which has been in force (through various versions and revisions) since the 1930s. Merck & Co.'s rights are territorially limited to domestic use within North America, whereas Merck KGaA retains those rights globally throughout the rest of the world. Merck KGaA has also taken legal action against the infringing activities of Merck & Co. before the District Court of Hamburg, Germany, and in the courts of the United Kingdom. Merck KGaA is preparing additional legal measures in other jurisdictions.

The Ombudsman's Actions

The fact that the ombudsman had been engaged in extensive communications with the objector (Merck & Co.) and its counsel only came to the respondent's attention well after the issuance of the NGPC's ruling. This is because, although Mr. LaHatte discussed many of his ongoing "investigations" on his online blog, he intentionally elected not to utilize the names of the parties, or the TLD, involved in the .MERCCK case. He named the .AXIS and .GAY TLDs, but intentionally omitted any identifying references to the parties or TLD in the present matter. His behavior vis-à-vis the parties and in his email communications, and his statements in a recent reply message to Merck KGaA make abundantly clear his intent to prevent Merck KGaA from asserting its legal rights, and from providing evidence which would certainly have been material for the NGPC.

A short outline of the actions taken in this matter, as they involve the ombudsman, will be provided below for the benefit of the Governance Board.

As noted above, Merck & Co. did not submit its pleadings before the ICC in a timely

manner. Counsel for Merck & Co. made a number of allegations, first claiming technical failure and then “human error,” to excuse its actions before the ICC. These fact-specific issues are not in play in the present matter, and thus will be left aside for the purposes of this Request. If the Governance Board would like any additional information, however, Merck KGaA will be happy to supply any further evidence that is required. For the present, it is noted that Merck & Co.’s objections were untimely filed. Two days after the deadline had passed, Merck & Co.’s counsel sent a message to the ICANN ombudsman, improperly failing to copy the respondent (Merck KGaA) under the required communications rules of Article 6(b) of the New gTLD Dispute Resolution policy. Merck & Co.’s counsel asked, essentially, how he could receive special treatment and have his untimely filed pleading accepted by the ICC. See **Annex 1**. The ombudsman’s reply suggested that Merck & Co. should take the matter up with the ICC. Merck KGaA was only provided with a copy of this email when Merck & Co. requested acceptance of its improperly filed materials with the ICC. Given that the ombudsman appeared to have correctly indicated that the ICC was the sole authority on such matters, it appeared at that time that ICANN was taking no further role in the dispute. In the weeks that followed, the ICC requested numerous rounds of comments from the parties, and entered its proper and accurate ruling to dismiss Merck & Co.’s untimely filed submissions.

On July 12, Merck & Co.’s counsel sent an email communication to Mr. Jeffrey, Mr. Akram and Ms. Dryden, again arguing that its untimely submissions should be accepted. At that time, Merck & Co. did not disclose that it had been undertaking extensive conversations with the ICANN ombudsman or members of the ICANN Board. Merck

KGaA replied to this message, copying the same individuals listed on Merck & Co.'s email, indicating that the issue had already been properly handled by the ICC. Merck & Co.'s counsel sent another letter, again advancing the same arguments already rejected by the ICC. Merck KGaA replied on July 29, noting that there were no grounds for any further consideration of the issue, but indicating that if ICANN, or any other body were to contemplate the reopening of these discussions, that Merck KGaA must be offered its opportunity to reply. At no time did the Ombudsman, the relevant ICANN Board members, or any member of ICANN staff reply to the various messages of Merck KGaA, nor offer it (the respondent in the matter, whose legal rights were in issue through the entire course of these discussions) any opportunity to refute the dubious claims of Merck & Co., to challenge the jurisdiction of the ombudsman, or to assert any arguments on its own behalf.

On August 16th, Merck KGaA became aware that not only the ICANN ombudsman, but also members of the ICANN Board and the entire NGPC had been making decisions in the matter, which directly and adversely impacted its rights, all without being provided an opportunity to be heard, to provide evidence or arguments on its behalf, or even to be provided with mere notice of the ongoing discussions. On that date, Merck KGaA was copied to a lengthy pleading, filed by Merck & Co. with the ICC, demanding rehearing of the dismissal on the basis of a newly-imposed "discretionary" standard, which was designed to offer special and preferential treatment to an extremely small percentage of dispute participants. At that time, Merck KGaA discovered that ICANN, via its Board members, staff members, and ombudsman, had been engaging in a lengthy and complex

series of unilateral discussions, including a clandestine, in-person hearing of the matter during the ICANN meeting in Durban. At no time was Merck KGaA made aware of these communications or offered a right to refute the allegations made by Merck & Co. (some of which are very dubious, including one early version of their “timeline” which has been affirmatively disproven by the timing of their filings with WIPO).

