

## ICANN BOARD PAPER NO. 2020.01.26.1b

**TITLE:** Request to Defer Compliance Enforcement of Gaining Registrar Form of Authorization

**PROPOSED ACTION:** For Board Consideration and Approval

### EXECUTIVE SUMMARY:

On 31 October 2019, the GNSO Council [sent a letter](#) to the ICANN Board asking the Board to instruct ICANN org to defer Contractual Compliance enforcement of the Transfer Policy's Gaining Registrar FOA requirement until the matter is settled in the planned GNSO Transfer Policy review. The GNSO Council took this step in response to concerns raised to the Council by the Registrar Stakeholder Group (RrSG) concerning Section 1.1 of Appendix G to the [Temporary Specification for gTLD Registration Data](#) (Temporary Specification), which superseded the Transfer Policy under certain conditions.

### ICANN ORGANIZATION RECOMMENDATION:

ICANN org recommends that the Board accept the GNSO Council request and direct the ICANN President and CEO to defer compliance enforcement of the Transfer Policy's Gaining Registrar FOA requirement until the matter is settled in the GNSO Council's planned Transfer Policy review.

### PROPOSED RESOLUTION:

Whereas, the Transfer Policy requires that an inter-registrar transfer “may only proceed if confirmation of the transfer is received by the Gaining Registrar from the Transfer Contact” and such authorization “must be made via a valid Standardized Form of Authorization (FOA)”;

Whereas, on 9 October 2019, the Registrar Stakeholder Group (RrSG) [wrote to the GNSO Council](#), reporting that the RrSG had identified an issue in the implementation of the Gaining Registrar FOA Requirement, and asking the Council to request the

ICANN Board to refer this issue to the impending Transfer Policy review and instruct ICANN Contractual Compliance not to enforce the Gaining Registrar FOA requirement while such review is ongoing;

Whereas, on 31 October 2019, the [GNSO Council requested](#) that the ICANN Board instruct ICANN org to defer compliance enforcement of the Gaining Registrar FOA requirement until this matter is settled in the GNSO's planned Transfer Policy review;

Resolved (2020.01.26.xx) to be assigned by Secretary]], the Board accepts the GNSO Council request and directs ICANN org to defer compliance enforcement of the Transfer Policy's Gaining Registrar FOA requirement until the matter is settled in the GNSO Council's planned Transfer Policy review.

#### **PROPOSED RATIONALE:**

##### **Why is the Board addressing the issue?**

The Board is addressing this issue at the request of the GNSO Council. On 31 October 2019, the GNSO Council [sent a letter](#) to the ICANN Board asking the Board to instruct ICANN org to defer Contractual Compliance enforcement of the Transfer Policy's Gaining Registrar FOA requirement until the matter is settled in the planned GNSO Transfer Policy review.

##### **What is the proposal being considered?**

The proposal being considered is a request from the GNSO Council that the ICANN Board direct ICANN org to defer Contractual Compliance enforcement of the Transfer Policy's Gaining Registrar FOA requirement.

The [Transfer Policy](#) requires that an inter-registrar transfer “only proceed if confirmation of the transfer is received by the Gaining Registrar from the Transfer Contact.” Such authorization “must be made via a valid Standardized Form of Authorization (FOA).” The Temporary Specification, effective 25 May 2018, superseded this Gaining Registrar FOA requirement in certain circumstances, stating that, “Until such time when the RDAP service (or other secure methods for transferring data) is required by ICANN to be offered, if the Gaining Registrar is unable to gain

access to then-current Registration Data for a domain name subject of a transfer, the related requirements in the Transfer Policy will be superseded...[.]” Section 1.1 of Appendix G to the Temporary Specification provides that when the Gaining Registrar is unable to gain access to then-current Registration Data for the domain name subject to a transfer, the “Gaining Registrar is not REQUIRED to obtain a Form of Authorization from the Transfer Contact.”

However, this superseding provision in Appendix G of the Temporary Specification only applies if the then-current registration data is not accessible in the public WHOIS/Registration Data Directory Service (RDDS) at the time of the transfer request. Where the registration data is displayed in the public WHOIS/RDDS, the Gaining Registrar FOA requirement continues to apply.

As set forth in greater detail below, the Registrar Stakeholder Group (RrSG) has identified issues with the implementation of this requirement. The GNSO Council cited these issues in submitting this request to the Board.

The [Interim Registration Data Policy for gTLDs](#) (Interim Policy), effective 20 May 2019, requires continued implementation of measures consistent with the Temporary Specification. Additionally, the Phase 1 Final Report of the Temporary Specification for gTLD Registration Data Expedited Policy Development Process, at Recommendation #24, is consistent with the Temporary Specification and does not alter the current contractual obligations. Thus, the implementation issues identified by the RrSG will continue to persist when the Registration Data Policy becomes effective.

In light of these implementation issues, the GNSO Council asked the ICANN Board to refer the Gaining Registrar FOA issue to the anticipated Transfer Policy review and to direct ICANN org to defer compliance enforcement of the Gaining Registrar FOA requirement until this issue is settled in the Transfer Policy review.

## **What concerns or issues were raised by the community?**

The RrSG raised concerns about the Gaining Registrar FOA requirement in a [9 October 2019 letter](#) to the GNSO Council. In raising these issues, the RrSG said it was concerned that the Transfer Policy must be implemented in compliance with the General Data Protection Regulation (GDPR), the California Consumer Privacy Act (CCPA), and other applicable privacy laws.

The RrSG pointed out in its letter that, even where data is present in the registrant email field in the public RDDS output, an email sent to that address may not go directly to the registrant due to the email being obfuscated, redacted, replaced by a web form URL, or use of pseudonymized email addresses. They believe that if a registrar implemented a system to send the Gaining Registrar FOA to any address listed in the public RDDS, there is no guarantee that the email would reach the registrant. As a result, the registrars contend that they are unable to build a reliable automated process to continue processing the large volume of transfers between registrars. According to the registrars, this would ultimately defeat the purpose of the Transfer Policy, which is to enable registrants to have the ability to transfer domain names to other registrars. Additionally, the RrSG asserts that many registrars believe that under the European Union's General Data Protection Regulation (GDPR), the gaining registrar does not have consent to process this information because that would require registrars to send an email to an individual that is not their customer.

Prior to the adoption of the Temporary Specification, on 1 May 2018, the Contracted Party House (CPH) Tech-Ops committee proposed to ICANN org to remove the Gaining Registrar FOA requirement, [stating in a letter that](#), "After 25 May 2018, gaining registrars will not have the ability to pull the registrant email or a proxy from the public WHOIS output; data will not be available from losing registrar or registry on a consistent basis." They further stated that the current transfer process, which requires both FOAs, was developed before authorization codes were used consistently across registrars. Additionally, the committee said that the Gaining Registrar FOA provides negligible protection in the context of a domain transfer and that registrars seldom rely upon the Gaining Registrar FOA in the context of a transfer dispute.

**Are there positive or negative community impacts?**

In the 9 October 2019 letter, the RrSG stated that they have “observed that the vast majority of ICANN-accredited registrars are no longer sending the Gaining Registrar FOA post Temporary Specification, and there appears to be no evidence of an increase in unauthorized transfers since May 2018.” Additionally, ICANN Contractual Compliance has not seen a material increase in complaints regarding unauthorized transfers. The data gathered by ICANN Contractual Compliance shows that 143 unauthorized transfer cases were closed 13 months prior to the adoption of the Temporary Specification (May 2017 - May 2018); and 138 cases were closed 13 months directly following the adoption of the Temporary Specification (June 2018 - June 2019).

As identified by the CPH Tech-Ops committee, during gTLD transfers when the email address is not present in public RDDS, the AuthInfo code is sufficient to confirm the intent of the registrant to transfer. The Losing Registrar FOA also confirms this intent.

The Gaining Registrar FOA requirement continues to cause implementation difficulties and compliance issues for many registrars. This deferred compliance period will allow the ICANN community time to consider the Gaining Registrar FOA requirement through the Transfer Policy review. Furthermore, the additional time will allow the affected contracted parties to assess any potential impact on the Transfer Policy and allow ICANN Contractual Compliance to focus their resources on requests with greater urgency or impact.

**Are there fiscal impacts or ramifications on ICANN (strategic plan, operating plan, budget); the community; and/or the public?**

There are no anticipated fiscal impacts on ICANN's resources, the community, and/or the public as a result of this action.

**Are there any security, stability or resiliency issues relating to the DNS?**

There is no anticipated impact on the security, stability or resiliency of the DNS.

**Is this either a defined policy process within ICANN's Supporting Organizations or ICANN's Organizational Administrative Function decision requiring public comment or not requiring public comment?**

This resolution is an organizational administrative function for which no public comment is required.

**Is this action within ICANN's Mission? How does it relate to the global public interest?**

This action is in line with ICANN's mission and is in the public interest as it helps to ensure a consistent and coordinated implementation of policies in gTLDs.

**Signature Block:**

Submitted by: Cyrus Namazi

Position: Sr. Vice President, Global Domains

Date Noted: 10 Jan 2020

Email: [cyrus.namazi@icann.org](mailto:cyrus.namazi@icann.org)

## ICANN BOARD PAPER NO. 2020.01.26.xx

**TITLE:** Recommendations for the Technical Utilization of the Root Zone Label Generation Rules

**PROPOSED ACTION:** For Board Consideration and Approval

### EXECUTIVE SUMMARY:

The ICANN Board is being asked to consider requesting the ccNSO and GNSO to take the [\*Recommendations for the Technical Utilization of the Root Zone Label Generation Rules \(RZ-LGR\)\*](#) into account in their respective policies related to Internationalized Domain Names (IDN) top-level domains (TLDs) and their variant labels for a consistent and transparent approach towards managing the TLDs. These recommendations have been developed by an expert community-based study group on the request of the ICANN Board and reviewed by ICANN organization and the ICANN Board Internationalized Domain Names and Universal Acceptance Working Group (Board IDN-UA WG).

With the availability of the RZ-LGR, the ICANN Board had asked the ICANN community to investigate any issues in technically employing the RZ-LGR for validating existing and future country code top-level domains (ccTLDs) and generic top-level domains (gTLDs). Following the Board request, a study group (SG) on the technical use of the RZ-LGR was formed based on nominations from Supporting Organizations (SOs), Advisory Committees (ACs) and Internet Architecture Board (IAB). The SG has deliberated a range of issues from the viewpoint of the different stakeholders and, after public consultations, has finalized and published technically focused recommendations for the use of RZ-LGR.

### ICANN BOARD IDN-UA WG RECOMMENDATION:

The ICANN Board IDN-UA WG has reviewed the *Recommendations for the Technical Utilization of the RZ-LGR* and recommends that the ICANN Board ask the ccNSO and GNSO to consider these recommendations while developing their respective policies for a consistent approach for managing IDN variant TLD labels.

**PROPOSED RESOLUTION:**

Whereas, the ICANN Board approved the *Procedure to Develop and Maintain the Label Generation Rules for the Root Zone in Respect of IDNA Labels* on 4 November 2013, which has been implemented to incrementally develop the Root Zone Label Generation Rules to determine valid top-level domains (TLDs) and their variant labels;

Whereas, multiple script communities have completed their RZ-LGR proposals, of which sixteen scripts have been integrated into the third version of the RZ-LGR, while many of the remaining scripts are in the process of finalizing their RZ-LGR proposals;

Whereas, the ICANN Board approved the *Recommendations for Managing IDN Variant TLDs* on 14 March 2019 which require the use of RZ-LGR to determine valid IDN TLDs and their variant labels, requesting that the ccNSO and GNSO take into account these recommendations for developing their respective policies relevant to IDN variant TLDs while ensuring a consistent solution;

Whereas, the ICANN Board further requested the ICANN community to form a study group to investigate any issues in technically employing the RZ-LGR to determine valid IDN TLDs and their variant labels;

Whereas, the ICANN community formed the study group which has finalized the *Recommendations for the Technical Utilization of the RZ-LGR*, after taking input from the community, and has published these recommendations on 7 October 2019, which have been reviewed by ICANN org and considered by the ICANN Board;

Resolved (2020.01.26.xx) to be assigned by Secretary]), the Board requests that the ccNSO and GNSO take into account the *Recommendations for the Technical Utilization of the RZ-LGR* while developing their respective policies to define and manage the IDN variant TLDs for the current TLDs as well as for future TLD applications.

## PROPOSED RATIONALE:

Initial work by the community in 2012 on the issues related to IDN variant TLDs, as part of the [Integrated Issues Report](#) (IIR)<sup>1</sup>, identified that there is no accepted definition for what may constitute a variant relationship between top-level labels. To address this issue ICANN org and the community developed the [Procedure to Develop and Maintain the Label Generation Rules for the Root Zone in Respect of IDNA Labels](#) (LGR Procedure)<sup>2</sup>. This procedure allows to define label generation rules for different scripts to determine valid TLD labels and their variant labels. In 2013, the ICANN Board [endorsed](#) this procedure and requested ICANN org and the community to undertake it. Based on process stipulated in the LGR Procedure, to date multiple Generation Panels (GPs) have completed their RZ-LGR [proposals](#), of which sixteen scripts have already been integrated into the third version of the [RZ-LGR](#) (RZ-LGR-3). Many of the [remaining script communities](#) are also in the process of finalizing their RZ-LGR proposals. Further, the ICANN Board [approved](#) the [recommendations](#)<sup>3</sup> for managing the IDN variant TLDs, which requires the use of RZ-LGR to determine valid IDN TLDs and their variant labels, and requested ccNSO and GNSO to take these into account in their policy development processes.

With the availability of the RZ-LGR and its anticipated central role in determining valid TLDs and their variant labels, the ICANN Board requested the ICANN community (including [Supporting Organizations \(SOs\)](#), [Advisory Committees \(ACs\)](#) and [Internet Architecture Board \(IAB\)](#)) to study issues in the technical use of the RZ-LGR consistently across all IDN TLDs, including IDN gTLDs and IDN ccTLDs. Accordingly, the RZ-LGR Study Group (SG) was formed from the nominees of SOs, ACs, IAB and additional volunteers from the ICANN community to address the request from the ICANN Board. After its formation, the RZ-LGR SG first worked on the scope of its work and finalized it after feedback received by the community through the first [public comment](#) call in August 2018. The SG deliberated the relevant technical details based on this scope and developed a set of recommendations. These recommendations were released in the second [public comment](#) by the SG in May 2019. Based on the

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<sup>1</sup> <https://www.icann.org/en/system/files/files/idn-vip-integrated-issues-final-clean-20feb12-en.pdf>

<sup>2</sup> <https://www.icann.org/en/system/files/files/draft-lgr-procedure-20mar13-en.pdf>

<sup>3</sup> <https://www.icann.org/resources/pages/idn-variant-tld-implementation-2018-07-26-en>

input from the community, the SG finalized these recommendations and [published](#)<sup>4</sup> them on 7 October 2019 for further consideration of the ICANN Board.

There will be fiscal impact of these recommendation due to the maintenance of the RZ-LGR based on the LGR Procedure and deployment and maintenance of an LGR Tool to process TLD labels based on the RZ-LGR. The continued fiscal impact for maintaining the RZ-LGR is anticipated to be less significant than the existing financial support being expended for its development. Also, an LGR Tool has already been developed and deployed by ICANN org to support the script-based GPs in developing their RZ-LGR proposals which can be used for processing TLD labels in the future. The actual fiscal impact is also dependent on the recommendations eventually adopted by ccNSO and GNSO in their respective policies related to IDN TLDs and their variant labels.

The recommendations contribute towards a secure and stable operation of the unique identifier system in multiple ways: support a uniform definition of IDN variant TLDs across gTLDs and ccTLDs and for both the existing TLDs and future TLD applications; support a community-driven mechanism to maintain RZ-LGR in line with the LGR Procedure which maintains its stability; encourage to highlight and address any discrepancies between what is allowed through RZ-LGR and what is delegated in the root zone. This is achieved while respecting the community policy development role. The work, supporting the use of RZ-LGR to consistently determine and possibly delegate IDN variant TLDs, also contributes to the public interest by enhancing access to the Internet's Domain Name System (DNS) in different scripts.

### **Signature Block:**

Submitted by: Sarmad Hussain

Position: Director, IDN and UA Programs

Date Noted: 9 January 2020

Email: [sarmad.hussain@icann.org](mailto:sarmad.hussain@icann.org)

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<sup>4</sup> <https://www.icann.org/en/system/files/files/rz-lgr-technical-utilization-recs-07oct19-en.pdf>

## **ICANN BOARD PAPER NO. 2020.01.26.1d**

**TITLE:** **FY21 IANA Operating Plan and Budget**

**PROPOSED ACTION:** **For Board Consideration and Approval**

### **EXECUTIVE SUMMARY:**

As required by the ICANN Bylaws, the draft FY21 IANA Operating Plan and Budget (OP&B) was developed and posted for public comment and discussion on 14 October 2019. The Board of Public Technical Identifiers (PTI) adopted the FY21 PTI OP&B on 09 January 2020. The FY21 PTI OP&B then was provided to ICANN as input into the FY21 IANA OP&B. All public comments have been taken into consideration, and where appropriate and feasible, have been incorporated into a final FY21 IANA OP&B. Per the Bylaws, the IANA OP&B is to be adopted by the Board and then posted on the ICANN website.

### **BOARD FINANCE COMMITTEE (BFC) RECOMMENDATION:**

The BFC has recommended, after careful consideration of the public comments received and the corresponding responses, that the Board approve the FY21 IANA Operating Plan and Budget.

### **PROPOSED RESOLUTION:**

Whereas, the draft FY21 IANA Operating Plan & Budget was posted for public comment in accordance with the Bylaws on 14 October 2019.

Whereas, comments received through the public comment process were reviewed and responded to and provided to the BFC members for review and comment.

Whereas, all public comments have been taken into consideration, and where appropriate and feasible, have been incorporated and a final FY21 IANA OP&B. Per the Bylaws, the IANA OP&B is to be adopted by the Board and then posted on the ICANN website.

Whereas, the public comments received, as well as other solicited community feedback were taken into account to determine required revisions to the draft PTI FY21 Operating Plan and Budget.

Resolved (2020.01.26.xx), the Board adopts the FY21 IANA Operating Plan and Budget.

**PROPOSED RATIONALE:**

In accordance with Section 22.4 of the ICANN Bylaws, the Board is to adopt an annual IANA budget and publish it on the ICANN website. On 14 October 2019 drafts of the FY21 PTI Operating Plan & Budget and the FY21 IANA OP&B were posted for public comment. The PTI Board approved the PTI Budget on 09 January 2020, and the PTI Budget was received as input into the FY21 IANA Budget.

The draft FY21 PTI OP&B and the draft FY21 IANA OP&B were based on numerous discussions with members of ICANN org and the ICANN Community, including extensive consultations with ICANN Supporting Organizations, Advisory Committees, and other stakeholder groups throughout the prior several months.

