

RECOMMENDATION OF THE BOARD GOVERNANCE COMMITTEE (BGC)

RECONSIDERATION REQUEST 13-8

10 OCTOBER 2013

On 30 August 2013, Merck KGaA submitted a reconsideration request (“Request”). The Request asked the Board to reconsider the 13 July 2013 resolution of the New gTLD Program Committee (“NGPC”) that permitted and encouraged dispute resolution panels to use discretion in enforcing the deadlines set forth in the New gTLD Applicant Guidebook. Specifically, the Request challenges the NGPC resolution as it relates to Merck & Co. Inc.’s (“the Objector”) community objection to Merck KGaA’s application for .MERCK, which was rejected by the International Chamber of Commerce (“ICC”) for being filed after the published closing deadline.

I. Relevant Bylaws

Article IV, Section 2.2 of ICANN’s Bylaws states in relevant part that any entity may submit a request for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

- (a) one or more staff actions or inactions that contradict established ICANN policy(ies); or
- (b) one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or
- (c) one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.

Dismissal of a request for reconsideration is appropriate if the Board Governance Committee (“BGC”) recommends, and the NGPC agrees, that the requesting party does not have standing because the party failed to satisfy the criteria set forth in the Bylaws. These standing

requirements are intended to protect the reconsideration process from abuse and to ensure that it is not used as a mechanism simply to challenge an action with which someone disagrees.

For reconsideration requests that challenge Board actions, requests must be submitted to the BGC within fifteen days after the date on which information about the challenged Board action is first published in a resolution with an accompanying rationale. Bylaws, Art. IV, § 2.5.

The Request was received on 30 August 2013. The challenged NGPC resolution was published on 14 July 2013, which would render the Request untimely under the Bylaws. However, it appears that Merck KGaA did not become “adversely affected” by the challenged resolution until 16 August 2013, when the Objector, based on the discretion afforded to the ICC under the 13 July 2013 resolution, submitted a request for rehearing of the ICC’s previous rejection of its community objection to Merck KGaA’s application for .MERCK. Bylaws, Art. IV, § 2.2. Because the Request was received within fifteen days of the Objector’s submission of its request for rehearing, the BGC will consider the merits of Merck KGaA’s Request.

II. Background

A. Filing An Objection To A New gTLD Application

The New gTLD Program includes an objection procedure pursuant to which objections to applications for new gTLDs are submitted to an independent dispute resolution service provider (“DRSP”). The objection procedures are set out in Module 3 of the Applicant Guidebook (<http://newgtlds.icann.org/en/applicants/agb/objection-procedures-04jun12-en.pdf>) and the New gTLD Dispute Resolution Procedure (the “Procedure”) attached thereto.

To initiate a dispute resolution proceeding, an objection must comply with the procedures set out in Articles 5-8 of the Procedure. This includes the requirement that objections be filed with the appropriate DRSP before the published closing date for the objection filing period. (Applicant Guidebook, Section 3.2.3; Procedure, Art. 7(a).) Before an objection will be

registered for processing, the DRSP will conduct an administrative review to verify compliance with Articles 5-8 of the Procedures and the applicable DRSP Rules. (Procedure, Art. 9(a).)

B. The Objection to Merck KGaA's Application for .MERCK

The Objector attempted to file two community objections to Merck KGaA's applications for .MERCK and .EMERCK.¹ The objections were transmitted to the ICC "ten and eleven minutes" past the 8:00 pm Eastern Standard Time filing deadline on 15 March 2013. (Request, Pg. 3 and Annex 1 to Request.) The next morning, the Objector's counsel sent an email to ICANN's Ombudsman indicating that there was an Internet outage that caused the objections to be filed late and inquiring whether there was a process for determining whether the objections were accepted by the ICC. (Annex 1 to Request.) The Objector's counsel further indicated that the filing fees for the objections were paid via wire transfer earlier in the day before the filing deadline. (Annex 1 to Request.) Counsel also inquired whether, should the ICC reject the objections, there was a process for appealing that rejection based on technical difficulties. (Annex 1 to Request.) In an email response to the Objector's counsel, ICANN's Ombudsman stated that the Objector should wait to see whether the objections are accepted by the ICC before starting an official investigation through the Ombudsman. (Annex 1 to Request). Merck KGaA was not included on the correspondence between the Ombudsman and the Objector. (Request, Pg. 7.)