Accordingly, on August 20th, Merck KGaA’s counsel contact Mr. LaHatte directly, noting a copy of an email which had been listed as an Annex by Merck & Co., and requesting an explanation of the nature and extent of these discussions. See **Annex 2**. Mr. LaHatte’s reply made quite clear that he had no intention of allowing Merck KGaA any opportunity to defend its rights or to challenge the submissions and claims of Merck & Co. Furthermore, he questioned how Merck KGaA had become aware of his involvement, and indicated that his communications were intended to be “confidential.” See **Annex 3**.

Mr. LaHatte’s claims that his communications were intended to be “confidential,” and that he felt he did not have “permission” to discuss this issue with Merck KGaA, are extremely disingenuous for a number of reasons. First, as the potential respondent in these matters, Merck KGaA has an absolute right to both be heard in the matter and to be kept apprised of all case-related communications. Secondly, Merck KGaA was copied on several of the emails sent by Merck & Co.’s counsel to ICANN staff, thus clearly indicating Merck & Co.’s assent to the inclusion of Merck KGaA on all such discussions. Third, Mr. LaHatte has apparently been posting details of this dispute publicly on his

blog for several months now, and has specifically solicited the input from the online community (see **Annex 4**). To quote from his blog entry of June 10th, discussing the Merck & Co. late filing issue:

“To undertake this investigation I have undertaken a number of steps. In particular I discussed this with the applicant with an exchange of emails, I have talked to Christine Willett (VP gTLD Operations) and legal staff at ICANN, and I have also made a call for comments on my blog and Twitter feed. I believe it is important that the community should comment on this issue, both from the perspective of applicants and of objectors. I am grateful to those who have made comments, which have been thoughtful and useful. I am conscious that there have been very substantial investments in the applications, but also of course recognise that objectors also consider that they have economic and other interests affected by awarding a new gTLD to applicants.” [emphasis added]

So, apparently, the ombudsman was willing to discuss this issue with anyone, anywhere in the world, except the party which is adversely affected by this inappropriate ruling. By intentionally preventing the respondent, Merck KGaA from discovering the nature and extent of his closed-door dealings with Merck & Co., and his discussions with ICANN staff and Board members, combined with his election to discuss these issues on his blog without naming the concerned parties (or mentioning the name “Merck & Co.”), it is clear that Mr. LaHatte conspired to ensure that Merck KGaA was shut out of the process, and denied an opportunity to assert its rights or challenge the legality of his actions. It is highly inappropriate for one party to a dispute to have recourse to a deciding body

without providing copies of said communications, and a full and fair chance to respond, to the other party to the action. Such conduct is akin to unilateral communications between an appointed Expert and one party, which is expressly forbidden by Article 6(b) of the new gTLD dispute procedure. These actions taken by the ombudsman are manifestly contrary to the principles of natural justice. Both parties to a dispute must be provided with full knowledge of all discussions regarding the contested matter, and certainly with regard to the passage of any rulings which would severely and detrimentally harm their rights and interests. The fact that the ombudsman actively discussed this issue with numerous unrelated third parties, but refused to hear the arguments of the respondent to the dispute is not only extremely troubling, but constitutes a serious breach of due process. The ombudsman's reports to the NGPC, therefore, were based on biased information, did not contain the full and necessary facts concerning this matter, and were intentionally skewed in a manner which deprived Merck KGaA of its due process rights.