All comments received in all manners were considered in developing the FY21 IANA OP&B. Where feasible and appropriate these inputs have been incorporated into the final FY21 IANA OP&B proposed for adoption.

The FY21 IANA OP&B will have a positive impact on ICANN in that it provides a proper framework by which the IANA services will be performed, which also provides the basis for the organization to be held accountable in a transparent manner.

This decision is in the public interest and within ICANN's mission, as it is fully consistent with ICANN's strategic and operational plans, and the results of which in fact allow ICANN to satisfy its mission.

This decision will have a fiscal impact on ICANN and the Community as is intended. This should have a positive impact on the security, stability and resiliency of the domain name system (DNS) with respect to any funding that is dedicated to those aspects of the DNS.

This is an Organizational Administrative Function that has already been subject to public comment as noted above.

Submitted By: Xavier Calvez, Chief Financial Officer  
Date Noted: 25 January 2020  
Email: [xavier.calvez@icann.org](mailto:xavier.calvez@icann.org)

# FY21 IANA Functions Operating Plan and Budget Proposed for Adoption

Goran Marby, President and CEO  
Xavier Calvez, CFO

LA Board Workshop  
26 January 2020



# IANA Functions Budget Timeline and Process Overview

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- ◉ Objectives:
  - Have the IANA Functions Operating Plan and Budget submitted to ICANN at least nine months in advance of the fiscal year and
  - Have the IANA Budget approved by the ICANN Board in a much earlier timeframe than the overall ICANN budget due to the separate empowered community process
- ◉ Key Steps
  - ICANN received input from PTI on its budget as input into the IANA Functions Budget – 01 July 2019 through 28 Sept 2019
  - The IANA Functions Draft FY21 Operating Plan and Budget (“IANA Budget”) were posted for public comment 14 October 2019 through 27 November 2019
    - A report of public comment was published on 19 December 2019
  - The PTI Board adopted the FY21 PTI Operating Plan and Budget on 08 January 2020

# FY21 IANA Operating Plan and Budget: Public Comments

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- Public comment period ran from 14 October – 27 November 2019 (~6 weeks)
- 32 comments received by 6 organizations/groups and 1 individual.
  - ICANN At Large Advisory Committee (ALAC) – 1
  - GNSO Council (GNSO) – 6
  - Non-Commercial Stakeholders Group (NCSG) - 9
  - ICANN Business Constituency (BC) - 7
  - Registries Stakeholder Group (RySG) – 6
  - Registrars Stakeholder Group (RrSG) – 2
  - Individual – 1
- Consistent themes across comments
  - Financial Data and Format - 18
  - PTI Structure & Information – 11
  - Public Comment Process - 1
  - General Comments - 2
- No substantive changes required to Operating Plan and Budget as a result of public comments.

# FY21 IANA Functions Budget for Adoption Summary

1

## IANA Functions Funding/ICANN Funding

FY21 Funding of IANA Functions is \$10.6M provided solely from ICANN and is driven by the FY21 Expenses

2

## IANA Functions baseline cash expenses

FY21 Expenses of \$10.6M (including \$0.5M contingency) increased versus FY20 Forecast driven by inflationary Personnel increases of \$0.3M, partially offset by decreases in administrative activities of \$0.2M

3

## IANA Functions contingency

Contingency of \$0.5M remains flat in FY21 compared to FY20 Forecast. Contingency is about 10% of the Direct Dedicated costs and represents an amount of budgeted expense unallocated to specific activities or departments

FY21 IANA Budget in Millions, USD	FY21 IANA Budget	FY20 IANA Forecast	Under/(Over)		FY19 IANA Actuals	Under/(Over)	
			Total	%		Total	%
PTI Services	\$10.0	\$9.9	(\$0.1)	-1.2%	\$7.9	(\$2.1)	-26.8%
IANA Services (a)	\$0.6	\$0.6	\$0.0	2.9%	\$0.4	(\$0.2)	-36.2%
<b>TOTAL</b>	<b>\$10.6</b>	<b>\$10.5</b>	<b>(\$0.1)</b>	<b>-1.0%</b>	<b>\$8.3</b>	<b>(\$2.3)</b>	<b>-27.3%</b>

(a) IANA Services includes the Root Zone Maintainer function, Customer Standing Committee, Root Zone Evolution Committee and IANA Naming Function reviews  
These costs are funded by ICANN Operations.

# Decision

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- ⦿ ICANN org recommends that the BFC recommend to the ICANN Board the approval of the FY21 IANA Functions Operating Plan and Budget.
- ⦿ See attached Board resolution
- Accompanying documents to the Board resolution
  - IANA Functions FY21 Operating Plan and Budget
  - Public comment report (published on 19 Dec 2019)

# ICANN Organization's Report of Public Comment Proceeding

Draft PTI and IANA FY21 Operating Plans and Budgets																			
<b>Publication Date:</b>		19 December 2019																	
<b>Prepared By:</b>		Kirsten Wattson and Shani Quidwai																	
<table><thead><tr><th colspan="2">Public Comment Proceeding</th></tr></thead><tbody><tr><td>Open Date:</td><td>14 October 2019</td></tr><tr><td>Close Date:</td><td>27 November 2019</td></tr><tr><td>Staff Report Due Date:</td><td>10 December 2019</td></tr></tbody></table>		Public Comment Proceeding		Open Date:	14 October 2019	Close Date:	27 November 2019	Staff Report Due Date:	10 December 2019	<table><thead><tr><th colspan="2">Important Information Links</th></tr></thead><tbody><tr><td colspan="2"><a href="#">Announcement</a></td></tr><tr><td colspan="2"><a href="#">Public Comment Proceeding</a></td></tr><tr><td colspan="2"><a href="#">View Comments Submitted</a></td></tr></tbody></table>		Important Information Links		<a href="#">Announcement</a>		<a href="#">Public Comment Proceeding</a>		<a href="#">View Comments Submitted</a>	
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<b>Staff Contact:</b>		Becky Nash	<b>Email:</b> <a href="mailto:planning@icann.org">planning@icann.org</a>																
<b>Section I: General Overview and Next Steps</b>																			
<p>PTI (Public Technical Identifiers) was incorporated in August 2016 and became operational in October 2016. Under PTI's Bylaws, draft Operating Plans and Budgets for PTI must be submitted to the PTI Board nine months before the start of each fiscal year. A draft Operating Plan and Budget for PTI for FY21 were presented to the PTI Board and ICANN Board Finance Committee for review and published for public comment on 14 October 2019.</p> <p>The FY21 PTI Operating Plan and Budget will be proposed for adoption by the PTI Board on 09 January 2020. As required under the PTI Bylaws, the PTI Operating Plan and Budget will also be presented to the ICANN Board as an input into ICANN org's budget process and will also be the basis for the required IANA Budget. The FY21 IANA Operating Plan and Budget will be proposed for adoption by the ICANN Board at the end of January 2020.</p> <p>ICANN org and PTI use comments on draft planning documents to identify areas of strength and areas for improvement. Comments provided in this public comment proceeding will help identify specific changes that may be incorporated into the final budget documents and/or implemented in the next planning process. This analysis is part of our commitment to continuous improvement.</p> <p>Each year, ICANN org and PTI use the comments and other feedback about the draft planning documents to identify areas of strength, areas that need improvement, and specific changes to the planning process for the following planning year. This is a part of ICANN org and PTI's process of continuous improvement.</p>																			

Monetary references are in U.S. dollars unless otherwise stated. All references to suggested changes in the FY21 Operating Plan and Budget are subject to approval by the Board.

## Section II: Contributors

*At the time this report was prepared, 6 communities and one individual posted comments to the forum. The following table lists these contributors in alphabetical order. Any quotations taken from contributor comments will reference the contributor's initials.*

### Organizations and Groups:

Name	Submitted by	Initials
GNSO Council	Terri Agnew	GNSO
ICANN At Large Advisory Committee	ICANN At-Large Staff	ALAC
ICANN Business Constituency	Steve DelBianco	BC
Non-Commercial Stakeholders Group	Rafik Dammak	NCSG
Registrar Stakeholder Group	Zoe Bonython	RrSG
gTLD Registries Stakeholder Group	Samantha Demetriou	RySG

### Individuals:

Name	Affiliation (if provided)	Initials
Syed Iftikhar H. Shah	Individual	SS

## Section III: Summary of Comments

*General Disclaimer: This section intends to summarize broadly and comprehensively the comments submitted to this public comment proceeding but does not address every specific position stated by each contributor. The preparer recommends that readers interested in specific aspects of any of the summarized comments, or the full context of others, refer directly to the specific contributions at the link referenced above (View Comments Submitted).*

There were seven submissions to the public comment forum on the Draft FY21 PTI and IANA Operating Plans and Budgets. The comments were further broken down into a total of 32 individual comments and segmented by theme. Further analysis follows in the section below.

Many comments pertained to financial management or document structure on both the PTI and IANA documents. These comments provided suggestions for changes to improve readability and understanding. Other comments included those pertaining to general comment, level of detail provided in the documents, and strategic planning.

Comments have been separated thematically, and not based on the group submitting them, to gain a better understanding of the comments. The comment themes are listed here and the analysis

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section provides a high-level assessment of the observations, questions, and requests. Responses to individual comments are provided in the appendix.

### **Themes**

Financial Data and Format (18 Comments)

General (two Comments)

PTI Structure and Information (11 Comments)

Public Comment Process (one Comment)

## **Section IV: Analysis of Comments**

*General Disclaimer: This section provides a brief description of the comments submitted within each theme.*

### **Financial Data and Format**

There were 18 comments submitted by five groups on various aspects of ICANN org's and PTI's expenses and data format.

### **General**

Two comments were submitted in support and general acknowledgement of the PTI and IANA budget structure.

### **PTI Structure and Information**

There were 11 comments submitted by six groups on various aspects of PTI Strategy and supporting details.

### **Public Comment Process**

One comment was submitted in regard to the public comment process and format.

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# 1 Introduction

ICANN org and PTI published the Draft FY21 PTI and FY21 IANA Operating Plan and Budgets on 14 October 2019 for public comment. We received 32 specific comments from six community groups and one individual.

This document provides ICANN org and PTI's responses to the 32 comments submitted through the public comment process. These responses were organized into three relevant themes, which constitute the three sections that follow this Introduction and precede the Appendix. To more effectively address the comments, this document has adopted a new presentation format. This new format differs from the one used previously in the Staff Report of Public Comment on the FY20 PTI and IANA Operating Plan & Budget. Instead of displaying each question and each response in side-by-side columns, this document presents all of the questions in the Appendix. Responses, however, are featured in the three sections that immediately precede the Appendix and follow this Introduction. To find responses to submitted questions:

- Community organizations and individuals should first locate their organization name (or individual name) in the left-hand column (the Contributor column) of the Appendix.
- The middle column (the Question/Comment column) displays the comment submitted by the organization or individual. If an organization or individual submitted more than one comment, these are located sequentially in the middle column adjacent to the name of the organization or individual.
- The right-hand column (the Reference column) displays the section of this document that contains the response to the submitted comment.

ICANN org and PTI welcome and recognize the diverse participation from stakeholders as ICANN org and PTI's planning processes continue to evolve, including ICANN org's Strategic Plan, Operating Plan, Budget, and on-going operational and financial updates.

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## 2 Financial Data and Format

ICANN org and PTI continually strive to provide more information in the published documents to enhance transparency and accountability. ICANN org and PTI will implement further controls and align formatting and style for future Operating and Budget Plans. ICANN org and PTI encourage input from the community for improvements to future iterations.

ICANN org and PTI acknowledge that changing the verbiage of the charts to indicate the change from one year to the other has been confusing. These changes were made in order to keep the PTI and IANA documents consistent with the total ICANN org documents. ICANN org and PTI will work to make it clear and concise in future publications. In reference to the Appendices in the Operating Plan and Budgets, ICANN org and PTI will revise footnotes for more clarity and insight for community members new to the PTI and IANA Operating Plan and Budget. ICANN org and PTI will also consider showing more cost details for the IANA Services expenses.

The FY19 actuals were \$2.1M under the FY19 budget. This variance was driven mainly by the open headcount for \$1.0M and the unused budgeted contingency for \$0.5M. Contingency is budgeted each year at a consistent amount in order to compensate for unforeseen and/or unallocated expenses

In the FY21 Draft PTI and IANA Operating Plans and Budget, an inflation rate of 3% was assumed for the personnel expenses growth over the FY20 budget. ICANN org will amend the FY21 PTI Operating Plan and Budget to include the 3% reference. Furthermore, the incremental costs for personnel were offset by decreases in direct shared activities. Personnel levels will remain relatively flat as the program requirements for IANA are stabilizing.

IANA customers and the core maintenance of the Root Zone Maintainer System, as well as other IANA functions, are well accounted for in the budget and remain a priority. In addition, the IANA Budget remains flat to FY20 because 0.3 FTEs were reduced due to the program stability needing less personnel time, offset by incremental expenses for root zone maintenance. ICANN org and PTI will consider showing more details for the IANA Services expenses for clarity.

Areas of clarification:

1. In the Draft FY21 PTI Operating Plan and Budget, the financial table in section 4.1.1, is showing funding as an increase of \$0.1M over FY20.
2. In the Draft FY21 PTI Operating Plan and Budget, the financial table in 6.3 includes \$0.5M of contingency expense in Professional Services and \$0.3M of depreciation expenses in Admin. We will format the table going forward to be clearer.

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3. Figures are shown in millions in order to maintain consistency with how the total ICANN org Operating plan and Budget is presented to the community.

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## 3 PTI Structure and Information

### 3.1 Research and Development

PTI does not embark on significant research and development (R&D) efforts beyond the evolution of the work methods and systems to support operation of the IANA functions. These efforts are predominantly supported through personnel time, which is a component of the personnel costs presented. Pure research activities within ICANN org relating to unique identifiers is conducted by ICANN's Office of the Chief Technology Officer (OCTO) and that budget is presented to the community as part of the ICANN Operating Plan and Budget process. The work of OCTO and the outcomes of OCTO's research informs PTI operational decisions.

### 3.2 Root Zone Management

ICANN org and PTI do not foresee any material impact on PTI and IANA costs for FY21 due to implementation of RSSAC 037 and RSSAC 038. ICANN org and PTI will continue to monitor that activity for future budget impact and note that there is likely budgetary impact elsewhere in ICANN org. There are no foreseen material costs for IANA and PTI in implementing changes to the root server operators.

### 3.3 Strategic Planning

The PTI Board is actively developing a multi-year strategic plan that it intends to present to the community in 2020. This follows an interim period by which the IANA Transition documents along with the contracts for performing the IANA functions formed the basis of the PTI strategy. Additionally, PTI's work resides under one of ICANN's strategic goals in ICANN's FY21-FY25 Strategic Plan, to "Continue to deliver and enhance the IANA functions with operational excellence." The development of a PTI strategic plan will indicate more clearly the duration of projects and programs.

ICANN org and PTI acknowledge that the GNSO council New gTLD Subsequent Procedures Policy Development Process Working Group is currently developing policy that may lead to changes to the existing Introduction of New Generic Top-Level Domains policy recommendations from 8 August 2007 as well as the Applicant Guidebook dated June 2012.

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### **3.4 Structure and Naming**

Terminology used in the operating plan and budget is derived from the various contracts and documents that govern the business activities of PTI. ICANN org and PTI work to adhere to this terminology accurately to be faithful to these community agreed documents, which may come at the expense of clarity. In addition, the term “IANA” has limited allowable usages under the IPR agreements that govern its use. ICANN welcomes identifying ways of adding clarity to the presentation that does not contradict these governing documents.

ICANN org and PTI note the confusion referring to “thematically aligned activities” in section 4 of the Operating Plan and Budget and will review to improve the language and clarity.

## **4 Public Comment Process**

ICANN org and PTI are continually revising and assessing how best to utilize the public comment process. ICANN org and PTI acknowledge that a more interactive question format may be more beneficial to the community and will review the feasibility of adding this functionality to future public comments.

## 5 Appendix – Contributor Question/Comment and Reference to Response

### 5.1 List of Public Comments Received

Contributor	Question / Comment	Reference
RySG gTLD Registries Stakeholder Group	The FY21 budget is fiscally prudent in that it is forecast to only marginally exceed the FY20 forecast. This is welcomed by the RySG.	Section 2: Financial Data and Format
RySG gTLD Registries Stakeholder Group	The FY21 budget as presented represents (US\$10.6m) a marginal increase on FY20 and therefore appears to be fiscally prudent; this is generally welcomed by the RySG. That said, the FY20 forecast of US\$10.5m represents a significant uplift on the FY19 actuals (US\$7.9m) so the apparent prudence of FY21 needs to be seen in that context. Further detailed explanation on the underspend in 2019 and why this cannot be retained would be helpful.	Section 2: Financial Data and Format
ICANN Business Constituency (BC)	While it was noted that the PTI Budget of \$10m is an increase of only 1% of the preceding year's budget (\$9.9m) due to inflation with respect to personnel compensation, the BC for transparency purposes requests that the comparative inflationary rate in view should be indicated.	Section 2: Financial Data and Format
ICANN Business Constituency (BC)	Furthermore, looking at the table below in "Funding" row and "Under/(Over)" column: The BC desires clarity on whether an increase of \$100,000 over the FY20 budget for FY21 Budget should be classified as a decrease rather than an increase	Section 2: Financial Data and Format
ICANN Business Constituency (BC)	The BC also seeks clarification on the use of the Contingency funds identified in this table. We note that while there is no increase anticipated from FY20 to FY21, FY19 provided no funding in this area. Since it represents \$500,000 of the PTI budget, we request details on how the Contingency was used in FY20 that warrants continued allocation for the coming year.	Section 2: Financial Data and Format

Contributor	Question / Comment	Reference
ICANN Business Constituency (BC)	Comparing the above table to the one provided in Section 6.3 below, BC also requests clarification of expenses for Professional Services and for Admin, which differ. We surmise that the table folds Contingency and Deprecation into these categories, but it would be helpful to have this identified so that the two tables do not conflict.	Section 2: Financial Data and Format
ICANN Business Constituency (BC)	The BC noted that the IANA FY21 Budget sum of \$600,000 is flat compared to that of FY20. We ask why is there no inflationary effect on that cost, noting that personnel are also involved?	Section 2: Financial Data and Format
ICANN Business Constituency (BC)	As a general note, the BC would like to compute the budgets to arrive at the percentage values indicated and would therefore like to have access to the raw data from which computations were made. Or as an alternative, base data could be provided up to 2 or 3 decimal points. Based on the data provided, we should also be able to verify the computational results indicated without any assumptions.	Section 2: Financial Data and Format
GNSO Council	While it was noted that the PTI Budget of US\$10m is an increase of only 1% of the preceding year's budget (US\$9.9m) due to inflation with respect to personnel compensation, for transparency purposes, it would be appropriate to indicate the comparative inflationary rate utilized.	Section 2: Financial Data and Format
Non-Commercial Stakeholders Group (NCSG)	NCSG strongly supports the continued maintenance of the PTI budget to ensure continuity of service in the IANA functions. The flat year on year approach of the FY21 budget is acceptable to NCSG as long as the IANA customers and the core maintenance of the RZMS and the other IANA functions are sufficiently accounted for in the FY21 budget.	Section 2: Financial Data and Format
Non-Commercial Stakeholders Group (NCSG)	NCSG would look favourably on increasing the precision of the numbers presented in future budgetary documents. Indeed, irrespective of accounting standards, a comparatively small budget of 10 millions USD would in our view require rounding up to no more than the closest 10 000. We formulated a similar comment last year and it appears it was not taken into consideration in the preparation of the FY21 budgets	Section 2: Financial Data and Format