¹ The Request is directed only at the objection to .MERCK. As a result, this Recommendation will only refer to the .MERCK objection. However, to the extent an analysis applies to the objection to .MERCK, it equally applies to the analysis of the objection to .EMERCK.

In the weeks that followed, the ICC requested comments from the Objector and Merck KGaA, and ultimately rejected the two community objections to .MERCK and .EMERCK for being untimely. (Request, Pg. 7.)

C. The NGPC Resolution Giving DRSPs Discretion in Enforcing Deadlines

On 13 July 2013, the NGPC adopted three resolutions relating to deadlines found in the dispute resolution procedures of the Applicant Guidebook.

(<http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-13jul13-en.htm>

(hereinafter “13 July 2013 Resolutions”).) The NGPC resolutions were taken following receipt of two separate reports and recommendations issued by ICANN’s Ombudsman.

The Ombudsman’s first report to the Board (dated 7 June 2013) addressed an objection from Axis Communication AB (“Axis”) to the Saudi Telecom Company’s (“STC”) application for .AXIS (the “.AXIS Report”). See Meeting of the NGPC, Briefing Materials 2 (“NPGC Briefing Materials”) available at <http://www.icann.org/en/groups/board/documents/briefing-materials-2-13jul13-en.pdf>. According to the .AXIS Report, STC filed its response to Axis’ objection two days after the filing deadline and the Arbitration and Mediation Center of the World Intellectual Property Organization (“WIPO”) did not accept the response.² (NGPC Briefing Material, Pgs. 12-13.) The Ombudsman expressed concern that, under the circumstances of that particular matter, the rejection of STC’s response could be unfair, and therefore recommended that the Board (or NGPC in this case) ask WIPO to reconsider its stance

² Article 11(b) of the Procedures provides that an applicant must file a response to an objection within thirty days of receiving notice of the objection from the DRSP. (Procedure, Art. 11(b).) If an applicant fails to provide a response within the thirty-day period, the applicant is deemed to be in default and the objection will be sustained. (Procedure, Art. 11(g).)

with regard to the rejection of STC's response in light of the facts and analysis stated in the .AXIS Report. (NPGC Briefing Material, Pg. 15.)

The Ombudsman's second report to the Board (dated 1 July 2013) addressed an objection to .GAY by GOProud (the ".GAY Report"). (NPGC Briefing Material, Pg. 10-11.) According to the .GAY Report, GoProud's objection was timely filed but was not accepted because it was too long. The Ombudsman suggested that the notice of the rejection was sent to an email address that was not the one used to file the objection, therefore GOProud did not see it within the time permitted to amend the objection, and so the objection was rejected. (NPGC Briefing Material, Pg. 10.) Based on the facts available to him, the Ombudsman expressed concerns about the fairness of the decision to reject GOProud's objection and recommended that the Board (or NGPC in this case) ask the ICC to revisit its decision. (NPGC Briefing Material, Pg. 11.)

Upon consideration of the Ombudsman's reports, the NGPC resolved as follows:

(i) (2013.07.13.NG02) The NGPC directs the President of the Generic Domains Division (or his designee) to forward the .AXIS Report to WIPO and ask WIPO to reconsider its stance with regard to the rejection of STC's response in view of the facts and analysis in the .AXIS Report;

(ii) (2013.07.13.NG03) The NGPC directs the President of the Generic Domains Division (or his designee) to forward the .GAY Report to the ICC and ask the ICC to revisit its decision in view of the facts and analysis in the .GAY Report; and

(iii) (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.

(13 July 2013 Resolutions.)