The Ombudsman's Lack of Jurisdiction

The ombudsman's recommendations to the NGPC are additionally inappropriate in this matter, as the ombudsman lacks jurisdiction to review the decisions taken by a DSRP, which is a "supplier" of dispute services and thus explicitly removed from the ombudsman's oversight under Article V (3)(1) of the ICANN Bylaws. The ombudsman himself notes that this is likely the case, noting on his blog that it is indeed highly questionable whether ICANN has any scope to intercede in these matters, and appears decidedly unsure as to whether he has jurisdiction to enter any ruling on this issue (please

refer to **Annex 4**). He appears to come to the conclusion that, since Merck & Co. raised the issue with him, this is in his mind sufficient to grant him authority to review procedural matters uniquely within the control of the DSRPs. Specifically, he states:

“This is a matter where I do need to carefully consider the jurisdiction to investigate the complaint. My jurisdiction is limited to issues between ICANN and the ICANN community. The issue is therefore whether a dispute resolution provider, contracted by ICANN to evaluate objections, can be subject of an investigation by the ombudsman in relation to fairness. Put in another way, is the dispute resolution provider a member of the ICANN community? My jurisdiction is excluded for certain types of contractual relationship with the bylaws says “or issues related to vendor/supplier relations”. However that sort of contractual relationship is intended to deal with issues of procurement rather than the more complex arrangements made in the context of the gTLD programme. The complainant did make the point that ICANN was consulted during the course of the discussion about loosening the rigour of the time for objection. So in the context of the purpose of the exclusion, I do believe that I have jurisdiction. Certainly the applicant/ complainant submitted that I did, and should investigate the decision.”

This does not, in any way, constitute sufficient grounds for a finding of jurisdiction. Mr. LaHatte has cited no provision, in the Guidebook or otherwise, which indicates that the ICANN ombudsman or ICANN Board (via the NGPC) can hear “appeals” of sorts, where one party has failed to comply with the stipulated rules of procedure. Thus, in the context

of this Reconsideration Request, the Governance Board must consider whether the ombudsman's exercise of jurisdiction is defensible under the ICANN Bylaws, or on any other strong, clearly-published and unambiguous grounds.

Arguing that jurisdiction "by consent" is sufficient is extremely inappropriate in this case, where only one party to the dispute was granted leave of hearing. Merck KGaA was never asked to comment on this issue, never given an opportunity to challenge ICANN's jurisdiction in this matter, and was not allowed to submit any arguments or evidence to challenge Merck & Co.'s dubious claims. One party cannot "consent" to jurisdiction in an improper venue where the other side has been affirmatively denied an opportunity to comment or challenge such jurisdiction. Moreover, where a particular body has no authority to hear a particular case, it cannot exercise jurisdiction simply because a case is filed with it.

The Resolution of the NGPC

Turning again to the ruling issued by the NGPC, on the basis of the ombudsman's incomplete reports, there is the question of the legality of the NGPC's actions. Under the laws of the United States, hard deadlines (including filing deadlines and statutes of limitations) are strictly imposed. Under US law, statutes of limitations, or statutes of repose, establish absolute time bars, after which no case may be brought. Filing deadlines are strictly enforced in all cases, unless explicit, prior-established provisions allow for late filing in a particular instance. In the absence of such a provision, however, untimely filings are rejected, regardless of how minor or technical the breach may be. Accordingly,

an attorney in the United States can have no reasonable expectation that a tribunal would accept an untimely filing when there is no explicit, previously-established exception to the deadline.

In a recent case, Merck & Co. (who is now asking for special treatment from the ICC), itself successfully moved to dismiss a complaint because the plaintiffs had failed to file within the statute of limitations. Merck & Co. argued for the strict enforcement of the statute of limitations, and insisted that the plaintiff must bring its case within the two-year filing window, regardless of any mitigating or later-arising factors. In decreeing that the statute of limitations (which governs the filing time of actions), the Supreme Court of Virginia wrote: “It is well-established that statutes of limitations are strictly enforced ... A statute of limitations may not be tolled, or an exception applied, in the absence of a clear statutory enactment to such effect. [A]ny doubt must be resolved in favor of the enforcement of the statute.” *Casey v. Merck & Co., Inc.*, 283 Va. 411, 416 (Va. 2012) (citations omitted, case provided in **Annex 5**). See also *Mione v. McGrath*, 435 F. Supp. 2d 266, 270 (S.D.N.Y. 2006) (same, see **Annex 6**).