Contributor	Question / Comment	Reference
Non-Commercial Stakeholders Group (NCSG)	In addition, several elements of the two documents under comment here are presented without definitions, explanations or in a generally obtuse way. As a not-for-profit organization accountable to its community, it is paramount that ICANN deploys the required efforts in order to properly enable that community to inform itself, produce comments and generally engage the organization on issues it deems important. This is especially important when such information is of a more technical nature, like in the case of accounting or quantitative information. This is not about simply finding the right amount of details to include in disclosure documents, but also about presentation, which is paramount when it comes to quantitative information.	Section 2: Financial Data and Format
Non-Commercial Stakeholders Group (NCSG)	In our comment on last year's operating plans and budgets, we made similar comments on the importance of presentation and definitions. No visible improvements were made. In addition, new obfuscating elements have found their way in this year's budget documents, decreasing further their intelligibility and in doing so the capacity of the community to engage	Section 2: Financial Data and Format
Non-Commercial Stakeholders Group (NCSG)	Footnote (a) of Appendix A and B cannot be understood without precise knowledge of the context of the transition of IANA from ICANN to PTI as well as the numbering of Section 5.1 in the IANA Budget. NCSG is happy to work further with the relevant persons and departments of ICANN org to find ways to improve the accessibility of future budgetary documents while meeting ICANN org's objectives of uniform presentation.	Section 2: Financial Data and Format
Non-Commercial Stakeholders Group (NCSG)	Moreover, it also appears that this year's draft budget tables (e.g. Appendix A and B of the draft IANA budget) were changed in two ways. First, the replacement of the terms "increase" and "(decrease)" by "under" and "(over)" respectively, as well as the addition of an extra under/over column on the right of FY19 actuals. NCSG deplores both of these changes and would suggest reverting to what was done in the FY20 document.	Section 2: Financial Data and Format
Non-Commercial Stakeholders Group (NCSG)	Even for those familiar with the accounting parenthetical notation, the terms "over" and "under" most likely remain equivocal. It is possible to make sense of them, but it does require knowledge of accounting. Without that knowledge, one may not understand that it is the budget numbers which are understood to be "over" or "under" either the forecast or actuals. This issue is compounded by the fact that the basis for the over/under comparison for actual is	Section 2: Financial Data and Format

Contributor	Question / Comment	Reference
	not even given. Usage of “increase” and “decrease” more directly implied that what is planned (next FY budget) is an increase or a decrease over the more certain numbers (the current FY forecast or the actuals for the previous FY). It does not suffice that one may understand the meaning of “over” and “under” by looking at the numbers and reasoning by induction. The meaning of these two terms should be obvious without looking at the numbers, and for now it is not	
Registrar Stakeholder Group (RrSG)	However, the RrSG notes that although there is only a modest budget increase in FY21, there is a significant increase from the PTI services FY19 actuals of 7.9 million to the FY21 budget of 10 million, the bulk of which is coming from personnel costs. This is questionable given the headcount is actually going down between 2020-21 (albeit following an increase in 2019-20). The RrSG recognises that there is already a commitment to these personnel, but we would now expect the personnel budget to remain stable over the next 3 years, as no further changes should be required. Likewise, the decrease in budgeted administration costs shown from FY20-21 should also continue now that the department is fully established.	Section 2: Financial Data and Format
Registrar Stakeholder Group (RrSG)	Finally, for the sake of transparency, the RrSG would like to see a better breakdown of the budget for the IANA services. Although notably smaller than the PTI services budget, there should still be more information provided on how the 0.6 million is allocated	Section 2: Financial Data and Format
GNSO Council	The GNSO, as a Decisional Participant within the Empowered Community, recognizes that arms-length separation of ICANN and PTI is important and that should any of its constituent parts have issue with the IANA/PTI budget, it is the PTI-IANA Operating Plan and Budget that would be subject to possible rejection petition should that occur.	Thank you for your feedback and we acknowledge your comment
GNSO Council	The GNSO Council noted PTI’s expectation in FY21 to deliver a comprehensive set of systems and tools to support protocol parameter assignment workflows following a multi-year development effort. This is a welcome development and it is GNSO Council’s expectation that PTI will continue to focus on service improvement as a culture.	Thank you for your feedback and we acknowledge your comment

Contributor	Question / Comment	Reference
Individual	The proposed budget is the same as the previous year. However, I am unable to see the budget for the PTI R&D activities and budget to create awareness on PTI functions among the global community. I think these both components are important for PTI better services and to get handsome feedback from the global community on PTI related matters including its PDP processes. I proposing that there may be some budget for the PTI R&D activities and to create awareness about PTI functions among the global community.	Section 3: PTI Structure and Information
ICANN at Large	In August of this year, community comment was requested regarding the evolution of the Root Zone Management System, based on RSSAC 037 and RSSAC 038. The ALAC provided a statement in response to the ICANN Public Comment on Evolving the Governance of the Root Server System accordingly. This evolution involves a big change in the governance of the Root Server System. But these changes are not reflected in the proposed PTI and IANA FY21 Operating Plan and Budgets. Did these changes have any consequences (short, medium or long term) to the PTI and IANA Operating Plan and Budgets? Do ICANN, PTI and IANA need to be prepared to take on an additional Root Server?	Section 3: PTI Structure and Information
RySG gTLD Registries Stakeholder Group	The budget as presented is lacking in underlying detail and any apparent linkage to a strategic plan and this makes it difficult to comment in substantial detail on any of the key areas of expenditure.	Section 3: PTI Structure and Information
RySG gTLD Registries Stakeholder Group	Review of the budget as presented presents a challenge to a third party seeking to comment. For example, Section 4 provides clear and useful descriptions of the activities carried out in various areas of work. But there are no questions posed to anyone commenting or indications of the choices or compromises being made. Absent such information, it is challenging for a commenter to provide substantial or material input. While the RySG is not be asked to approve the budget as such, if we were being asked to do so, we would find that difficult to do with this limited level of detail. The RySG appreciates that the PTI budget process necessitates that this budget is for a reasonably long time ahead and therefore it is challenging to provide some of the details. But, recognising the obvious constraints, alternatives to the current presentation should be considered. The development and socialisation of a longer	Section 3: PTI Structure and Information

Contributor	Question / Comment	Reference
	term view - a strategic plan for the IANA services - and the linkage of such a plan to the budgets may help here.	
RySG gTLD Registries Stakeholder Group	Fiscal prudence is only one parameter and, should the IANA services require investment, the RySG would welcome the opportunity to understand and comment on what investment may be required. To this extent, the RySG welcomes interaction with the IANA staff and, potentially, a more interactive style of budget. For example, the budget as presented could offer more than one option for investment. Such an approach could offer two or even three options along the lines of a base budget, a development budget and an investment budget that the community could comment on. We anticipate that users of the IANA services may find such an approach particularly helpful in facilitating more detailed and interactive community comment and input.	Section 3: PTI Structure and Information
ICANN Business Constituency (BC)	The BC notes PTI's expectation in Fiscal Year (FY) 21 to deliver a comprehensive set of systems and tools to support protocol parameter assignment workflows following a multi-year development effort. This is a welcome development and it is BC's expectation that PTI will continue to focus on service improvement as a culture. As an improvement, the BC would like PTI to indicate the expected end of similar projects going forward. Projects and Programs should have start dates and proposed end dates which are subject to change based on management approval. The idea behind this is to avoid unending/unpredictable multi-year efforts. Once the project/Program is completed, it can be absorbed into the general day-to-day activity as part of "business as usual".	Section 3: PTI Structure and Information
GNSO Council	The GNSO Council notes that one of our current policy development activities does potentially intersect with the operations of the IANA Functions by PTI. The New gTLD Subsequent Procedures Policy Development Process Working Group is currently developing policy that may lead to changes to the existing Introduction of New Generic Top-Level Domains policy recommendations from 8 August 2007 as well as the final Applicant Guidebook dated June 2012. This may ultimately lead to ICANN instructing PTI to place new gTLDs into the root. However, it is not anticipated that delegations would occur in FY21.	Section 3: PTI Structure and Information

Contributor	Question / Comment	Reference
GNSO Council	As an improvement, the GNSO Council would recommend that PTI provide more details on such improvements and could also indicate the expected end date of similar projects going forward. Projects and programs should have start dates and proposed end dates which are subject to change based on management approval. The idea behind this is to avoid unending/unpredictable multi-year efforts. Once the project/program is completed, it can be absorbed into the general day-to-day activity as part of what is called “business as usual”.	Section 3: PTI Structure and Information
GNSO Council	The budget as presented is lacking in underlying detail and any apparent linkage to a strategic plan and this makes it difficult to comment in substantial detail on any of the key areas of expenditure. Given that the process necessitates that this budget is for a reasonably long time ahead and it is clearly challenging to provide some of the underlying details but, recognizing this, alternatives to the current presentation should be considered.	Section 3: PTI Structure and Information
Non-Commercial Stakeholders Group (NCSG)	Naming conventions - there is no standard usage of terms, and it appears several terms overlap each other, at least partially or completely (“Core IANA Services”, “IANA Services”, “PTI Services”, “PTI O&B”, “Contract Oversight and Auxiliary Services”) This makes reading and understanding difficult, if not outright guesswork. NCSG would strongly recommend the usage of defined terms, with one single term per item or concept, as is common practice in the professional services industry, with an appendix giving a list of definitions.	Section 3: PTI Structure and Information
Non-Commercial Stakeholders Group (NCSG)	Relationship between ICANN, IANA and PTI - these are three different entities (or group of “functions,” as far as IANA is concerned) which are easily confused. While the boxes visual is a helpful aid, the variation in language across the document undermines the usefulness of that aid. Moreover, under section 4 of the IANA budget, it is mentioned that PTI is divided in “two groups of thematically aligned activities”. However, what follows is a list of four elements, which is found nowhere else the tables or in the text of the document. NCSG would strongly recommend an individual explanatory section, which would contain both a visual and text, both using the standardized vocabulary recommended above.	Section 3: PTI Structure and Information

Contributor	Question / Comment	Reference
RySG gTLD Registries Stakeholder Group	The format is a statement of the budget as planned. Community input and comment may be better facilitated by the authors providing specific questions around key expenditure for community input and comment.	Section4: Public Comment Process

# **Proposed Adopted FY21 IANA Operating Plan and Budget**

26 January 2020



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# IANA Operating Plan & Budget

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## 1 Introduction

### **CONTENTS OF THE DOCUMENT**

This document contains the total Proposed Adopted Fiscal Year 2021 (FY21) Internet Assigned Numbers Authority (IANA) Operating Plan and Budget, which is posted for public comment as required by the Internet Corporation for Assigned Names and Numbers' (ICANN's) Bylaws, and in accordance with ICANN's public comment process.

This document provides the details of the IANA Functions and other IANA Services for FY21 from 1 July 2020 through 30 June 2021. This Proposed Adopted FY21 IANA Operating Plan and Budget includes the amounts covered in the Proposed Adopted FY21 Public Technical Identifiers (PTI) Budget and the amounts for the IANA Services performed by ICANN as the IANA Functions Operator, and which are not performed by PTI. All amounts referenced are in U.S. dollars unless otherwise stated.

Section 6 of this document describes the IANA Functions and other IANA Services and the activities performed to deliver them. Where useful, comparative information for FY20 Forecast is provided, which represents the total IANA Functions and other IANA Services forecast information for FY20.

### **YOUR PARTICIPATION**

ICANN seeks community input on the Proposed Adopted FY21 IANA Operating Plan and Budget through the public comment process. Your feedback and participation is an important part of ICANN's planning process and multistakeholder model.

## 2 Executive Summary

The annual IANA Operating Plan and Budget is comprised of the full PTI budget, plus other costs associated with governance and delivery of IANA Functions that are not borne directly by PTI.

### SEPARATION OF PTI AND IANA BUDGETS

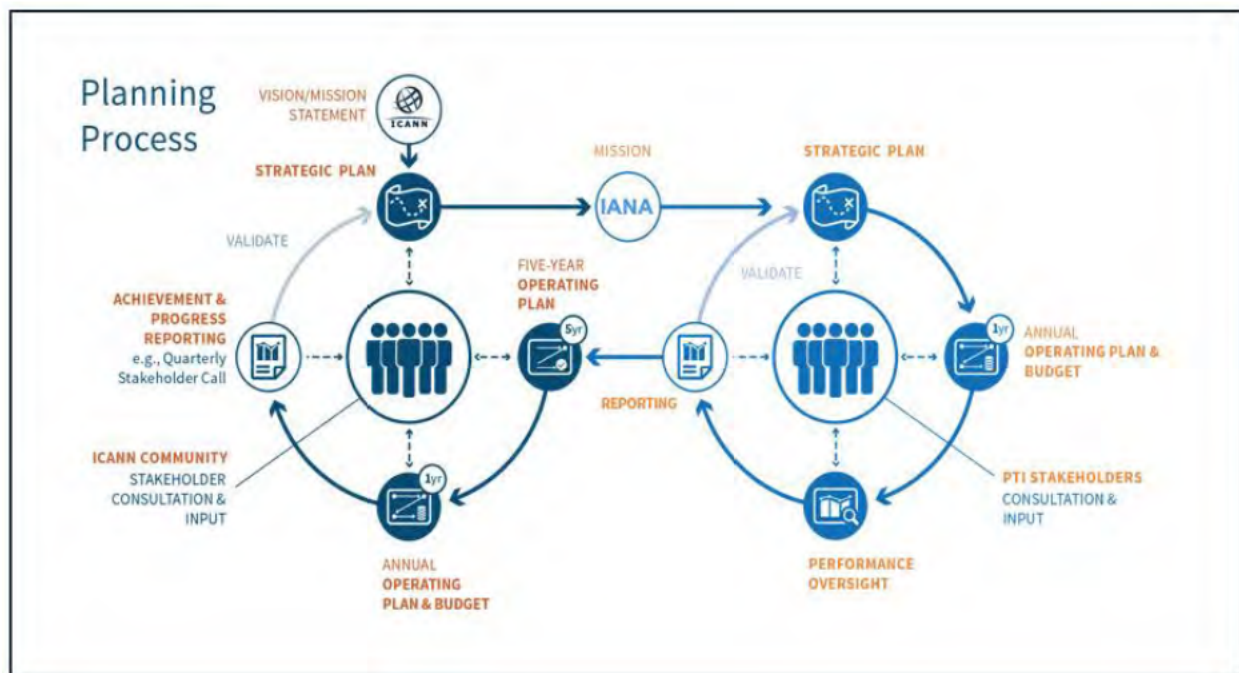
The PTI Services and the IANA Services will each be reflected under the overall IANA Budget, as described in this document.

### STRUCTURE OF WORK

The ICANN-funded PTI operational activities and PTI technical systems enhancements (PTI Services) is outlined in the Adopted FY21 PTI Operating Plan and Budget. This represents the PTI Services component of the Proposed Adopted FY21 IANA Operating Plan and Budget. The other component of this plan and budget is the IANA Services performed by ICANN, that are not borne directly by PTI in its role as the IANA Functions Operator.

### PLANNING AND BUDGET OVERVIEW

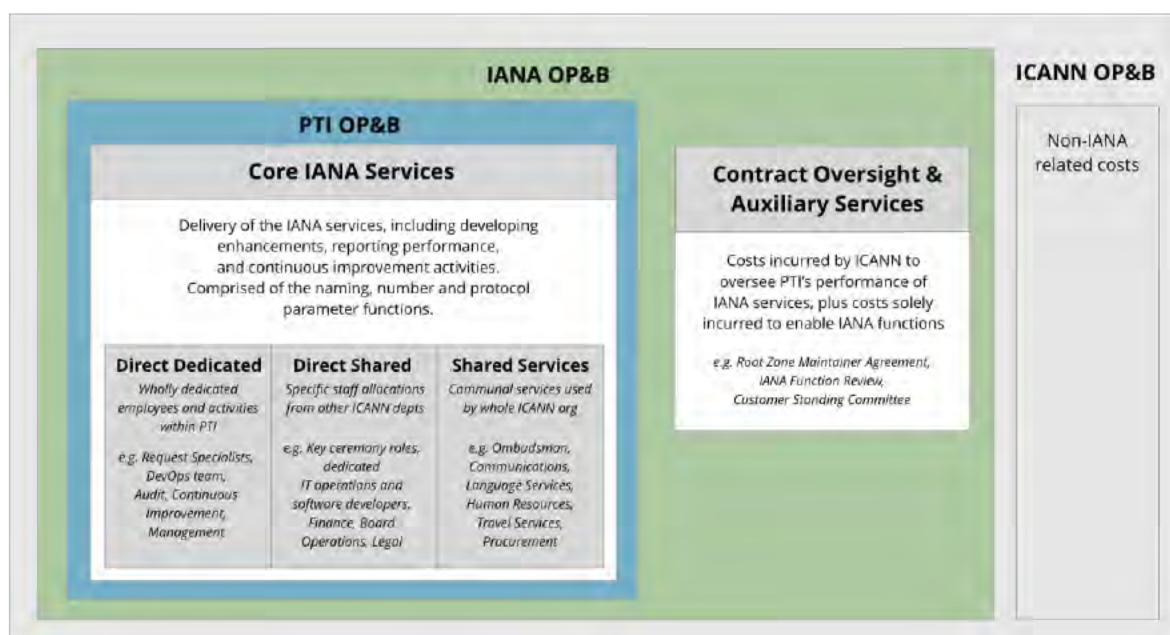
This graphic below shows the IANA planning process and the encompassing ICANN planning process. The Annual IANA Operating Plan and Budget is represented in ICANN's Five-Year Operating Plan, and will become a component of ICANN's FY21 Annual Operating Plan and Budget.



### 3 IANA Budget Overview

The PTI Board adopts the PTI Operating Plan and Budget each year, which constitutes a large component of the IANA Operating Plan and Budget. This is included in ICANN's Operating Plan and Budget, which is sent to the ICANN Board to review and adopt.