In the rationale for the three resolutions, the NGPC acknowledged that, beyond the two Ombudsman reports, ICANN has received several other inquiries from objectors, applicants, and

the DRSPs about issues related to late filing and whether the DRSPs have the discretion to deviate from the deadlines set forth in the Applicant Guidebook. (13 July 2013 Resolutions.) The NGPC concluded that notwithstanding the deadlines in the Guidebook, in the interests of fairness and reasonableness the DRSPs should have discretion to provide extensions of those deadlines, on case-by-case bases depending on the circumstances, and in cases where it is shown that the affected party is making a good faith effort to comply. (13 July 2013 Resolutions.)

D. The Objector's Request for Rehearing with ICC on Rejected Objection

On 16 August 2013, the Objector, citing the NGPC's 13 July 2013 Resolutions, submitted a request to the ICC that it rehear its previous rejection of the .MERCK objection. Both the Objector and Merck KGaA timely filed additional comments regarding the Objector's request for rehearing, and on 30 August 2013, the ICC's Standing Committee was invited to issue a decision on the issue. However, having received a copy of Merck KGaA's Reconsideration Request, the ICC has since indicated that it will not rule on the Objector's request for rehearing until after ICANN determines whether it is going to reconsider and/or revise the 13 July 2013 resolutions. See Letter from Judith Harris to the BGC, available at <http://www.icann.org/en/groups/board/governance/reconsideration/harris-to-bgc-13sep13-en.pdf>.³

³ A letter from the Objector's counsel, Judith Harris, was received on 13 September 2013. The letter included as an attachment a letter from the ICC indicating that the ICC would not rule on the Objector's request for rehearing until after ICANN determined whether it was going to reconsider the NGPC resolution. The Objector's letter, as well as the attached letter from the ICC, have been reviewed and given appropriate consideration in connection with this Recommendation.

III. Analysis of Merck KGaA’s Request for Reconsideration – The NGPC Did Not Fail To Consider Material Information In Adopting The Challenged Resolution⁴

Merck KGaA seeks reconsideration of the NGPC’s 13 July 2013 resolution that generally gives DRSPs discretion in enforcing deadlines set forth in the Applicant Guidebook (hereinafter, the “Resolution”).

In its Request, Merck KGaA claims that the NGPC failed to consider material information in that the challenged Resolution was based on “incomplete, and improperly compiled, reports by the ICANN Ombudsman.” (Request, Pg. 16.) Specifically, Merck KGaA claims that the Ombudsman denied Merck KGaA’s right to be heard and issued its recommendations to the NGPC on the basis of unilateral communications with only the Objector’s position being presented. (Request, Pg. 5.) Merck KGaA’s claims are not supported.

ICANN’s Ombudsman issued only two reports to the Board – the .AXIS Report and the .GAY Report – relating to purportedly missed deadlines found in the dispute resolution procedures of the Applicant Guidebook. (NPGC Briefing Material.) Each report addressed a particular complaint to the Ombudsman and made a recommendation to the Board (or NGPC in this instance). Neither report addressed, nor were they intended to address, the Objector’s complaint to the Ombudsman regarding the ICC’s rejection of the objection to .MERCK. (NPGC Briefing Material.) Because neither report addressed the Objector’s complaint to the Ombudsman – or, otherwise reflected a recommendation to the NGPC on how to resolve the

⁴ To the extent that the Request purports to raise concerns about ICANN Ombudsman’s performance of his duties, a review of the Ombudsman is not within the scope of the Reconsideration process. However, the Board is authorized to, and does regularly evaluate the Ombudsman’s performance and whether he is following his mandate and Framework. The BGC will ask that the issues raised in this Request be taken into consideration in the Board’s evaluation of the Ombudsman.

Objector's complaint – there is no support for Merck KGaA's assertion that the NGPC failed to consider material information relating to the Objector's complaint.

Based on the .AXIS Report and the .GAY Report, the NGPC adopted two very specific resolutions asking the respective DRSPs to reconsider/revisit their decisions relating to the relevant filings about those strings. In addition to the resolutions that specifically address the .AXIS and .GAY strings, the NGPC adopted a resolution that generally permits and encourages DRSPs to exercise discretion in enforcing the deadlines set forth in the Applicant Guidebook. (13 July 2013 Resolutions.) This more general resolution is not directed towards any one specific DRSP or any one specific dispute resolution proceeding or Ombudsman's complaint, including the complaint relating to the .MERCK objection.