Not all examples of strict filing deadlines in the United States are based on statutes of limitations. The Securities Investor Protection Act provides for the liquidation of bankrupt broker-dealers, and it sets forth a procedure by which customers of the bankrupt entity may file claims against the estate for lost funds and securities. The Act sets a hard deadline for the filing of all customer claims against the bankrupt debtor. Customer claims filed after the bar date are denied because “[t]he statutory time limitations for

filing a claim in a SIPA case are clearly delineated and do not allow the Court to fashion judicial exceptions to such filing deadlines.” *In re Lehman Brothers, Inc.*, 493 B.R. 437, 444 (Bankr. S.D.N.Y. 2013) (see **Annex 7**). In the absence of an explicit exception to a filing deadline, “equitable pleas for special exceptions are beyond the scope of the statutory language and are unavailing.” *Id.*

Here, the applicable rules do not provide for any extension of the deadline to file objections. The Guidebook explicitly states, in Article 7(a) of the new gTLD dispute resolution procedure – the controlling authority on such matters, which was published well before the opening of the new gTLD application cycle, and over a year prior to the objection period – that no objections may be accepted if filed after the published deadline. To quote, the provision reads: “[a]ny Objection to a proposed new gTLD must be filed before the published closing date for the Objection Filing period.” Accordingly, Merck & Co. had no reasonable expectation of the deadline being “discretionary,” and under U.S. law, they are entitled to no extension of any kind.

While deadlines that have no statutory exceptions are strictly enforced, some filing deadlines in the United States have “excusable neglect” provisions. Under those provisions, a party’s late-filed submission will be considered timely if the party is able to show “excusable neglect.” As defined in *Kanoff v. Better Life Renting Corp.*, 350 Fed. Appx. 655, 657 (3d Cir. 2009), “excusable neglect” describes situations where the court, after weighing the relevant considerations, is satisfied that counsel has exhibited substantial diligence, professional competence and has acted in good faith to conform his

or her conduct in accordance with the rule, but as the result of some minor neglect, compliance was not achieved. See **Annex 8**.

The “excusable neglect” standard echoes the common requirement in the United States that an attorney act with diligence and competence in representing a client. *See, e.g.*, New York Rules of Professional Conduct, Part 1200, Rule 1.3(a) (“A lawyer shall act with reasonable diligence and promptness in representing a client.”). Missing a published deadline is not an example of “excusable neglect,” however, and often such behavior results in bar sanctions for the responsible attorney. *See, for example, Board of Professional Responsibility, Wyoming State Bar v. Dunn*, 262 P.3d 1268 (Wyo. 2011) (attorney sanctioned for late filings), and *In the Matter of Brown-Williams*, 2012 WL 366587 (Ga. 2012) (attorney sanctioned for missing statute of limitations).

A recent case from New York illustrates this point. In *Graves v. Deutsche Bank Securities, Inc.*, No. 07-05471, 2011 WL 1044357 (Mar. 4, 2011, S.D.N.Y.), the court rejected an attorney’s filing because it missed the 11:59 p.m. filing deadline by one minute and the attorney was unable to establish excusable neglect. See **Annex 9**.

Accordingly, there is no basis in fact or law for the NGPC’s post-facto imposition of a discretionary standard, in direct contravention of Article 7(a) of the Guidebook, to benefit only a select few participants in the new gTLD dispute process. The NGPC’s ruling was made on the basis of incomplete, and improperly compiled, reports by the ICANN ombudsman, and as it stands, represents a gross dereliction of ICANN’s duty to treat all

participants equally and fairly (under the ICANN Bylaws) and of principles of due process.

4. Date of action:

The NGPC issued its recommendation on July 13, 2013, although Merck KGaA was unaware of the intended impact of this ruling (as it did not mention “Merck & Co.” by name) until opposing counsel filed for rehearing with the ICC on August 16, 2013. Mr. LaHatte’s active exclusion of Merck KGaA from his unilateral discussions with opposing counsel, and failure to provide notice to Merck KGaA (both as the respondent in the disputed action and as a party whose rights were materially affected by his decision) prevented Merck KGaA from being made aware of the impact and intent of the NGPC’s ruling.

5. On what date did you become aware of the action or that action would not be taken?

Neither Merck KGaA nor its counsel was made aware of the ongoing discussion between opposing counsel and members of ICANN staff, let alone of the ombudsman’s election to take a decision in this matter without offering the potential respondent a chance to be heard, until receiving the voluminous file submitted by Merck & Co.’s counsel to the ICC on August 16, 2013. This lack of notice is further confirmed by Mr. LaHatte’s email to Merck KGaA’s counsel on August 20th, in which he indicated that he intentionally and affirmatively prevented Merck KGaA from discovering the nature or existence of his ongoing discussions with Merck & Co., and questioning precisely how Merck KGaA had become aware of his unilateral communications with opposing counsel (see **Annex 3**).