The ICANN-funded PTI operational activities and PTI technical systems enhancements (PTI Services) are outlined in the Adopted FY21 PTI Operating Plan and Budget. This represents the PTI Services component in this document. The other component is the IANA Services performed by ICANN, that are not borne directly by PTI in its role as the IANA Functions Operator.



### FY21 IANA BUDGET

The Proposed Adopted FY21 IANA Budget is \$10.6M, of which \$10.0M is for PTI Services and \$0.6M is for IANA Services (not performed by PTI). The PTI Services increased by \$0.1M versus FY20 Forecast primarily driven by inflationary Personnel increases, partially offset by decreases in direct shared activities. The IANA Services component is flat to FY20 Forecast.

FY21 IANA Budget In Millions, USD	FY21 IANA Budget	FY20 IANA Forecast	Under/(Over)		FY19 IANA Actuals	Under/(Over)	
			Total	%		Total	%
PTI Services	\$10.0	\$9.9	(\$0.1)	-1.2%	\$7.9	(\$2.1)	-26.8%
IANA Services (a)	\$0.6	\$0.6	\$0.0	2.9%	\$0.4	(\$0.2)	-36.2%
<b>TOTAL</b>	<b>\$10.6</b>	<b>\$10.5</b>	<b>(\$0.1)</b>	<b>-1.0%</b>	<b>\$8.3</b>	<b>(\$2.3)</b>	<b>-27.3%</b>

(a) IANA Services includes the Root Zone Maintainer function, Customer Standing Committee, Root Zone Evolution Committee and IANA Naming Function reviews  
These costs are funded by ICANN Operations.

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Dollar figures are shown in millions of U.S. dollars with a granularity of \$100,000. Due to rounding, numbers presented may not add up precisely to the totals indicated and percentages may not precisely reflect the absolute figures. An absence of any expenditure is shown with a dash.

## 4 IANA Operating Plan and Budget

The IANA Functions and other IANA Services support ICANN's strategic objectives to support a healthy, stable, and resilient unique identifier ecosystem. The IANA Functions and other IANA Services include four activities: two activities where PTI operationalizes work that include operational activities and system enhancements, and two activities for the IANA Services within ICANN that include activities performed as the IANA Functions Operator.

Of the two PTI activities, one is focused on operational activities and the other is focused on systems enhancements and development. The two other IANA Services activities include the activities that ICANN performs as the IANA Functions Operator.

PTI is structured in two groups of thematically aligned activities:

### 1. PTI Operations

Description: Delivery of IANA Services and all associated operational responsibilities, plus work to maintain and enhance processes, tools, and systems.

### 2. IANA Operations

The IANA Services performed by ICANN include the activities that ICANN performs as the IANA Functions Operator and logistical support for the Customer Standing Committee (CSC) and the Root Zone Evolution Review Committee. This includes scheduled reviews such as of the IANA Naming Functions (IFR) and of CSC effectiveness, as well as the activities supporting the continued evolution of the root server system.

#### Support Policy Development, Policy-Related and Advisory Activities

Description: Optimize efficiency and effectiveness of community policy development and advice efforts.

#### Root Systems Operations

Description: Facilitating the continued evolution of the root server system to ensure its ongoing security, stability, and resiliency as domain name system technology and operations change over time: maintenance of relationships with the root server operators, Root Server System Advisory Committee (RSSAC), and related stakeholders. This includes the activities that ICANN performs as the IANA Functions Operator.

#### Global Domains Division (GDD) Strategic Programs

Description: Work related to Global Domains Division strategic programs in support of a healthy, secure, stable and resilient identifier ecosystem.

## 5 Appendices

### Appendix A — FY21 Proposed Adopted IANA Budget

FY21 IANA Budget in Millions, USD	IANA Budget FY21	IANA Forecast FY20	Under/(Over)		IANA Actuals FY19	Under/(Over)	
			Total	%		Total	%
<b>FUNDING</b>	<b>\$10.6</b>	<b>\$10.5</b>	<b>(\$0.1)</b>	<b>-1.0%</b>	<b>\$8.3</b>	<b>(\$2.3)</b>	<b>-27.3%</b>
Personnel	\$6.6	\$6.3	(\$0.3)	-5.0%	\$4.9	(\$1.7)	-34.2%
Travel & Meetings	\$0.5	\$0.5	\$0.0	0.1%	\$0.5	(\$0.0)	-7.9%
Professional Services	\$1.7	\$1.7	\$0.0	0.1%	\$1.5	(\$0.2)	-10.2%
Administration	\$0.9	\$1.1	\$0.2	18.3%	\$0.9	(\$0.0)	-4.7%
Contingency	\$0.5	\$0.5	\$0.0	0.0%	\$0.0	(\$0.5)	0.0%
Capital	\$0.1	\$0.1	\$0.0	0.0%	\$0.3	\$0.2	64.0%
Depreciation (a)	\$0.3	\$0.3	\$0.0	0.0%	\$0.1	(\$0.2)	-425.4%
<b>TOTAL CASH EXPENSES</b>	<b>\$10.6</b>	<b>\$10.5</b>	<b>(\$0.1)</b>	<b>-1.0%</b>	<b>\$8.2</b>	<b>(\$2.4)</b>	<b>-29.2%</b>
EXCESS/(DEFICIT)	\$0.0	\$0.0	\$0.0	100.0%	\$0.1	\$0.1	100.0%
Average Headcount (FTE) (b)	24.7	24.9	0.2	0.8%	21.0	(3.7)	-17.6%

(a) Depreciation is treated as a cash expense for PTI since it will be reimbursed to ICANN

(b) FTE: Full-time staff equivalent

### Appendix B — FY21 Proposed Adopted PTI Services and the Proposed Adopted IANA Budget Summary

FY21 PTI Budget in Millions, USD	PTI Services FY21 Budget	PTI Services FY20 Forecast	Under/(Over)		PTI Services FY19 Actuals	Under/(Over)	
			Total	%		Total	%
<b>FUNDING</b>	<b>\$10.0</b>	<b>\$9.9</b>	<b>(\$0.1)</b>	<b>-1.2%</b>	<b>\$7.9</b>	<b>(\$2.1)</b>	<b>-26.8%</b>
Personnel	\$6.3	\$6.0	(\$0.3)	-5.6%	\$4.9	(\$1.4)	-29.0%
Travel & Meetings	\$0.5	\$0.5	\$0.0	1.5%	\$0.5	(\$0.0)	-3.4%
Professional Services	\$1.4	\$1.4	\$0.0	0.1%	\$1.2	(\$0.2)	-12.7%
Administration	\$0.9	\$1.1	\$0.2	18.3%	\$0.9	(\$0.0)	-4.7%
Contingency	\$0.5	\$0.5	\$0.0	0.0%	\$0.0	(\$0.5)	0.0%
Capital	\$0.1	\$0.1	\$0.0	0.0%	\$0.3	\$0.2	64.0%
Depreciation (a)	\$0.3	\$0.3	\$0.0	0.0%	\$0.1	(\$0.2)	-425.4%
<b>TOTAL CASH EXPENSES</b>	<b>\$10.0</b>	<b>\$9.9</b>	<b>(\$0.1)</b>	<b>-1.2%</b>	<b>\$7.9</b>	<b>(\$2.1)</b>	<b>-26.8%</b>
EXCESS/(DEFICIT)	\$0.0	\$0.0	\$0.0	0.0%	\$0.0	\$0.0	0.0%
Average Headcount (FTE) (b)	23.0	23.0	0.0	0.2%	21.0	(2.0)	-9.5%

(a) Depreciation is treated as a cash expense for PTI since it will be reimbursed to ICANN

(b) FTE: Full-time staff equivalent

FY21 IANA Budget in Millions, USD	FY21 IANA Budget	FY20 IANA Forecast	Under/(Over)		FY19 IANA Actuals	Under/(Over)	
			Total	%		Total	%
PTI Services	\$10.0	\$9.9	(\$0.1)	-1.2%	\$7.9	(\$2.1)	-26.8%
IANA Services (c)	\$0.6	\$0.6	\$0.0	2.9%	\$0.4	(\$0.2)	-36.2%
<b>TOTAL</b>	<b>\$10.6</b>	<b>\$10.5</b>	<b>(\$0.1)</b>	<b>-1.0%</b>	<b>\$8.3</b>	<b>(\$2.3)</b>	<b>-27.3%</b>

(c) IANA Services includes the Root Zone Maintainer function, Customer Standing Committee, Root Zone Evolution Committee and IANA Naming Function reviews. These costs are funded by ICANN Operations.

Dollar figures are shown in millions of U.S. dollars with a granularity of \$100,000. Due to rounding, numbers presented may not add up precisely to the totals indicated and percentages may not precisely reflect the absolute figures. An absence of any expenditure is shown with a dash.

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## Appendix C — IANA Caretaker Budget

Under the ICANN Bylaws, after the ICANN Board approves the IANA Budget and Operating Plan, the Empowered Community has the right to reject it. The rejection process must conclude in order for the FY21 IANA Budget and Operating Plan to go into effect. If FY21 begins prior to the completion of the Empowered Community's rejection process, the Caretaker IANA Budget must go into effect until that rejection process has concluded pursuant to Annex D of the ICANN Bylaws.

For purposes of FY21, the "Caretaker IANA Budget" as described in Annex F to ICANN's Bylaws, is defined as the FY20 IANA Operating Plan and Budget as approved by the ICANN Board in May 2019.



## ICANN BOARD PAPER NO. 2020.01.26.1e

**TITLE:** Competition, Consumer Trust, and Consumer Choice Review Team (CCT) - Adoption of Plan for Implementation of Accepted Recommendations

**PROPOSED ACTION:** For Board Consideration and Approval

### **EXECUTIVE SUMMARY:**

On 1 March 2019, the ICANN Board took [action](#) on the Final Recommendations produced by the Competition, Consumer Trust, and Consumer Choice Review Team (CCT-RT) and directed ICANN org to "develop and submit to the Board a plan for the implementation of the accepted recommendations". A [Plan for Implementation](#) was posted for [public comment](#) on 11 September 2019, along with a proposal to include implementation of CCT recommendations in the Operating Planning and Budgeting Process. The call for feedback yielded a total of five contributions. As applicable, comments were addressed in the "Analysis" section of the [Public Comment Summary Report](#).

This Board resolution is intended to direct ICANN org to commence implementation work for the set of CCT-RT Accepted recommendations, in accordance with the [Plan for Implementation](#) ICANN org released for public comment in September 2019.

Implementation work, where no significant incremental costs and resources are needed, should begin as soon as possible. Any CCT recommendations addressed in the Plan for Implementation that require significant resources and budget, should be included into the operational planning and budgeting process, allowing for appropriate community consideration and prioritization, as appropriate, of planned work.

### **CCT BOARD CAUCUS GROUP'S RECOMMENDATION:**

The CCT Board Caucus Group recommends that ICANN org commence implementation as proposed in the Plan for Implementation. Implementation work, where no significant incremental costs and resources are needed, should begin as soon as possible. For any CCT recommendations that require significant resources and budget, these should be included into operational planning and budgeting processes, allowing for appropriate community consideration and prioritization, as applicable, of planned work. Additionally, the CCT Board Caucus Group recommends that ICANN org assemble detailed implementation steps, which includes specifics such as resource availability and scheduling, to be supplemented with budget plans once implementation is underway.

#### **PROPOSED RESOLUTION:**

Whereas, ICANN was obligated under the Affirmation of Commitments to "organize a review that will examine the extent to which the introduction or expansion of gTLDs has promoted competition, consumer trust and consumer choice, as well as effectiveness of (a) the application and evaluation process, and (b) safeguards put in place to mitigate issues involved in the introduction or expansion." A community-led review team – the Competition, Consumer Trust and Consumer Choice Review Team (CCT-RT) – was [announced](#) on 23 December 2015 to fulfill that mandate.

Whereas, the CCT-RT submitted a [Final Report](#) containing 35 full consensus recommendations to the ICANN Board for consideration on 8 September 2018.

Whereas, the ICANN Board took action on each of the 35 recommendations issued within the Final Report of the Competition, Consumer Trust and Consumer Choice Review Final Report as specified within the scorecard titled "[Final CCT Recommendations: Board Action \(1 March 2019\)](#)" ("Scorecard").

Whereas, the Board resolved to accept CCT recommendations 1, 17, 21, 22, 30, 31, subject to costing and implementation considerations, as specified in the [Scorecard](#), and directed the ICANN President and CEO, or his designee(s), to develop and submit to the Board a plan for the implementation, with the objective of completing and providing the plan to the community for consideration no later than six months after this Board action.

Whereas, a [Plan for Implementation](#) was submitted for [public comment](#) on 11 September 2019. Community feedback was also sought on the proposal to include implementation of CCT recommendations in the Operating Planning and Budgeting Process, as appropriate, allowing for appropriate prioritization within the context of all ICANN work. The call for feedback yielded a total of five comments; analysis and ICANN org responses to the input received can be found in the [summary](#) produced by ICANN org.

Resolved (2020.01.26.xx) to be assigned by Secretary]], the Board directs the ICANN President and CEO, or his designee(s), to commence implementation of the accepted CCT-RT recommendations as proposed in the [Plan for Implementation](#). Implementation work, where no significant incremental costs and resources are needed, is to begin as soon as possible. Detailed implementation steps, which include specifics such as resource availability and scheduling, should be assembled and supplemented with budget plans once implementation is underway. Any CCT recommendations addressed in the Plan for Implementation that require significant resources and budget, should be included into operational planning and budgeting processes, allowing for appropriate community consideration and prioritization, as applicable, of planned work.

#### **PROPOSED RATIONALE:**

##### **Why is the Board addressing this issue?**

As detailed in Article 1 of ICANN [Bylaws](#), reviews are important accountability measures that are critical to maintaining a healthy multistakeholder model and to helping ICANN achieve its Mission. Reviews also contribute to ensuring that ICANN serves the public interest. The first Competition, Consumer Trust and Consumer Choice Review (CCT), initiated under the Affirmation of Commitments (AoC), is an important aspect of ICANN's commitment to continuous review and assessment of key areas.

The Competition, Consumer Trust, and Consumer Choice Review Team (CCT-RT) submitted its [Final Report](#) and [Recommendations](#) to the ICANN Board of Directors on 8 September 2018.

On 1 March 2019, the ICANN Board took [action](#) on the Final Recommendations produced by the CCT-RT. Per ICANN Bylaws, the ICANN Board carefully considered how to best address each of the recommendations, and decided on three categories of action: accepted, pending, and passing through to different parts of the community, as documented in a detailed [scorecard](#) accompanying the Board resolution.

Today, the Board is taking action to direct implementation of the accepted recommendations as outlined in the Plan for Implementation.

### **What is the proposal being considered?**

ICANN org produced a [Plan for Implementation](#) in furtherance of Board resolution 2019.03.01.03 to: 1) accept CCT recommendations 1, 17, 21, 22, 30, 31, subject to costing and implementation considerations; and 2) direct ICANN "to develop and submit to the Board a plan for the implementation of the accepted recommendations.

The [Plan for Implementation](#) sets out the approach for implementation of accepted recommendations. It contains information such as a description of the activities, estimated duration, resource requirements (including funding source), dependencies, and other elements, where available and possible.

In addition to articulating milestones and steps leading to implementation, the intent of the [Plan for Implementation](#) is to inform, to the extent possible, on anticipated costs and resources needed to complete implementation, pursuant to the Board's fiduciary responsibility to the corporation. It addresses how the resources allocated to specific recommendations support ICANN in serving its Mission, and to understand the balance of resources and prioritization needed in order to fund the work identified to meet the CCT-RT recommendations.

The [Plan for Implementation](#) was developed by ICANN org subject matter experts leading on topics of the six accepted recommendations.

### **Which stakeholders or others were consulted?**

The [Plan for Implementation](#) was posted for [public comment](#) on 11 September 2019. Community feedback was also sought on the proposal to include implementation of CCT recommendations in the Operating Planning and Budgeting Process, allowing for appropriate prioritization within the broader context of all ICANN work. The call for feedback closed on 31 October and yielded a total of five contributions. As applicable, comments were addressed in the “Analysis” section of the [Public Comment Summary Report](#).

Prior to releasing the [Plan for Implementation](#), CCT-RT Implementation Shepherds<sup>1</sup> were invited to join the Board Caucus Group dedicated to the CCT effort for an overview of the proposed path forward and plans to address the 1 March Board action on CCT Final Recommendations.

**Are there fiscal impacts or ramifications on ICANN (strategic plan, operating plan, budget); the community; and/or the public?**

As articulated in the [Plan for Implementation](#), implementing these recommendations may in some instances require resources beyond what is allocated in the current budget. Accordingly, the Board resolution calls for recommendations addressed in the Plan for Implementation that require significant resources and budget, to be included into cycles of operational planning and budgeting.

**Are there positive or negative community impacts?**

Adopting the [Plan for Implementation](#) will allow ICANN org to begin implementing some of the recommendations developed by the community-led review team as soon as possible. It is anticipated that implementation of specific recommendations will require the community to participate in some consultations, as outlined in the [Plan for Implementation](#). This could potentially affect community workload and resources.

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<sup>1</sup> CCT-RT Implementation Shepherds are former CCT-RT members who volunteered to provide clarifications, on an as-needed basis, on recommendations’ intent, rationale, facts leading to conclusions, timeline, and measures of implementation. See <https://community.icann.org/display/CCT/Implementation+Shepherds> for more information.

**Are there any security, stability or resiliency issues relating to the DNS?**

This Board action is not expected to have a direct effect on security, stability or resiliency issues relating to the DNS.

**Is this action within ICANN's Mission? How does it relate to the global public interest?**

This action is within ICANN's Mission and mandate. It is considered in the public interest as it is a result of a key commitment entered into in 2009 within the Affirmation of Commitments, now embodied in the ICANN Bylaws. Reviews are an important and essential part of how ICANN upholds its commitments. The scope of this review is inherently tied to ICANN's core values of introduction and promotion of competition in the registration of domain names.

**Is this either a defined policy process within ICANN's Supporting Organizations or ICANN's Organizational Administrative Function decision requiring public comment or not requiring public comment?**

Public comment was received prior to Board consideration.

**Signature Block:**

Submitted by: Theresa Swinehart

Position: Senior Vice President,  
MSSI

Date Noted: 15 January 2020

Email:  
Theresa.swinehart@icann.org

**ICANN BOARD PAPER NO. 2020.01.26.1f**

**TITLE:** Brussels Branch Manager and Legal Representative

**PROPOSED ACTION:** For Board Consideration and Approval

**EXECUTIVE SUMMARY:**

By resolution 2017.06.24.13, the ICANN Board appointed Jean-Jacques Sahel as branch manager and legal representative in Brussels, Belgium in 2017. Mr. Sahel resigned from ICANN in October 2019. Chris Mondini, Vice-President, Stakeholder Engagement – Europe and Managing Director has agreed to assume the role of branch manager and legal representative in Brussels, effective 26 January 2020. The Board is being asked to withdraw formally Mr. Sahel's authority to act as branch manager and legal representative in Brussels and appoint Mr. Mondini to this role and delegate specific powers to him to enable him to carry out this role.