In its published rationale for the Resolution, the NGPC acknowledged that, beyond the two Ombudsman reports, ICANN received several other inquiries from objectors, applicants, and the DRSPs about issues related to late filings and whether the DRSPs have the discretion to deviate from the specific deadlines set forth in the Applicant Guidebook. The NGPC concluded, in the interests of fairness and reasonableness, that it is appropriate for the DRSPs to exercise discretion in enforcing dispute resolution deadlines. (13 July 2013 Resolutions.) This grant of discretion is just that, it does not direct any DRSP to reverse any specific decision to accept or reject a late filing. Rather, the Resolution is intended to provide further guidance to the DRSPs on the issue of late submissions.⁵

In view of the above, there is no support for Merck KGaA's claim that the NGPC failed to consider material information at the time of adopting the challenged Resolution. The

⁵ To address potential technical inconsistencies, the DRSPs had previously agreed to accept objections up to five minutes after the deadline in the Guidebook. (Annex 4 to Request.)

challenged Resolution was a general grant of discretion to the DRSPs and not specifically directed towards the .MERCCK objection. Merck KGaA's suggestion that the NGPC was lacking specific information relating to the objection to Merck KGaA's application for .MERCCK is not well founded and should be rejected.

IV. Merck KGaA's Other Alleged Violations of ICANN Policy and Procedure Are Not Proper Bases for Reconsideration.

A challenge of a Board action (or inaction) must be based upon the Board taking an action (or inaction) without consideration of material information or as a result of the Board's reliance on false or inaccurate material information. (Bylaws, Art. IV, § 2.)

In its Request, Merck KGaA seeks reconsideration of the challenged Resolution on the additional grounds that: (i) the NGPC lacks the jurisdiction to "oversee, appeal or challenge" the procedural decisions of the DRSPs (Request, Pg. 2.); and (ii) the NGPC's actions constitute breaches of ICANN's Core Values, including the requirement to make "decisions by applying documented policies neutrally and objectively, with integrity and fairness," and the requirement to employ "open and transparent policy development mechanisms that ... ensure that those entities most affected can assist in the policy development process" (Bylaws, Art. 1, §§ 2.7 & 2.8.) (Request, Pg. 4.) Neither of the stated grounds is a proper basis for Reconsideration under ICANN's Bylaws and need not be considered.

Even if these were proper bases for Reconsideration, the above-stated grounds do not support reconsideration. On the issue of jurisdiction, Article 23(a), clearly provides ICANN with the jurisdiction to modify the procedures governing the dispute resolution process. Article 23(a) states: "ICANN may from time to time, in accordance with its Bylaws, modify this Procedure." (Procedures, Art. 23(a).) Thus, even if the challenged Resolution was considered a modification

to the Procedure, the NGPC has the authority to make such modifications, provided the modifications are in accordance with ICANN's Bylaws.

With respect to the purported violations of ICANN's Core Values, Merck KGaA's assertions are similarly unsupported. As explained above, the .MERCCK complaint to the Ombudsman was not before the NGPC. The NGPC adopted two resolutions specifically addressing issues surrounding objections to the applied-for .AXIS and .GAY strings, and adopted a third resolution generally permitting and encouraging DRSPs to exercise discretion in enforcing dispute resolution procedure deadlines. (13 July 2013 Resolutions.) This general grant of discretion is to be applied neutrally and objectively. Both the .AXIS Report and .GAY Report are publicly posted, and the NGPC clearly stated and published its rationale for the Resolution (13 July 2013 Resolutions). The NGPC's actions – both the evaluation of the issues and its ultimate resolutions – were at all times open, transparent, and in good faith. Accordingly, there is no support for Merck KGaA's claim that the NGPC's actions were somehow inconsistent with ICANN's Core Values.

V. Recommendation and Conclusion

Based on the foregoing, the BGC concludes that Merck KGaA has not stated proper grounds for reconsideration. Accordingly, we recommend that Merck KGaA's Request be denied and the Request not be considered further.