Accordingly, under Article IV, Section 2(5)(b) of the ICANN Bylaws, this Request for Reconsideration of an ICANN staff member's action is brought within the 15-day time limit stipulated for such challenges, starting from the date on which Merck KGaA reasonably became aware of the ruling (August 16th, 2013).

6. Describe how you believe you are materially affected by the action or inaction:

In this case, Merck KGaA was denied its right to respond and be heard, or at a bare minimum, to be provided with any notice whatsoever that the ICANN ombudsman and members of the ICANN Board (it has come to our attention that Ms. Dryden was copied on several of the ombudsman's messages) was engaging in unilateral discussions with opposing counsel. As the respondent in the relevant action, it had an unalienable right to be joined as a participant in these discussions, and to be provided with an opportunity to challenge both ICANN's jurisdiction and the allegations of Merck & Co. Thus, Merck KGaA has suffered real and tangible harm by the loss of its right to be heard in these proceedings.

Additionally, the NGPC ruling in this matter has a direct impact on the outcome of an ADR dispute between two new gTLD applicants, as the NGPC's actions (and direct orders from an ICANN staff member) have triggered a review of an already-closed procedure. See **Annex 10** for a copy of Ms. Willett's letter to the ICC, indicating to the ICC that ICANN intended for a review to be conducted in the .MERCK case (this is made explicit by the fact that Ms. Willett also attached a letter from Ms. Harris (a member of Merck & Co.'s counsel) to ICANN staff – the attachment name, as shown on

the email, is “harris-to-atallah-12jul13[2].pdf”). Ms. Willett’s letter thus makes abundantly clear the fact that the NGPC’s ruling was issued specifically to interfere in this, and a very small, select number of other dispute proceedings. Thus, Merck & Co. has been offered (on the direct order of ICANN) a “second bite at the apple,” to the direct harm of Merck KGaA. This is not equitable practice. Merck & Co. had the same opportunity to assert its rights in the context of the new gTLD dispute procedure as all other potential objectors, and failed to comply with the mandatory requirements. To allow it a “second chance” to file, and to excuse its (likely strategic and intentional) violation of the applicable filing rules, is impermissible under US law, and unconscionable in light of due process requirements. Merck KGaA has thus suffered real and direct harm in this grant of additional, extra-legal “rights” to its opponent, and is thus forced to defend itself when there is no legal basis (as Merck & Co.’s objections should remain time-barred under the applicable and binding rules in effect at the time of filing) for the case now again brought against it.

Furthermore, Merck KGaA has suffered direct financial harm. It has now been put to the extra cost (including attorney’s fees) of again refuting the spurious claims and allegations of Merck & Co. before the ICC, as well as the cost of preparing the present Reconsideration Request for the Governance Board in order redress this matter and see the NGPC’s improper recommendation nullified. Should the Governance Board fail to discharge its duty in this regard, and vacate the relevant portion of the NGPC’s post-facto ruling (which purports to change the mandatory provisions of the new gTLD dispute resolution procedure in a way which benefits only one objector, and only a handful of

parties in total), then Merck KGaA will be put to the additional cost of filing an action for Independent Review with the ICDR, and potentially a case in antitrust against ICANN for breach of its duty as a monopoly provider of DNS services under the US Sherman Act.

8. Detail of Board Action

Given the complex nature of this matter, much of the relevant background and explanatory information has been listed together under heading # 3. It is noted that the NGPC's ruling was issued on the basis of incomplete reports compiled by the ICANN ombudsman, which did not take into account critical facts and arguments which would have been offered by the affected respondent in the .MERCK case.

Additionally, it should be noted that the NGPC's ruling is also insupportable in light of the antitrust law standards of the US and the EU. The NGPC's/ICANN's urging the ICC to grant an exception for a very small number of affected parties (including apparently only one, solitary objector), constitutes an abuse of a dominant position under Section 2 of the US Sherman Act and Article 102 of the Treaty on the Functioning of the European Union (TFEU).

ICANN, as the sole authoritative body worldwide controlling the DNS root, and charged with overseeing and managing the new gTLD registration system, is undoubtedly a monopolist in the sense of US and EU antitrust law. It is settled (indeed, black-letter) law that its status as a non-profit organisation does not grant it antitrust immunity. Nor may ICANN claim immunity on the grounds of the "state-action-doctrine," as its actions with respect to the new gTLD registration system are neither clearly and affirmatively

expressed nor explicitly determined and supervised by the State itself. In fact, the 1998 US Department of Commerce White Paper – which according to ICANN’s own statements dictates its policies still today – explicitly considered and rejected the idea that ICANN should be given antitrust immunity:

“The new corporation does not need any special grant of immunity from the antitrust laws so long as its policies and practices are reasonably based on, and no broader than necessary to promote the legitimate coordinating objectives of the new corporation. [...] Antitrust law will provide accountability to and protection for the international Internet community.”