**ICANN ORGANIZATION RECOMMENDATION:**

ICANN organization recommends that the Board formally withdraw Jean-Jacques Sahel's authority to act as the branch manager and legal representative in Belgium, effective immediately, and appoint Mr. Chris Mondini to this role and delegate the specific powers to him to enable him to carry out this role, effective 26 January 2020.

**PROPOSED RESOLUTION:**

Whereas, the Internet Corporation for Assigned Names and Numbers, a non-profit, public benefit corporation, duly incorporated and existing under the laws of the State of California and the United States of America, having its principal place of business at 12025 E. Waterfront Drive, Suite 300, Los Angeles, California USA 90094 ("ICANN"), has established a branch office of a non-profit foreign entity in Belgium, currently residing at 6 Rond Point Schuman, B-1040 Brussels under the name of Internet Corporation for Assigned Names and Numbers.

Whereas, by resolution 2017.06.24.13 of the ICANN Board, Jean-Jacques Sahel was appointed as the branch manager and legal representative in Belgium, to serve in this capacity until his appointment is withdrawn by resolution of this Board of Directors.

Whereas, Jean-Jacques Sahel's role as the branch manager and legal representative in Belgium ended in October 2019, upon his resignation from ICANN.

Whereas, effective 26 January 2020, Christopher Mondini,

**Contact Information Redacted**

will assume the duties of the  
branch manager and legal representative for the ICANN office in Brussels, Belgium.

Resolved (2020.01.26 xx), Jean-Jacques Sahel's authority to act as branch manager and legal representative for ICANN's branch office in Brussels, Belgium shall be withdrawn, effective immediately.

Resolved (2020.01.26 xx), Christopher Mondini shall be the new branch manager and legal representative for ICANN's branch office in Brussels, Belgium, effective 26 January 2020.

Resolved (2020.01.26 xx), Christopher Mondini be delegated full power to carry out the daily management of ICANN's branch office in Brussels, Belgium including, but not limited to, the following specific powers regarding the operations of such branch:

1. Represent the corporation vis-à-vis all public authorities, whether governmental, regional, provincial, municipal or other, the Enterprise Courts, the Crossroads Bank for Enterprises, the Corporate Counters, the Tax Authorities, including the V.A.T. administration, the Postal Checks service, customs, postal, telephone and telegraph services, and all other public services and authorities.
2. Sign daily correspondence, receive and sign receipts for registered letters or parcels addressed to the corporation through the post, the customs, the rail-, air- and other transport companies and services.

3. Take out, sign, transfer or cancel all insurance policies and all contracts for supply of water, gas, power, telephone and other utilities for the branch, and pay invoices, bills and other dues relating thereto.
4. Sign and accept all quotations, contracts and orders for the purchase or sale of office equipment and other investment goods, services and supplies necessary for the functioning of the branch which do not obligate the corporation to expend more than 500 Euro.
5. Take or grant leases, including long term leases, on real estate, equipment or other fixed assets and enter into leasing agreements with respect to the same, upon approval from President and CEO of ICANN or ICANN's Board of Directors.
6. Claim, collect and receive sums of money, documents or property of any kind and sign receipts with respect thereto.
7. Affiliate the branch with all professional or business organizations.
8. Represent the branch in court or arbitration proceedings, as plaintiff or defendant, take all necessary steps with respect to the above proceedings, obtain all judgments, and have them executed.
9. Draft all documents and sign all papers in order to be able to exercise the powers listed above.
10. Adopt all necessary measures to implement the resolutions and recommendations of the Board of Directors.
11. Move the branch to any other location in Belgium upon approval of the ICANN President and CEO or the ICANN Board of Directors.

#### **PROPOSED RATIONALE**

ICANN is committed to continuing its global reach and presence in all time zones throughout the globe. To this end, the ICANN Board passed resolutions establishing a

branch office in Belgium and in 2017 appointed Jean-Jacques Sahel as the branch manager and legal representative with associated delegated powers to commit these duties. Mr. Sahel resigned from his employment with ICANN In October 2019. This requires the Board to appoint a new branch manager and legal representative. This resolution, appointing Mr. Mondini as the branch manager and legal representative with delegation of the specific powers required to manage the branch, continues ICANN's effective management of the branch office following the resignation of the former branch manager and legal representative.

ICANN's commitment to a global reach is consistent with the public interest and with ICANN's mission in that it helps support ICANN's global stakeholder focus.

There will be a fiscal impact on ICANN only to the extent there are expenses for naming the new branch manager, but such impact can be accounted for in the FY20 budget.

This resolution is not intended to have any impact on the security, stability and resiliency of the domain name system.

This is an Organizational Administrative Function not requiring public comment.

Submitted: Amy Stathos, Deputy General Counsel

Date: 17 January 2020

Email: amy.stathos@icann.org

## ICANN BOARD PAPER NO. 2020.01.26.2a

**TITLE:** GAC Advice: Montréal Communiqué (November 2019)

**PROPOSED ACTION:** For Board Consideration and Approval

### **EXECUTIVE SUMMARY:**

The Governmental Advisory Committee (GAC) issued its [Montréal Communiqué](#) on 6 November 2019. The Communiqué includes four items of consensus advice and three items of follow-up to previous advice issued to the ICANN Board. The consensus advice concerns the CCT Review and Subsequent Rounds of New gTLDs, and Domain Name Registration Directory Service and Data Protection. The follow-up to previous advice concerns the Protection of the Red Cross and Red Crescent Designations and Identifiers, IGO Protections, and Domain Name Registration Directory Services and Data Protection. The consensus advice was the subject of a clarification call held between the ICANN Board and the GAC on [17 December 2019](#). Prior to the clarification call, the ICANN organization submitted a letter to the GAC Chair on [16 December 2019](#) regarding the GAC's advice on the CCT Review in the Montréal Communiqué. Additionally, as requested by the GAC in its Montréal Communiqué, the ICANN organization also provided an update on the EPDP Phase 1 Implementation schedule in a [6 January 2020](#) letter. Finally, in a [22 January 2020](#) letter, the GAC provided a response to the ICANN Board clarification questions.

The Board is being asked to approve the GAC-Board Scorecard to address the GAC's advice in the Montréal Communiqué. The draft Scorecard is attached to this briefing paper. The draft Scorecard includes: the text of the GAC follow-up to previous advice; the Board's understanding of the GAC follow-up to previous advice; the GNSO Council's review of the follow-up to previous advice in the Montréal Communiqué as presented in a [19 December 2019](#) letter to the Board (included for Board review only and will not be part of the final scorecard); and the Board's proposed response to the GAC advice.

## **ICANN ORG RECOMMENDATION:**

The ICANN org recommends that the Board adopt the attached scorecard to address the GAC's advice in the November 2019 Montréal Communiqué.

## **PROPOSED RESOLUTION:**

Whereas, the Governmental Advisory Committee (GAC) met during the ICANN66 meeting in Montréal, Canada and issued a communiqué on 6 November 2019 ("Montréal Communiqué"), which contains four items of consensus advice and three items of follow-up to previous advice. The consensus advice concerns the CCT Review and Subsequent Rounds of New gTLDs, and Domain Name Registration Directory Service and Data Protection. The follow-up to previous advice concerns Protection of the Red Cross and Red Crescent Designations and Identifiers, IGO Protections, and Domain Name Registration Directory Services and Data Protection.

Whereas, in a 16 December 2019 letter, the ICANN President and CEO provided information on the implementation efforts related to the CCT Review and posed clarifying questions regarding the GAC's advice on the topic to the GAC Chair.

Whereas, in a 17 December 2019 call, the ICANN Board and GAC discussed the Montréal Communiqué and any clarifying questions from the ICANN Board regarding the GAC's advice.

Whereas, in a 19 December 2019 letter, the GNSO Council provided its feedback to the Board concerning the follow-up to previous advice contained in the Montréal Communiqué.

Whereas, in a 6 January 2020 letter, the ICANN org provided an update on the EPDP Phase 1 Implementation schedule, as requested by the GAC in its Montréal Communiqué.

Whereas, in a 22 January 2020 letter, the GAC provided additional clarifications regarding its advice in its Montréal Communiqué.

Whereas, the Board developed a scorecard to respond to the GAC’s advice in the Montréal Communiqué, taking into account previous dialogue between the Board and the GAC on the topics as well as the information provided by the GNSO Council.

Resolved (2020.01.26.2a), the Board adopts the scorecard titled “GAC Advice – Montréal Communiqué: Actions and Updates (26 January 2020)” **[INSERT LINK TO FINAL GAC ADVICE SCORECARD ADOPTED BY BOARD]** in response to items of GAC advice in the Montréal Communiqué.

### **PROPOSED RATIONALE:**

Article 12, Section 12.2(a)(ix) of the ICANN Bylaws permits the GAC to “put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies.” In its Montréal Communiqué (6 November 2019), the GAC issued consensus advice to the Board on the CCT Review and Subsequent Rounds of New gTLDs, and Domain Name Registration Directory Service and Data Protection. The GAC also issued follow-ups to previous advice on the Protection of the Red Cross and Red Crescent Designations and Identifiers, IGO Protections, and Domain Name Registration Directory Services and Data Protection. The ICANN Bylaws require the Board to take into account the GAC’s advice on public policy matters in the formulation and adoption of the policies. If the Board decides to take an action that is not consistent with the GAC advice, it must inform the GAC and state the reasons why it decided not to follow the advice. Any GAC advice approved by a full consensus of the GAC (as defined in the Bylaws) may only be rejected by a vote of no less than 60% of the Board, and the GAC and the Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.

The Board is taking action today on all items in the Montréal Communiqué.

The Board’s actions are described in the scorecard dated 26 January 2020 **[INSERT LINK TO FINAL GAC ADVICE SCORECARD ADOPTED BY THE BOARD].**

In adopting its response to the GAC advice in the Montréal Communiqué, the Board reviewed various materials, including, but not limited to, the following materials and documents:

- Board resolutions of 15 May 2019 regarding the Kobe Communiqué:  
<https://www.icann.org/resources/board-material/resolutions-2019-05-15-en#1.a>
- Montréal Communiqué (6 November 2019):  
<https://gac.icann.org/contentMigrated/icann66-montreal-communique>
- 16 December 2019 letter from ICANN President and CEO to GAC Chair regarding the GAC's advice on the CCT Review and Subsequent Rounds of New gTLDs: <https://www.icann.org/en/system/files/correspondence/marby-to-ismail-16dec19-en.pdf>
- The GNSO Council's review of the follow-up to previous advice in the Montréal Communiqué as presented in the 19 December 2019 letter to the Board:  
<https://gns0.icann.org/sites/default/files/file/field-file-attach/drazek-et-al-to-botterman-19dec19-en.pdf>
- 6 January 2020 letter from ICANN President and CEO to GAC Chair regarding the EPDP Phase 1 Implementation Schedule:  
<https://www.icann.org/en/system/files/correspondence/marby-to-ismail-06jan20-en.pdf>
- 22 January 2020 letter from GAC Chair to ICANN Board Chair regarding additional clarifications of the Montréal Communiqué advice:  
<https://gac.icann.org/contentMigrated/gac-response-to-icann-board-clarification-questions-on-the-gac-montr-al-communique-advice>

The adoption of the GAC advice as provided in the scorecard will have a positive impact on the community because it will assist with resolving the advice from the GAC concerning gTLDs and other matters. There are no foreseen fiscal impacts associated with the adoption of this resolution. Approval of the resolution will not impact security, stability or resiliency issues relating to the DNS. This is an Organizational Administrative function that does not require public comment.

**Signature Block:**

Submitted by: David Olive

Position: Senior Vice President, Policy Development Support

Date Noted: 26 January 2020

Email: [david.olive@icann.org](mailto:david.olive@icann.org)

**GAC Advice – Montréal Communiqué: Consensus Advice (26 January 2020)**

GAC Advice Item	Advice Text	Board Understanding Following Board-GAC Call	Board Response
<p><b>§1.a.I</b> <b>CCT Review and Subsequent Rounds of New gTLDs</b></p>	<p><b>a. The GAC advises the Board to:</b></p> <p>i. Not to proceed with a new round of gTLDs until after the complete implementation of the recommendations in the Competition, Consumer Trust and Consumer Choice Review that were identified as "prerequisites" or as "high priority".</p> <p><u>RATIONALE:</u></p> <p>The Competition, Consumer Trust and Consumer Choice Review is the first completed Bylaw-mandated review after the IANA Stewardship Transition and serves as a vital accountability mechanism. The review identified a number of issues that should be addressed, in areas such as the necessity and availability of data, including on costs and benefits, the effectiveness of safeguards, the promotion of consumer trust, the mitigation of DNS abuse and improved geographic representation of applicants. The review produced 35 consensus recommendations. It said that 14 of the recommendations must be implemented prior to the launch of subsequent procedures for new gTLDs ("prerequisites") and a further 10 recommendations ("high priority") should be implemented by 8th March 2020 (eighteen months after the issuance of the report).</p> <p>It is particularly important that a new round of gTLDs should not be launched until after the successful implementation of those recommendations that were identified by the Review Team as necessary prior to any subsequent rounds of new gTLDs. It has been suggested that although some of the recommendations are for the Board to implement, other recommendations are for other parts of the community to implement. It would be helpful for the Board to monitor progress on all of the recommendations and support other parts of the community to implement the recommendations that are addressed to them.</p>	<p>The Board understands that the GAC is advising the Board to not proceed with a subsequent round of gTLDs until after implementation of the recommendations in the Competition, Consumer Trust and Consumer Choice Review that were identified as “prerequisites” or as “high priority”.</p>	<p>The Board is unable to accept or reject this advice at this time and proposes to defer action until such time as the Board has concluded its consideration of the CCT recommendations and the Subsequent Procedures PDP Working Group and the All Rights Protection Mechanisms PDP Working Group have delivered their policy recommendations to the GNSO Council.</p> <p>On 16 December 2019, ICANN org sent a <a href="#">letter</a> to the GAC Chair providing some additional background and considerations relating to implementation of the Competition, Consumer Trust, and Consumer Choice Review Team (CCTRT) recommendations. The CEO noted that the Board had referred policy-dependent recommendations contained in the CCT report to the community policy development process. The CEO also noted that the Board has put several such recommendations in pending status due to significant dependencies as well as various stated implementation and public interest concerns.</p> <p>On 17 December 2019, the Board discussed its questions on this advice on a <a href="#">call</a> with the GAC regarding the Montreal communiqué. As discussed on this call, accepting the GAC’s advice at this time appears to be in tension with the delegation of policy development authority under the ICANN Bylaws to the community through the bottom-up multistakeholder policy development process. In addition, until community-developed policy recommendations applicable to a subsequent round are developed, the Board has no basis to determine whether the GAC’s concerns have been adequately addressed and, if not, no basis for entering into discussion with the GAC in an effort to identify a mutually acceptable solution as required by the Bylaws. We understand that the GAC plans to review and may provide additional clarifications or updates to this advice, as relevant. The Board will consider when and if further action is needed on this item after review of GAC clarifications, if any, and after continued discussion with the GAC.</p>
<p><b>§2.a.I</b> <b>Domain Name Registration Directory Service and</b></p>	<p>With regard to Phase 1 of the EPDP,</p> <p><b>a. The GAC advises the Board to:</b></p>	<p>The Board understands the GAC’s request for the ICANN org and EPDP Phase 1 Implementation Review team (IRT) to generate a detailed work plan identifying an updated realistic schedule to complete its work.</p>	<p>The Board accepts this advice. The Board agrees that a realistic schedule for the implementation of the EPDP Phase 1 work plan is a prudent component of the implementation plan. The Board notes the ICANN org sent <a href="#">a letter to the GAC chair on 6 January 2019</a> with a status update as requested by the GAC. In that letter the Org cites they are applying the</p>

<b>Data Protection</b>	<p>i. Take all possible steps to ensure that the ICANN org and the EPDP Phase 1 Implementation Review team generate a detailed work plan identifying an updated realistic schedule to complete its work and provide and inform the GAC on the status of its progress by January 3, 2020.</p> <p><u>RATIONALE:</u> Consistent with our prior advice, we take this opportunity to issue further guidance as the progress of the development and implementation of the EPDP activities have raised concerns. The GAC has consistently advised on the necessity of finding a swift solution to ensuring timely access to non-public registration data for legitimate third party purposes that complies with the requirements of the GDPR and other data protection and privacy laws, in view of the significant negative impact of the changes in WHOIS accessibility on users with legitimate purposes. The GAC has previously noted that such legitimate purposes include civil, administrative and criminal law enforcement, cybersecurity, consumer protection and IP rights protection. The GAC also notes that the European Data Protection Board, in its guidance, has expressly encouraged ICANN and the community to develop a comprehensive model covering the entirety of the data processing cycle, from collection to access.</p> <p>As already highlighted in the GAC’s San Juan and Kobe Communiqués, the GDPR provides for mechanisms to balance the various legitimate public and private interests at stake, including privacy and accountability. We note that the legitimate interests reflected in ICANN’s Bylaws are consistent with the recitals to the GDPR, which provide examples such as “preventing fraud”; “ensuring network and information security,” including the ability to resist “unlawful or malicious actions” and reporting possible “criminal acts or threats to public security” to authorities (see GDPR Recitals 47, 49 and 50).</p>		<p>Consensus Policy Implementation Framework (CPIF) and summarizes both this process and progress to date. Additionally the letter notes that the implementation plan that will be published for public comment will include an implementation timeline. The Board will continue to closely monitor the implementation of the EPDP Phase 1 work.</p>
<b>§2.b.I Domain Name Registration Directory Service and Data Protection</b>	<p>With regard to Phase 2 and the conclusion of the EPDP,</p> <p>The GAC recognizes the considerable efforts undertaken by all participants within the EPDP. Nevertheless, there will likely be a significant time between finalization of the Phase 2 policy recommendations, implementation of Phase 1 and Phase 2, and the construction and deployment of any new Domain Name Registration System and Unified Access Model. Consequently,</p> <p><b>b. The GAC advises the Board to:</b></p>	<p>The Board understands the GAC’s advice to request the Board to direct ICANN org to ensure that the current system that requires “reasonable access” to non-public domain name registration is operating effectively. This should include:</p> <ul style="list-style-type: none"> <li>- educating key stakeholder groups, including governments, that there is a process to request non-public data;</li> <li>- actively making available a standard request form that can be used by stakeholders to request access based upon the current consensus policy; and</li> <li>- actively making available links to registrar and registry information and points of contact on this topic.</li> </ul>	<p>The Board notes that the GAC advice refers to a “current system” that requires “reasonable access” to non-public domain name registration. The Interim Registration Data Policy for gTLDs/Temporary Specification meets the “reasonable access” standard by requiring contracted parties to provide reasonable access to a requester who has a legitimate interest to data that is not outweighed by the fundamental rights and freedoms of the data subject. The rules do not, however prescribe how the contracted providers comply with this requirement. The Interim Policy does not prescribe a “system” that the contracted parties must utilize in order to fulfill their access obligations, nor does it contain a contractually-mandated standard form for requests for third-party access.</p>

	<p>i. instruct the ICANN organization to ensure that the current system that requires “reasonable access” to non-public domain name registration is operating effectively. This should include:</p> <ul style="list-style-type: none"> <li>– educating key stakeholder groups, including governments, that there is a process to request non-public data;</li> <li>– actively making available a standard request form that can be used by stakeholders to request access based upon the current consensus policy; and</li> <li>– actively making available links to registrar and registry information and points of contact on this topic.</li> </ul> <p><u>RATIONALE:</u> See Rationale on Item <b>§2.a.i</b></p>		<p>Accordingly, the Board accepts the GAC’s advise to ensure that the requirements to provide reasonable access are operating effectively consistent with existing Consensus Policy by instructing the ICANN org to:</p> <ul style="list-style-type: none"> <li>– educate key stakeholder groups, including governments, that contracted parties are obligated to address requests for non-public data; and</li> <li>-actively make available links to registrar and registry information and points of contact on this topic.</li> </ul> <p>Although Org does not have authority to unilaterally obligate Contracted Parties to use a standard form, the Board directs ICANN org to collaborate with the Registry and Registrar Stakeholder Groups to develop a voluntary standard request form that can be used by stakeholders to request access based upon the current Consensus Policy and actively making that request form available.</p>
<p><b>§2.b.II</b> <b>Domain Name Registration Directory Service and Data Protection</b></p>	<p><b>b. The GAC advises the Board to:</b></p> <p>ii. instruct ICANN Compliance to create a specific process to address complaints regarding failure to respond to, and unreasonable denial of requests for non-public domain name registration data, and monitor and publish reports on compliance with the current policy as part of their regular monthly reporting.</p> <p><u>RATIONALE:</u> See Rationale on Item <b>§2.a.i</b></p>	<p>The Board understands the GAC’s advice to indicate that ICANN Compliance should create a unique complaint form and monthly reporting metric for complaints regarding non-compliance with the Temp Spec requirements applicable to third-party requests for non-public registration data.</p>	<p>The Board notes that, currently, ICANN Contractual Compliance does not offer specific complaint forms for complaints related to obligations created under the Temporary Specification. ICANN Contractual Compliance is in the process of migrating to a new ticketing system (“NSp Compliance”) that will allow it to easily create “smart forms” tailored to individual complaint types and to track and report granular data associated with each complaint type. NSp Compliance will include smart forms for Temp Spec-related complaints, including those concerning third-party access requests. Migration to NSp is expected to occur in 3Q2020.</p> <p>Accordingly, and in light of the above, the Board accepts the GAC’s advice and instructs ICANN org as part of the roll out of NSp Compliance to publish clear instructions on the ICANN Compliance web page describing how to submit a complaint concerning a third-party access request. Additionally, the Board instructs ICANN org to compile and publish monthly metrics data related to third-party access complaints once such forms are available in the new ticketing system.</p>

Montréal Communiqué: Follow-up on Previous Advice (26 January 2020)

GAC Follow-up on Previous Advice Item	Text of Follow-up on Previous Advice	Board Understanding Following Board-GAC Call	Board Response
<b>1. Protection of the Red Cross and Red Crescent Designations and Identifiers</b>	<p>The GAC welcomes the progress made towards the permanent protection and reservation of the Red Cross and Red Crescent designations, names and identifiers from registration at the second level. It takes note with appreciation of ICANN Board’s Resolution of 27 January 2019 acknowledging the public policy considerations associated with the protection of the Red Cross and Red Crescent names in the domain name system, adopting the consensus recommendations of the reconvened GNSO Policy Development Process, and instructing ICANN staff to execute the protections to be afforded to the names of the 191 National Red Cross and Red Crescent Societies, the International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies. The GAC welcomes the outputs of the Implementation Review Team and encourages ICANN, upon completion of the current public comment forum, and pursuant to comments made, to publish and to notify ICANN’s Contracted parties of the new policy and of applicable implementation/compliance deadlines.</p> <p>The GAC also reaffirms its past advice that the acronyms of the two international organizations within the International Red Cross and Red Crescent Movement (the ICRC and the IFRC) be addressed under the same protection regime to be agreed and implemented for the acronyms of IGOs.</p> <p>The GAC lastly encourages the Board to consider complementing the list of Red Cross and Red Crescent designations protected at the first level and included in the Applicant Guidebook, with the full and agreed list of names and identifiers of the different Red Cross and Red Crescent organizations.</p>	<p>The Board understands the GAC’s welcomes recent steps taken to complete the implementation of the Consensus Policy for protecting the names of the 191 National Red Cross and Red Crescent Societies, the International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies in accordance with the standard Policy Implementation process.</p> <p>The Board understands the GAC’s reaffirmation of its past advice that the acronyms of the two international organizations within the International Red Cross and Red Crescent Movement (the ICRC and the IFRC) be addressed under the same protection regime to be agreed and implemented for the acronyms of IGOs.</p> <p>The Board understands the GAC encourages the Board to consider complementing the list of Red Cross and Red Crescent designations protected at the first level and included in the Applicant Guidebook, with the full and agreed list of names and identifiers of the different Red Cross and Red Crescent organizations.</p>	<p>The Board acknowledges this follow-up advice item. The Board notes that the Public Comment period for the Implementation Plan for the GNSO Consensus Policy relating to the Protection of Certain Red Cross Names closed recently on 12 December 2019, and the public comment summary and analysis report has now been published: <a href="https://www.icann.org/public-comments/red-cross-names-implementation-2019-10-23-en">https://www.icann.org/public-comments/red-cross-names-implementation-2019-10-23-en</a></p> <p>The Board understands that ICANN Org anticipates publishing the Policy prior to ICANN67, with an effective date to be no later than 1 August 2020.</p> <p>Regarding the topic of protection for certain acronyms of the two international organizations within the International Red Cross and Red Crescent Movement, the Board had previously indicated its wish to resolve the question of second level protection for IGO acronyms in a holistic fashion, so as to allow for a comprehensive policy solution. In this regard, the Board is reviewing four approved policy recommendations from the GNSO concerning curative rights protections for IGOs. The Board is aware that a fifth recommendation has been referred to the GNSO’s Review of All Rights Protection Mechanisms Policy Development Process and a separate Work Track in which IGOs and the GAC have been encouraged to participate will be established.</p> <p>Regarding the GAC’s guidance on protections at the first level for certain Red Cross and Red Crescent names and identifiers, the Board notes that any changes to the scope of protections that were provided under the 2012 New gTLD Program round should be the result of community-developed policy that is submitted to the Board for consideration.</p>
<b>2. IGO Protections</b>	<p>The GAC notes that the topic of re-chartering a specific PDP work track concerning a curative mechanism to address the issue of protection of IGO identifiers remains under discussion with the GNSO.</p>	<p>The Board understands the GAC’s continued attention to the topic of protections for IGO identifiers, and that the possibility of creating a specific PDP work track concerning a curative mechanism to address the issue of IGO identifiers has been under discussion between the GAC and the GNSO.</p>	<p>The Board acknowledges discussions between the GAC and the GNSO about a specific work track concerning a curative mechanism to address the issue of protection of IGO identifiers. The Board understands, further, that the GNSO Council is voting on a charter for this work track in January 2020 and awaits the community’s decision on this matter.</p>
<b>3. Domain Name Registratio</b>	<p>The GAC emphasizes again that the Privacy Proxy Services Accreditation Issues (PPSAI) policy recommendations remain highly relevant and implementation efforts should continue as appropriate, in parallel with the</p>	<p>The Board understands that the GAC continues to emphasize that the Privacy Proxy Services Accreditation Issues (PPSAI) policy recommendations remain highly relevant and implementation efforts</p>	<p>The Board acknowledges the GAC’s attention to this matter and interest in continuing the implementation work of the Privacy Proxy Services Accreditation Issues (PPSAI) policy recommendations.</p>

<b>n Directory Service and Data Protection</b>	ongoing policy development work in the EPDP on gTLD Registration Data. The implementation of the PPSAI should not be deferred until the completion of the EPDP.	should continue in parallel with the ongoing EPDP on gTLD Registration Data and that the PPSAI not be deferred until completion of the EPDP.	However, the Board continues to support ICANN org’s decision to pause this implementation work. The EPDP Phase 1 Recommendation 27 specified the need for ICANN org to identify and address all policies and procedures that might be affected by the EPDP Phase 1 policy recommendations and the new Registration Data Policy and to provide this analysis to the GNSO Council. ICANN org has performed a detailed review of a set of 15 existing policies and procedures and has drafted a <a href="#">Wave 1 report</a> that has been shared with both the IRT and the GNSO Council. In ICANN org’s forthcoming Wave 2 Report, the PPSAI will be analyzed. The Board and ICANN org remained aligned that it would be imprudent to drive forward on implementing policy recommendations without conducting the appropriate analysis and obtaining guidance from the GNSO Council on any next steps which may call for further policy development work in light of the EPDP Phase 1.
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## ICANN BOARD PAPER NO. 2020-01-26-2a

**TITLE:** Delegation of the البحرين. (“albahrain”) domain representing Bahrain in Arabic script to the Telecommunications Regulatory Authority (TRA)

**PROPOSED ACTION:** For Board Consideration and Approval

**REFERENCE:** 1146151

### EXECUTIVE SUMMARY:

As part of PTI’s responsibilities under the IANA Naming Function contract with ICANN, PTI has prepared a recommendation to authorize the delegation of the البحرين. top-level domain, comprised of the IDN ccTLD Fast Track approved string representing Bahrain in Arabic script, to the Telecommunications Regulatory Authority (TRA).

Key points of the investigation on the delegation request are:

- The string under consideration successfully completed the Fast Track process, which deemed it an appropriate representation of Bahrain.
- In Arabic language, the string has a transliteration equivalent to “albahrain” in English.
- The proposed manager is TRA, a government agency based in Bahrain.
- TRA has managed the .BH top-level domain since 2012.
- Support for the delegation has been provided by:
  - Maram Mukhtar Alahmeed, Director of Information Systems at the Ministry of Industry, Commerce and Tourism of Bahrain.
  - Mikkel Vinter, Chief Executive of Batelco, a telecommunications company based in Bahrain.

### PROPOSED RESOLUTION:

Resolved (2020.01.26.xx), as part of the exercise of its responsibilities under the IANA Naming Function Contract with ICANN, PTI has reviewed and evaluated the request to delegate the البحرين. top-level domain to the Telecommunications Regulatory Authority. The documentation demonstrates that the proper procedures were followed in evaluating the request.

## **PROPOSED RATIONALE:**

### **Why the Board is addressing the issue now?**

In accordance with the IANA Naming Function Contract, PTI has evaluated a request for ccTLD delegation and is presenting its report to the Board for review. This review by the Board is intended to ensure that the proper procedures were followed.

### **What is the proposal being considered?**

The proposal is to approve a request to create the البحرين. country-code top-level domain in Arabic script and assign the role of manager to the Telecommunications Regulatory Authority.

### **Which stakeholders or others were consulted?**

In the course of evaluating a delegation application, PTI consulted with the applicant and other interested parties. As part of the application process, the applicant needs to describe consultations that were performed within the country concerning the ccTLD, and their applicability to their local Internet community.

### **What concerns or issues were raised by the community?**

PTI is not aware of any significant issues or concerns raised by the community in relation to this request.

### **What significant materials did the Board review?**

Sensitive Delegation Information

**What factors the Board found to be significant?**

The Board did not identify any specific factors of concern with this request.

**Are there positive or negative community impacts?**

The timely approval of country-code domain name managers that meet the various public interest criteria is positive toward ICANN's overall mission, the local communities to which country- code top-level domains are designated to serve, and responsive to obligations under the IANA Naming Function Contract.

**Are there financial impacts or ramifications on ICANN (strategic plan, operating plan, budget); the community; and/or the public?**

The administration of country-code delegations in the DNS root zone is part of the IANA

functions, and the delegation action should not cause any significant variance on pre-planned expenditure. It is not the role of ICANN to assess the financial impact of the internal operations of country-code top-level domains within a country.

**Are there any security, stability or resiliency issues relating to the DNS?**

ICANN does not believe this request poses any notable risks to security, stability or resiliency. This is an organizational administrative function not requiring public comment.

**SIGNATURE BLOCK:**

Submitted by:	Naela Sarras
Position:	Director, IANA Operations
Date Noted:	10 January 2020
Email:	<a href="mailto:naela.sarras@iana.org">naela.sarras@iana.org</a>



# **Report on the Delegation of the البحرين (“albahrain”) domain representing Bahrain in Arabic script to the Telecommunications Regulatory Authority (TRA)**

10 January 2020

This report is a summary of the materials reviewed as part of the process for the delegation of the البحرين (“albahrain”) top-level domain. It includes details regarding the proposed delegation, evaluation of the documentation pertinent to the request, and actions undertaken in connection with processing the delegation.

## **FACTUAL INFORMATION**

### **Country**

The “BH” ISO 3166-1 two-letter country code from which the application’s eligibility derives is designated for use to represent Bahrain.

### **String**

The domain under consideration for delegation at the DNS root level is “البحرين”. This is represented in ASCII-compatible encoding according to the IDNA specification as “xn--mgbcpq6gpa1a”. The individual Unicode code points that comprise this string are U+0627 U+0644 U+0628 U+062D U+0631 U+064A U+0646.

In the Arabic language, the string has a transliteration equivalent to “albahrain” in English. The string is expressed using the Arabic script.

### **Chronology of events**

In 2002, the Telecommunications Regulatory Authority (TRA) was established by Legislative Decree No. 48 as the government agency responsible for regulating, licensing and developing the telecommunications market in Bahrain.

In 2008, the Minister of Telecommunications of Bahrain issued Resolution No. 3, which assigned the TRA responsibility for the management of the .BH top-level domain.

In March 2012, a request to transfer management of the .BH top-level domain from the Bahrain Telecommunications Company (Batelco) to TRA was completed.

In July 2016, TRA hosted stakeholder meetings to discuss potential policy changes including security and stability best practices, setting up a registry-registrar model, and removing pre-registration restrictions.

In September 2018, an application was made to the ICANN ccTLD IDN Fast Track Process to have the string “البحرين” recognized as representing Bahrain in Arabic script.

In October of 2018, the Minister of Telecommunications issued Resolution No. 11 of 2018 regulating the registration and use of second and third level domain names within Bahrain’s domain name. Section 2 of this resolution assigned TRA the responsibility for managing the IDN representing Bahrain.

On 6 November 2018, a review by the IDN Fast Track DNS Stability Panel found that the applied-for string “presents none of the threats to the stability or security of the DNS identified in Module 4 of the Fast Track Implementation Plan, and presents an acceptably low risk of user confusion.” The request for the “البحرين” string to represent Bahrain was subsequently approved.

In June 2019, TRA initiated a request for delegation of the البحرين. top-level domain.

### **Proposed Manager and Contacts**

The proposed manager is TRA, a government agency established in 2002. It is based in Bahrain.

The proposed administrative contact is Anbar Dhahi, Technical Affairs Supervisor at TRA. The administrative contact is understood to be based in Bahrain.

The proposed technical contact is Nathan Van Overloop, Chief Technology Officer at CentralNIC.

### **EVALUATION OF THE REQUEST**

#### **String Eligibility**

The top-level domain is eligible for delegation, as the string has been deemed an appropriate representation of Bahrain through the ICANN Fast Track String Selection process, and Bahrain is presently listed in the ISO 3166-1 standard.

#### **Public Interest**

Support was provided by the following:

- Maram Mukhtar Alahmeed, Director of Information Systems at the Ministry of Industry, Commerce and Tourism of Bahrain.
- Mikkel Vinter, Chief Executive of Batelco, a telecommunications company based in Bahrain.

The application is consistent with known applicable laws and regulations in Bahrain. The proposed manager undertakes responsibilities to operate the domain in a fair and equitable manner.

### **Based in country**

The proposed manager is constituted in Bahrain. The proposed administrative contact is understood to be resident in Bahrain. The registry is to be operated in Bahrain.

### **Stability**

The application does not involve a transfer of domain operations from an existing domain registry, and therefore stability aspects relating to registry transfer are not relevant.

The application is not known to be contested.

### **Competency**

The application has provided information on the technical and operational infrastructure and expertise that will be used to operate the proposed new domain.

TRA will be responsible for day-to-day operations of the domain, while CentralNIC will provide registry backend services, training and support to TRA.

Proposed policies for management of the domain have also been tendered.

## **EVALUATION PROCEDURE**

PTI is tasked with coordinating the Domain Name System root zone as part of a set of functions governed by a contract with ICANN. This includes accepting and evaluating requests for delegation and transfer of top-level domains.

A subset of top-level domains are designated for the local Internet communities in countries to operate in a way that best suits their local needs. These are known as country-code top-level domains (ccTLDs), and are assigned to responsible managers that meet a number of public-interest criteria for eligibility. These criteria largely relate to the level of support the manager has from its local Internet community, its capacity to ensure stable operation of the domain, and its applicability under any relevant local laws.

Through the IANA Services performed by PTI, requests are received for delegating new ccTLDs, and transferring or revoking existing ccTLDs. An investigation is

performed on the circumstances pertinent to those requests, and the requests are implemented where they are found to meet the criteria.

### **Purpose of evaluations**

The evaluation of eligibility for ccTLDs, and of evaluating responsible managers charged with operating them, is guided by a number of principles. The objective of the assessment is that the action enhances the secure and stable operation of the Internet's unique identifier systems.

In considering requests to delegate or transfer ccTLDs, input is sought regarding the proposed new manager, as well as from persons and organizations that may be significantly affected by the change, particularly those within the nation or territory to which the ccTLD is designated.

The assessment is focused on the capacity for the proposed manager to meet the following criteria:

- The domain should be operated within the country, including having its manager and administrative contact based in the country.
- The domain should be operated in a way that is fair and equitable to all groups in the local Internet community.
- Significantly interested parties in the domain should agree that the prospective manager is the appropriate party to be responsible for the domain, with the desires of the national government taken very seriously.
- The domain must be operated competently, both technically and operationally. Management of the domain should adhere to relevant technical standards and community best practices.
- Risks to the stability of the Internet addressing system must be adequately considered and addressed, particularly with regard to how existing identifiers will continue to function.

### **Method of evaluation**

To assess these criteria, information is requested from the applicant regarding the proposed manager and method of operation. In summary, a request template is sought specifying the exact details of the delegation being sought in the root zone. In addition, various documentation is sought describing: the views of the local internet community on the application; the competencies and skills of the manager to operate the domain; the legal authenticity, status and character of the proposed manager; and the nature of government support for the proposal.