See **Annex 11**, at section 9, pgs. 15 and 23. As a monopolist under antitrust law, ICANN is under a particular obligation, a special responsibility to act in a transparent, fair, reasonable and non-discriminatory manner and to treat all applicants equally. ICANN has – to the detriment of Merck KGaA – violated not only one, but all of these principles via the NGPC’s declaration requiring the ICC to “review” Merck & Co.’s late filing. While the original procedural rules of the new gTLD process established mandatory filing deadlines at each stage of the process, which were defined and published before the initiation of the process and made binding on all applicants to the same extent, does indeed meet the prerequisites of antitrust law, this recent deviation now required by the NGPC’s declaration clearly does not.

NGPC’s declaration is nothing less than a “lex Merck & Co.,” established behind closed doors, after closure of the proceedings and without any objective justification. It is neither transparent, nor fair, reasonable or non-discriminatory, and treats Merck & Co.

favourably to the detriment of Merck KGaA and all other objectors that abided by the published filing deadlines established by the Guidebook. Monopolists, however, are only allowed to treat companies subject to their regulations differently if there is an objective justification for such unequal treatment. Beyond any doubt, the NGPC's declaration is in clear violation of antitrust law, by issuing a retroactive "law" which applies to (and benefits) only a slim handful of the various concerned parties.

9. What are you asking ICANN to do now?

The NGPC's Resolution of July 13, 2013 which states:

"Resolved (2013.07.13.NG04), in the interests of fairness and reasonableness, notwithstanding the deadlines set out in the Applicant Guidebook, in the future, the DRSPs are permitted and encouraged to use their discretion, in light of the facts and circumstances of each matter, and in cases where it is shown that the affected party is making a good faith effort to comply with the deadlines, as to whether to grant extensions, or deviate from the deadlines set forth in the Applicant Guidebook."

must be vacated.

10. Please state specifically the grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.

Merck KGaA has suffered real, tangible and legal harm as a result of the actions of the NGPC, acting on behalf of the ICANN Board, and therefore has standing to bring this Request. Additionally, Merck KGaA is an applicant in the current new gTLD application cycle, and ICANN's election to directly interfere in an ongoing ADR dispute between

Merck KGaA and Merck & Co. thus bears immediate impact on Merck KGaA's rights as a participant in the application process.

As a party to a dispute under the ICANN new gTLD dispute resolution procedure, Merck KGaA has a right to be copied on all dispute-related communications under the provisions of the Guidebook. Where, as here, ICANN has elected to act as a final "court of appeals" overseeing, weighing in on, and indeed altering the very standards of implementation on a post-hoc basis of its DSRPs, ICANN must be held to the same standards of transparency and fair dealing outlined both in its Bylaws and required by the communications regulations of the Guidebook. There is no scope for the issuance of a retroactive ruling, requiring a DSRP to re-evaluate some (but not all) of its decisions utilizing a previously unpublished standard. There is likewise no scope for the adoption of a "discretionary" standard with regard to the acceptance of untimely objections under the text of the Guidebook, which was made binding on all parties to the new gTLD dispute process.

Accordingly, the NGPC has overstepped his authority in this matter, as it (or the ICANN ombudsman) does not have the authority to act as an appeals court for the decisions of the DSRPs. Furthermore, the NGPC made its decision, which directly affects the legal rights of Merck KGaA, without any of the information or arguments which Merck KGaA would have offered had it not been expressly excluded from the ombudsman's decision making process. Thus, the NGPC's ruling has caused material harm to Merck KGaA by denying it an opportunity to be heard in case-related matters which affect its legal rights. For all of the above reasons, Merck KGaA has standing to

bring the present Request.

11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities?

x No

Terms and Conditions for Submission of Reconsideration Requests

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar.

The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious.

Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing.

The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC.

The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.



Martin Müller, Attorney at Law

30/08/2013

Date

on behalf of Dr. Torsten Bettinger,
Attorney at Law