After receiving this documentation and input, it is analyzed in relation to existing root zone management procedures, seeking input from parties both related to as well as independent of the proposed manager should the information provided in the original application be deficient. The applicant is given the opportunity to cure any deficiencies before a final assessment is made.

Once all the documentation has been received, various technical checks are performed on the proposed manager's DNS infrastructure to ensure name servers are properly configured and are able to respond to queries correctly. Should any anomalies be detected, PTI will work with the applicant to address the issues.

Assuming all issues are resolved, an assessment is compiled providing all relevant details regarding the proposed manager and its suitability to operate the relevant top-level domain.

## ICANN BOARD PAPER NO. 2020-01-26-1c

**TITLE:** Delegation of the .ລາວ (“Lao”) domain representing the Lao People’s Democratic Republic in Lao script to the Lao National Internet Center (LANIC)

**PROPOSED ACTION:** For Board Consideration and Approval

**REFERENCE:** 1144776

### EXECUTIVE SUMMARY:

As part of PTI’s responsibilities under the IANA Naming Function contract with ICANN, PTI has prepared a recommendation to authorize the delegation of the .ລາວ top-level domain, comprised of the IDN ccTLD Fast Track approved string representing the Lao People’s Democratic Republic in Lao script, to the Lao National Internet Center (LANIC).

Key points of the investigation on the delegation request are:

- The string under consideration successfully completed the Fast Track process, which deemed it an appropriate representation of the Lao People’s Democratic Republic, herein referred to as Lao PDR<sup>1</sup>.
- In Lao language, the string has a transliteration and translation equivalent to “Lao” in English.
- The proposed manager is LANIC, an organization within the Ministry of Post and Telecommunications based in Lao PDR.
- LANIC has managed the .LA top-level domain since 2010.
- Support for the delegation has been provided by:
  - Thansamay Kommasith, Minister of Post and Telecommunications.
  - Valaxay Dalaloy, Acting Permanent Secretary of the Ministry of Post and Telecommunications.
  - Daravone Kittiphanh, Acting Permanent Secretary of the Ministry of Education and Sports.

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<sup>1</sup> Lao PDR is the country name used by the applicant. It is also referred to as Laos. See: <https://www.iso.org/obp/ui/#iso:code:3166:LA>

- Vinij Kumsomboon, Director of WhatDomain.LA, a local branch of the Dot LA Marketing Company LLC that offers .LA domain names.
- Souphol Chanthavixay, General Director of the Lao Telecommunication Public Company, a local registrar of .LA domain names.
- Daovone Phachanthavong, Executive Vice President of the Lao National Chamber of Commerce and Industry, an independent, non-governmental body that was established in 1989 to promote the business community in Lao PDR.

## **PROPOSED RESOLUTION:**

Resolved (2020.01.26.xx), as part of the exercise of its responsibilities under the IANA Naming Function Contract with ICANN, PTI has reviewed and evaluated the request to delegate the .ລາວ top-level domain to the Lao National Internet Center. The documentation demonstrates that the proper procedures were followed in evaluating the request.

## **PROPOSED RATIONALE:**

### **Why the Board is addressing the issue now?**

In accordance with the IANA Naming Function Contract, PTI has evaluated a request for ccTLD delegation and is presenting its report to the Board for review. This review by the Board is intended to ensure that the proper procedures were followed.

### **What is the proposal being considered?**

The proposal is to approve a request to create the .ລາວ country-code top-level domain in Lao script and assign the role of manager to the Lao National Internet Center.

### **Which stakeholders or others were consulted?**

In the course of evaluating a delegation application, PTI consulted with the applicant and other interested parties. As part of the application process, the applicant needs to describe consultations that were performed within the country concerning the ccTLD, and their applicability to their local Internet community.

**What concerns or issues were raised by the community?**

PTI is not aware of any significant issues or concerns raised by the community in relation to this request.

**What significant materials did the Board review?**

Sensitive Delegation Information

**What factors the Board found to be significant?**

The Board did not identify any specific factors of concern with this request.

**Are there positive or negative community impacts?**

The timely approval of country-code domain name managers that meet the various public interest criteria is positive toward ICANN's overall mission, the local communities to which country-code top-level domains are designated to serve, and responsive to obligations under the IANA Naming Function Contract.

**Are there financial impacts or ramifications on ICANN (strategic plan, operating plan, budget); the community; and/or the public?**

The administration of country-code delegations in the DNS root zone is part of the IANA functions, and the delegation action should not cause any significant variance on pre-planned expenditure. It is not the role of ICANN to assess the financial impact of the internal operations of country-code top-level domains within a country.

**Are there any security, stability or resiliency issues relating to the DNS?**

ICANN does not believe this request poses any notable risks to security, stability or resiliency. This is an organizational administrative function not requiring public comment.

**SIGNATURE BLOCK:**

Submitted by:	Naela Sarras
Position:	Director, IANA Operations
Date Noted:	10 January 2020
Email:	naela.sarras@iana.org



# **Report on the Delegation of the .ລາວ (“Lao”) domain representing the Lao People’s Democratic Republic in Lao script to the Lao National Internet Center (LANIC)**

10 January 2020

This report is a summary of the materials reviewed as part of the process for the delegation of the .ລາວ (“Lao”) top-level domain. It includes details regarding the proposed delegation, evaluation of the documentation pertinent to the request, and actions undertaken in connection with processing the delegation.

## **FACTUAL INFORMATION**

### **Country**

The “LA” ISO 3166-1 two-letter country code from which the application’s eligibility derives is designated for use to represent the Lao People’s Democratic Republic, herein referred to as Lao PDR.

### **String**

The domain under consideration for delegation at the DNS root level is “ລາວ”. This is represented in ASCII-compatible encoding according to the IDNA specification as “xn--q7ce6a”. The individual Unicode code points that comprise this string are U+0EA5 U+0EB2 U+0EA7.

In the Lao language, the string has a transliteration and translation equivalent to “Lao” in English. The string is expressed using the Lao script.

### **Chronology of events**

In 2010, the Lao National Internet Center (LANIC) was established as an organization within the Ministry of Post and Telecommunications (MPT) to manage the .LA country code top-level domain.

On 15 February 2010, MPT assigned LANIC the role of managing the .LA top-level domain under the Ministerial Decision on Lao National Internet Center Organizational and Operational Structure (reference number 373/PMO.APT). This was later revised on 15 July 2016 by an additional Ministerial Decision (reference number 2164/MPT) granting LANIC the ability to continue to manage the .LA top-level domain, and additionally the .ລາວ top-level domain.

On 14 December 2016, LANIC and MPT held the 2016 Lao ICT Expo at the National Convention Center in Vientiane. Community outreach was performed at this event

and support was gathered and documented for the Lao IDN application.

On 4 January 2018, an application was made to the ICANN ccTLD IDN Fast Track Process to have the string "ລາວ" recognized as representing Lao PDR in Lao script.

On 13 December 2018, a review by the IDN Fast Track DNS Stability Panel found that the applied-for string "presents none of the threats to the stability or security of the DNS identified in Module 4 of the Fast Track Implementation Plan, and presents an acceptably low risk of user confusion" and the request for the "ລາວ" string to represent Lao was subsequently approved.

In June 2019, LANIC initiated a request for delegation of the .ລາວ top-level domain.

### **Proposed Manager and Contacts**

The proposed manager is the Lao National Internet Center (LANIC).

The proposed administrative contact is Minaxay Philavong, Deputy Director General of LANIC. The administrative contact is understood to be based in Lao PDR.

The proposed technical contact is Anisone Kingsada, Director of the ccTLD .LA Division at LANIC.

### **EVALUATION OF THE REQUEST**

#### **String Eligibility**

The top-level domain is eligible for delegation, as the string has been deemed an appropriate representation of Lao PDR through the ICANN Fast Track String Selection process, and Lao PDR is presently listed in the ISO 3166-1 standard.

#### **Public Interest**

Government support was provided by:

- Thansamay Kommasith, Minister of Post and Telecommunications.
- Valaxay Dalalay, Acting Permanent Secretary of the Ministry of Post and Telecommunications.
- Daravone Kittiphanh, Acting Permanent Secretary of the Ministry of Education and Sports.

Additional support letters were provided by the following:

- Vinij Kumsomboon, Director of WhatDomain.LA, a local branch of the Dot LA Marketing Company LLC that offers .LA domain names.

- Souphol Chanthavixay, General Director of the Lao Telecommunication Public Company, a local registrar of .LA domain names.
- Daovone Phachanthavong, Executive Vice President of the Lao National Chamber of Commerce and Industry, an independent, non-governmental body that was established in 1989 to promote the business community in Lao PDR.

The application is consistent with known applicable laws and regulations in Lao PDR. The proposed manager undertakes responsibilities to operate the domain in a fair and equitable manner.

### **Based in country**

The proposed manager is constituted in Lao PDR. The proposed administrative contact is understood to be resident in Lao PDR. The registry is to be operated in Lao PDR.

### **Stability**

The application does not involve a transfer of domain operations from an existing domain registry, and therefore stability aspects relating to registry transfer are not relevant.

The application is not known to be contested.

### **Competency**

The application has provided information on the technical and operational infrastructure and expertise that will be used to operate the proposed new domain.

LANIC will be responsible for day-to-day operations of the domain. LANIC has engaged the services of CentralNIC, a registry service provider, to provide registry backend services and support.

Proposed policies for management of the domain have also been tendered.

## **EVALUATION PROCEDURE**

PTI is tasked with coordinating the Domain Name System root zone as part of a set of functions governed by a contract with ICANN. This includes accepting and evaluating requests for delegation and transfer of top-level domains.

A subset of top-level domains are designated for the local Internet communities in countries to operate in a way that best suits their local needs. These are known as country-code top-level domains (ccTLDs), and are assigned to responsible

managers that meet a number of public-interest criteria for eligibility. These criteria largely relate to the level of support the manager has from its local Internet community, its capacity to ensure stable operation of the domain, and its applicability under any relevant local laws.

Through the IANA Services performed by PTI, requests are received for delegating new ccTLDs, and transferring or revoking existing ccTLDs. An investigation is performed on the circumstances pertinent to those requests, and the requests are implemented where they are found to meet the criteria.

### **Purpose of evaluations**

The evaluation of eligibility for ccTLDs, and of evaluating responsible managers charged with operating them, is guided by a number of principles. The objective of the assessment is that the action enhances the secure and stable operation of the Internet's unique identifier systems.

In considering requests to delegate or transfer ccTLDs, input is sought regarding the proposed new manager, as well as from persons and organizations that may be significantly affected by the change, particularly those within the nation or territory to which the ccTLD is designated.

The assessment is focused on the capacity for the proposed manager to meet the following criteria:

- The domain should be operated within the country, including having its manager and administrative contact based in the country.
- The domain should be operated in a way that is fair and equitable to all groups in the local Internet community.
- Significantly interested parties in the domain should agree that the prospective manager is the appropriate party to be responsible for the domain, with the desires of the national government taken very seriously.
- The domain must be operated competently, both technically and operationally. Management of the domain should adhere to relevant technical standards and community best practices.
- Risks to the stability of the Internet addressing system must be adequately considered and addressed, particularly with regard to how existing identifiers will continue to function.

### **Method of evaluation**

To assess these criteria, information is requested from the applicant regarding the proposed manager and method of operation. In summary, a request template is sought specifying the exact details of the delegation being sought in the root zone. In addition, various documentation is sought describing: the views of the local internet community on the application; the competencies and skills of the manager to operate the domain; the legal authenticity, status and character of the proposed manager; and the nature of government support for the proposal.

After receiving this documentation and input, it is analyzed in relation to existing root zone management procedures, seeking input from parties both related to as well as independent of the proposed manager should the information provided in the original application be deficient. The applicant is given the opportunity to cure any deficiencies before a final assessment is made.

Once all the documentation has been received, various technical checks are performed on the proposed manager's DNS infrastructure to ensure name servers are properly configured and are able to respond to queries correctly. Should any anomalies be detected, PTI will work with the applicant to address the issues.

Assuming all issues are resolved, an assessment is compiled providing all relevant details regarding the proposed manager and its suitability to operate the relevant top-level domain.

## **ICANN BOARD SUBMISSION NO. 2020.01.26.2d**

**TITLE:** **Consideration of Reconsideration Request 19-4**

**PROPOSED ACTION:** **For Board Consideration and Approval**

### **EXECUTIVE SUMMARY:**

The Requestors, Merck KGaA and Merck Registry Holdings, Inc., seek reconsideration of ICANN organization's denial of their mutual request for a second postponement of a string contention auction for the .MERCK generic top-level domain (gTLD) (Second Request). The Requestors assert that reconsideration is warranted because ICANN Staff: (1) failed to consider material information; (2) violated ICANN organization's policies favoring voluntary string contention settlement and permitting discretionary waiver of deadlines; and (3) violated ICANN organization's Commitment established in the Bylaws to apply documented policies neutrally and objectively.

The Board Accountability Mechanisms Committee (BAMC) evaluated Reconsideration Request 19-4 (Request 19-4) and concluded that ICANN Staff did not fail to consider material information and did not violate ICANN's Commitments, Core Values or established ICANN policy(ies) in its denial of Requestors' Second Request. Accordingly, the BAMC recommended that the Board deny Request 19-4. In addition, the BAMC noted that the delay the Requestors seek in order to have time to reach private resolution has nearly been achieved by virtue of their first postponement and their filing of Request 19-4. The BAMC also recommended that the Board ask ICANN organization to seek an update from Requestors on their progress toward settling the string contention issue. And, if the Requestors jointly declare they have made progress since filing Request 19-4 and that they are very close to private resolution, then the BAMC would recommend that the Board ask ICANN organization to consider providing the Requestors with some form of discretionary relief that could allow them time to finalize a settlement.

Following the issuance of the BAMC's Recommendation on Request 19-4 (BAMC Recommendation), the Requestors submitted a rebuttal<sup>1</sup> to the recommendation (Rebuttal) in accordance with Article 4, Section 4.2(q) of the Bylaws. As discussed below, the Rebuttal does not raise arguments or facts that support reconsideration.

## **BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC) RECOMMENDATION:**

The BAMC recommended that Request 19-4 be denied, but that the Board ask ICANN organization to seek an update from Requestors on their progress toward settling the string contention. As detailed in the BAMC Recommendation, attached as Attachment C to the Reference Materials in support of this submission, the BAMC determined that the Requestors' claims are unsupported because ICANN Staff did not fail to consider material information and did not violate ICANN's Commitments, Core Values or established ICANN policy(ies) in its denial of Requestors' Second Request.

## **PROPOSED RESOLUTION:**

Whereas, Merck KGaA and Merck Registry Holdings, Inc. (Requestors) submitted Reconsideration Request 19-4 seeking reconsideration of ICANN organization's denial of their mutual request for a second postponement of a string contention auction for the .MERCK generic top-level domain (gTLD) (Second Request).

Whereas, the Requestors claim that ICANN Staff failed to consider material information and violated established ICANN policies favoring voluntary string contention settlement and permitting discretionary waiver of deadlines when it denied the Second Request.

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<sup>1</sup> Article 4, Section 4.2(q) of the ICANN Bylaws permits the requestor to file a rebuttal to the BAMC's recommendation, provided that the rebuttal is: (i) "limited to rebutting or contradicting the issues raised in the BGC's recommendation; and (ii) not offer new evidence to support an argument made in the Requestor's original Reconsideration Request that the Requestor could have provided when the Requestor initially submitted the Reconsideration Request." (Bylaws, [Art. 4, § 4.2\(g\).](#))

Whereas, the Requestors further claim that denial of the Second Request violated ICANN's Commitment in its Bylaws to "[m]ake decisions by applying documented policies neutrally and objectively with integrity and fairness."

Whereas, the Board Accountability Mechanisms Committee (BAMC) previously determined that Request 19-4 is sufficiently stated and sent Request 19-4 to the Ombudsman for consideration in accordance with Article 4, Section 4.2(j) and (k) of the ICANN Bylaws.

Whereas, the Ombudsman recused himself from this matter pursuant to Article 4, Section 4.2(l)(iii) of the Bylaws.

Whereas, the BAMC carefully considered the merits of Request 19-4 and all relevant materials and recommended that Request 19-4 be denied because ICANN Staff did not fail to consider material information and did not violate ICANN's Commitments, Core Values or established ICANN policy(ies) in its denial of Requestors' Second Request.

Whereas, the BAMC recommended that the Board ask ICANN organization to seek an update from Requestors and, if the Requestors jointly declare they have made progress since filing Request 19-4 and that they are very close to private resolution, to consider providing some form of discretionary relief to allow the Requestors time to finalize a private resolution.

Whereas, the Requestors submitted a [Rebuttal](#) to the [BAMC's Recommendation](#) pursuant to Article 4, Section 4.2(q) of the ICANN Bylaws.

Whereas, the [Rebuttal](#) provided an update on the Requestors' progress toward reaching private resolution of the string contention issue and stated that the Requestors are not likely to resolve their disputes concerning .MERCK in the next month, and requested postponement of the auction until the end of August 2020.

Resolved (2020.01.26.XX), the Board adopts the [BAMC Recommendation on Request 19-4 and denies Reconsideration Request 19-4.](#)

Resolved (2020.01.26.XX), the Board directs the President and CEO, or his designee(s), to seek an additional update from the Requestors on settlement progress. If the Requestors jointly declare they have made progress since filing Request 19-4 and ICANN organization is satisfied

that the Requestors are very close to private resolution, the Board asks the President and CEO, or his designee(s), to consider providing the Requestors with some form of discretionary relief to allow them a short amount of time to finalize a private resolution.

Resolved (2020.01.26.XX), if the Requestors do not provide an additional update regarding their settlement progress and/or if ICANN organization is not satisfied that the Requestors are very close to private resolution, the Board directs the President and CEO, or his designee(s), to continue processing the .MERCK applications, including scheduling an auction if ICANN organization deems it appropriate.

## **PROPOSED RATIONALE:**

### **1. Brief Summary and Recommendation**

The full factual background is set forth in the [BAMC Recommendation on Request 19-4](#) (BAMC Recommendation), which the Board has reviewed and considered, and which is incorporated here.

On 19 December 2019, the BAMC evaluated Request 19-4 and all relevant materials and recommended that the Board deny Request 19-4 because ICANN Staff did not fail to consider material information and did not violate ICANN's Commitments, Core Values or established ICANN policy(ies) in its denial of Requestors' Second Request.

On 3 January 2020, the Requestors submitted a [Rebuttal](#) to the [BAMC Recommendation](#) (Rebuttal) pursuant to Article 4, Section 4.2(q) of ICANN's Bylaws. The Requestors claim that: (1) the BAMC mischaracterized the history of the Requestors' disputes over trademark rights involving the word "Merck"; (2) the Applicant Guidebook's rule prohibiting multiple renewals does not apply to the Requestors; (3) the BAMC improperly penalized the Requestors for not submitting evidence that ICANN Staff failed to consider material information; (4) by denying the Second Request, ICANN Staff discriminated against the Requestors; and (5) although Requestors initially expected that they would be able to resolve the string contention by early 2020, the Requestors now ask ICANN Staff to postpone the auction until the end of August 2020 to allow adequate time for the Requestors to privately resolve the string contention.

The Board has carefully considered the [BAMC's Recommendation](#), as well as all relevant materials for Request 19-4, and concludes that Request 19-4 is denied. Consistent with the BAMC's Recommendation, the Board will ask ICANN organization to seek an additional update from the Requestors on settlement progress although the Rebuttal suggested that private resolution, even if achieved, would not occur until August of 2020. If the Requestors jointly declare they have made progress since filing Request 19-4 and ICANN organization is satisfied that the Requestors are closer to private resolution than the Rebuttal suggests, then the Board asks ICANN organization to consider providing the Requestors with some form of discretionary relief that could allow them some limited time to finalize a settlement.

## **2. Issue**

The issues are as follows:

- Whether ICANN Staff failed to consider material information when it denied the Requestors' mutual request for a second postponement of the .MERCK contention set auction.
- Whether ICANN Staff violated established ICANN policies favoring voluntary settlement of string contentions and allowing for discretionary waiver of deadlines when it denied the Requestors' mutual request for a second postponement of the .MERCK contention set auction.
- Whether ICANN Staff violated ICANN's Commitment to "[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly" when it denied the Requestors' mutual request for a second postponement of the .MERCK contention set auction.

## **3. Analysis and Rationale**

- (a) ICANN Staff Did Not Fail to Consider Material Information Before Denying the Second Request

ICANN Staff considered all material information in denying the Second Request. The Requestors argue that ICANN Staff disregarded the history of multijurisdictional litigation between them concerning the "Merck" trademark, the fact that the Requestors expected to receive judgments in several pending cases "in the coming months," and the fact that the

Requestors were “hopeful” that they would be able to resolve their contention over .MERCK “soon” via voluntary agreement.<sup>2</sup> And the Requestors suggest that these facts were material to their Second Request.<sup>3</sup> The BAMC concluded that: (1) the Requestors have not presented any evidence to support their belief that ICANN Staff failed to consider the history of the Requestors’ dispute; (2) the Requestors’ lengthy history of dispute is well known to ICANN Staff; (3) ICANN Staff was aware of the Requestors’ ongoing efforts at private resolution; and (4) in any event, information regarding the Requestors’ dispute or attempts at private resolution was not material to ICANN Staff’s decision on the Second Request.<sup>4</sup>

In their Rebuttal, the Requestors argue that they were not required to present evidence supporting their belief that ICANN Staff failed to consider the material information, and that it would be impossible to prove such a negative.<sup>5</sup> The Board acknowledges that ICANN Staff did not expressly reference Requestors’ “legally-complex and politically-sensitive background”<sup>6</sup> in its decision on the Second Request; however, the record shows the exact opposite of what the Requestors are asserting, namely that ICANN Staff was well aware of that background. The Requestors must, but have failed to, rebut this evidence. Accordingly, the BAMC concluded and the Board agrees that the Requestors’ long and contentious history was well known to ICANN Staff.<sup>7</sup>

The Requestors also challenged ICANN Staff’s suggestion, in its denial of the Second Request, that two weeks might be enough “time to pursue and complete the self-resolution of the contention set.” Requestors assert that “ICANN Staff did not understand the full extent” of Requestors’ ongoing efforts at voluntary settlement; otherwise (according to Requestors), ICANN Staff would have realized that two weeks was not enough time for these parties, given their legally complex and sensitive background, to resolve their disputes.<sup>8</sup> However, ICANN

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<sup>2</sup> Request 19-4, § 8, at Pgs. 7-8.

<sup>3</sup> *See id.*

<sup>4</sup> BAMC Recommendation at Pgs. 9-10.

<sup>5</sup> Rebuttal, at Pgs. 3-4.

<sup>6</sup> Request 19-4, § 8, at Pg. 7.

<sup>7</sup> BAMC Recommendation, at Pgs. 4 n.28, 9.

<sup>8</sup> Rebuttal, at Pg. 4. The Requestors also assert that the BAMC’s statement, in its Recommendation, that the Requestors “each have trademark rights involving the word ‘Merck,’ which have been and continue to be the subject of litigation in multiple jurisdictions for many decades,” indicates that ICANN Staff failed to consider the Requestors’ history when Staff evaluated the Second Request, because “all of the current court cases” were initiated after the Requestors applied for the .MERCK gTLD in 2012. Rebuttal, at Pg. 3. Whether the Requestors’ legal

Staff's denial of the Second Request merely conveyed that the denial did not, in itself, require the parties to stop trying to privately resolve the string contention. The statement merely makes clear that the parties were free to continue negotiations until the deadline for withdrawing from string contention. Nothing in ICANN Staff's denial of the Second Request demonstrates that ICANN Staff did not appreciate the complexity of the Requestors' dispute. The Board agrees with the BAMC that there is no evidence that ICANN Staff failed to consider this information.

In any event, the BAMC concluded that information regarding the Requestors' history of disputes and resolution attempts was not material or relevant to ICANN Staff's decision on the Second Request.<sup>9</sup> The Board agrees. ICANN Staff denied the Second Request consistent with ICANN's rule against granting more than one request to postpone the auction for *any* contention set, regardless of the reason for the request.<sup>10</sup>

(b) ICANN Staff Did Not Violate ICANN Policies Favoring Voluntary Settlements.

The Requestors claim that ICANN Staff's denial of the Second Request violated ICANN organization's policies favoring voluntary settlements of contention sets and treating contention set auctions as a means of last resort only.<sup>11</sup> The BAMC concluded, and the Board agrees, that the denial of the Second Request was consistent with and did not violate ICANN's policy favoring the voluntary resolution of string contentions and treating auction as a tie-breaker method only.<sup>12</sup>

In their Rebuttal, the Requestors challenge the BAMC's reliance on the Applicant Guidebook's statement that postponement is "a one-time option; ICANN will grant no more than one such request for each set of contending applications."<sup>13</sup> Requestors assert that this language does not apply to them because it is in the section of the Applicant Guidebook discussing Community Priority Evaluation procedures when "more than one community-based application is found to

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fight began seven years ago or many decades ago is not material, the BAMC and ICANN Staff were well aware of the Requestors' history of disputes. More important, the Board agrees with the BAMC that the Requestors' history (however long it extends) was not material to the Second Request.

<sup>9</sup> BAMC Recommendation, at Pgs. 9-10.

<sup>10</sup> *Id.*

<sup>11</sup> Request 19-4, § 8, at Pgs. 8-11.

<sup>12</sup> See BAMC Recommendation at Pg. 11-12.

<sup>13</sup> Rebuttal, at Pg. 4, quoting BAMC Recommendation, at Pg. 9.

meet the criteria” for Community Priority, and neither of the community-based applications for .MERCK met the criteria for Community Priority.<sup>14</sup>

However, although the Applicant Guidebook’s discussion of the one-postponement rule comes in the section of Community Priority Evaluations, the language in the Applicant Guidebook makes clear that mutual requests for postponements of auctions will be granted once and only once. Further, and notably, as the BAMC pointed out and Requestors acknowledge, the Applicant Guidebook is not the only document referencing that one-postponement only rule. ICANN’s “Auction Date Advancement/Postponement Request Form” (the Postponement Request Form) explains that “ICANN may accommodate **one** postponement request per contention set.”<sup>15</sup> As the BAMC noted, the current version of the Auction Rules for New gTLDs refers to the Postponement Request Form.<sup>16</sup> The Postponement Request Form “provides applicants who have received an intent to Auction notification the ability to request an advancement or postponement to their scheduled Auction Date” if all contention set members agree on postponing (or advancing) the auction date.<sup>17</sup> The form is available for postponement requests from *any* group of applicants in *any* contention set (so long as all members of the contention set agree to the postponement). The Postponement Request Form does not limit the one-postponement rule to any certain type of contention set – rather, it is applicable to all.<sup>18</sup>

The Board concludes that the Postponement Request Form evidences ICANN organization’s rule to grant only one mutually requested postponement of an auction, and that the references to postponing auctions in the Applicant Guidebook and the Auction Rules do not evidence an intent to limit the applicability of that rule to certain types of contention sets, or to permit multiple postponements for certain types of contention sets.

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<sup>14</sup> *Id.*, at Pg. 5.

<sup>15</sup> Postponement Request Form, <https://newgtlds.icann.org/en/applicants/auctions/date-advancement-postponement-form-09nov17-en.pdf> (emphasis in original).

<sup>16</sup> BAMC Recommendation at 10 n.53, citing Auction Rules for New gTLDs (3 Nov. 2014), ¶ 10, <https://newgtlds.icann.org/en/applicants/auctions/rules-03nov14-en.pdf>

<sup>17</sup> Postponement Request Form.

<sup>18</sup> The Board acknowledges that the Auction Rules state that applicants may submit a postponement request through the ICANN Customer Portal without using the Postponement Request Form under certain circumstances. Auction Rules, ¶ 10. But the Auction Rules’ discussion of postponement does not indicate that ICANN may grant multiple postponements for the same contention set. *See id.* The Board concludes that the Auction Rules do not reflect a rule favoring or allowing multiple postponements of a contention set auction.

The Requestors also suggest in their Rebuttal that although they have sought to resolve the .MERCK contention set in good faith during the more than five months (now more than eight months) since the auction for the contention set was first scheduled on 2 May 2019, “the picture is far more complex” – presumably suggesting that five months is not enough time.<sup>19</sup> However, it should be noted that the Requestors have had much more than five months to resolve their disputes. The Requestors have been involved in disputes with each other for decades. The Requestors have known that their applications were destined for an auction if they did not reach a private resolution since their 2012 submission of competing .MERCK applications; or, at the very least, since March 2013 when Merck KGaA filed Legal Rights Objections against Merck Registry Holdings, Inc.’s application specifically relating to the use of the “Merck” name.<sup>20</sup> As such, this argument by the Requestors does not support reconsideration.

The BAMC concluded and, for the reasons stated above and those set forth in the [BAMC Recommendation](#), the Board agrees that the denial of the Second Request, and ICANN’s rule against second postponements of contention set auctions more broadly, is consistent with and does not violate ICANN’s policy favoring the voluntary resolution of string contentions and treating auction as a tie-breaker method only. In addition, it should be noted that the rule against second postponements does not prevent settlements, but merely prevents parties from indefinitely prolonging gTLD disputes by providing an auction deadline. This use of the auction process to provide a backstop if settlement efforts fail after a reasonable time is consistent both with ICANN’s pro-settlement policy and with its designation of auctions as a method of last resort to resolve string contention.

(c) ICANN Staff Did Not Violate ICANN’s Commitment to Apply Policies Neutrally and Objectively.

The Requestors claim that ICANN Staff’s denial of the Second Request violated ICANN’s Commitment to make “decisions by applying documented policies neutrally and objectively with

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<sup>19</sup> Rebuttal, at Pg. 10.

<sup>20</sup> Expert Determination Legal Rights Objections in March 2013, <https://www.wipo.int/export/sites/www/amc/en/domains/lro/docs/lro2013-0009.pdf>; <https://www.wipo.int/export/sites/www/amc/en/domains/lro/docs/lro2013-0010.pdf>; <https://www.wipo.int/export/sites/www/amc/en/domains/lro/docs/lro2013-0011.pdf>. And the Requestors were again alerted to the eventual need to resolve the contention set either via private resolution or by auction when Merck KGaA submitted Reconsideration Request 16-12 in August 2016. BAMC Recommendation, at Pgs. 11-12.

integrity and fairness.” The BAMC concluded, and the Board agrees, that neither ICANN’s Commitment to apply policies neutrally nor any other Commitment precludes the use of ICANN’s rule against second postponements or requires the use of case-by-case discretion in all instances.

In their Rebuttal, Requestors suggest that, “given the uniqueness of the circumstances here,” ICANN Staff were required to apply “flexibility and discretion” in considering the Second Request, even if ICANN organization would otherwise prohibit second postponements.<sup>21</sup> The “unique[] . . . circumstances” present here, according to the Requestors, are that the two Requestors are “completely aligned” insofar as they “are in complete alignment to postpone the auction.”<sup>22</sup> But those circumstances are not unique; agreement among applicants is a prerequisite for requesting *any* auction postponement.<sup>23</sup> The Board concludes that this argument does not support reconsideration.

The Requestors disagree with the BAMC’s conclusion that applying a one-postponement rule “treats every request for a second postponement equally, by providing that all such requests will be denied.”<sup>24</sup> The Requestors suggest that ICANN Staff’s denial of the Second Request has the effect of “discriminating against [the Requestors].”<sup>25</sup> As the Requestors note, ICANN’s Commitment to make “decisions by applying documented policies neutrally and objectively with integrity and fairness”<sup>26</sup> “specifically aims at preventing discrimination ‘singling out any particular party’.”<sup>27</sup> However, the Requestors have not demonstrated that ICANN Staff singled out any particular party for *disparate* treatment, because they have not identified any party that ICANN Staff treated *differently* nor have they identified any instance where ICANN suggested its policy was other than allowing just one mutually requested auction postponement . The Board agrees with the BAMC’s conclusion that the single-postponement rule in fact allows ICANN Staff to treat all second postponement requests equally. Accordingly, this argument does not support reconsideration.

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<sup>21</sup> Rebuttal, at Pgs. 6-7.

<sup>22</sup> *Id.*

<sup>23</sup> Auction Rules, ¶ 10; *see also* Postponement Request Form.

<sup>24</sup> Rebuttal, at Pg. 7, citing BAMC Recommendation, at Pg. 14.

<sup>25</sup> *Id.*

<sup>26</sup> ICANN Bylaws, Art. 1, § 1.2(a).

<sup>27</sup> Rebuttal, at Pg. 7.

(d) The Requestors' Disagreement with the Rule Against Second Postponements of Auctions is Not a Basis for Reconsideration.

The Requestors essentially disagree with ICANN organization's rule denying second postponements in all cases.<sup>28</sup> The BAMC concluded that none of the Requestors' arguments demonstrated that the rule contradicts ICANN's Mission, Commitments, Core Values, and/or established ICANN policy(ies), or otherwise provided a basis for reconsideration of the denial of the Second Request.<sup>29</sup>

On rebuttal, the Requestors clarify that they are not challenging the rule against second postponements itself but rather, they are challenging "the motivation of ICANN Staff to deny the second postponement of the auction."<sup>30</sup> For the reasons set forth in the [BAMC's Recommendation](#), the Board concludes that ICANN Staff's motivation in denying the Second Request was to comply with ICANN organization's one-postponement rule. The Board concludes that the Requestors' arguments concerning ICANN Staff's motivation do not support reconsideration.

(e) The Requestors' Update Concerning Settlement Discussions.

In the Rebuttal, the Requestors provide an update on the status of the ongoing litigation that they assert is related to their negotiations concerning .MERCK. The Requestors initially claim that they are "very close to the resolution" of their disputes, yet their new projected dates for the conclusion of the outstanding litigations in Australia, China, India, Switzerland, the U.S., and the U.K. is approximately June 2020; and that "[o]nce we have the above-mentioned decisions and hearings, we will be in a better position to seek to finalize a settlement." The Requestors currently request until the end of August 2020 to attempt to resolve the string contention.<sup>31</sup>

The Board believes that directing ICANN organization to obtain another update in the near future is unlikely to produce new or different information. Nonetheless, the Board acknowledges the Requestors' offer to "provide the Board with a more detailed update on the court rulings

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<sup>28</sup> Request 19-4, § 8, at Pgs. 8, 10, 13, 14.

<sup>29</sup> BAMC Recommendation, at Pg. 15.

<sup>30</sup> Rebuttal, at Pg. 8.

<sup>31</sup> Rebuttal, at Pg. 10.

which are expected in January 2020 and the progress they have made toward settlement.”<sup>32</sup> Accordingly, for good measure, the Board has directed the President and CEO, or his designee(s), to seek an update from the Requestors on: (i) whether the Requestors have received any of the court rulings that the Requestors expect in January 2020; and (ii) what progress, if any, the Requestors have made toward settlement. If the Requestors jointly declare they have made progress since filing Request 19-4 and ICANN organization is satisfied that the Requestors are very close to private resolution, the Board will ask ICANN organization to consider providing the Requestors with some form of discretionary relief that could allow them a limited amount of time to finalize a settlement. If the Requestors do not provide an additional update regarding their settlement progress and/or if ICANN organization is not satisfied that the Requestors are very close to private resolution, the Board directs the President and CEO, or his designee(s), to continue processing the .MERCK applications, including scheduling an auction if ICANN organization deems it appropriate.

This action is within ICANN's Mission and is in the public interest as it is important to ensure that, in carrying out its Mission, ICANN is accountable to the community for operating within the Articles of Incorporation, Bylaws, and other established procedures. This accountability includes having a process in place by which a person or entity materially affected by an action of the ICANN Board or Staff may request reconsideration of that action or inaction by the Board. This action should have no financial impact on ICANN and will not negatively impact the security, stability and resiliency of the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

Submitted By: Amy Stathos, Deputy General Counsel  
Date Noted: 16 January 2020  
Email: [amy.stathos@icann.org](mailto:amy.stathos@icann.org)

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<sup>32</sup> *Id.*

## REFERENCE MATERIALS – BOARD SUBMISSION 2020.01.26.2d

**Title:** **Consideration of Reconsideration Request 19-4**

### **Documents**

The following attachments are relevant to the Board’s consideration of Reconsideration Request 19-4:

Attachment A is [Reconsideration Request 19-4](#), submitted on 14 October 2019; the [Exhibits](#) submitted in support of Reconsideration Request 19-4 are available [here](#).

Attachment B is the [Ombudsman Action Regarding Request 19-4](#), issued on 21 November 2019.

Attachment C is the [BAMC Recommendation on Reconsideration Request 19-4](#), issued on 19 December 2019.

Attachment D is [Requestors’ Joint Rebuttal to the BAMC Recommendation on Reconsideration Request 19-4](#), submitted on 3 January 2020.

Submitted by: Amy Stathos, Deputy General Counsel

Date Noted: 16 January 2020

Email: amy.stathos@icann.org

## **Reconsideration Request Form**

Version as of 21 September 2018

ICANN's Board Accountability Mechanisms Committee (BAMC) is responsible for receiving requests for reconsideration (Reconsideration Request) from any person or entity that has been adversely affected by the following:

- (a) One or more Board or Staff actions or inactions that contradict ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies);
- (b) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board's or Staff's consideration at the time of action or refusal to act; or
- (c) One or more actions or inactions of the Board or Staff that are taken as a result of the Board's or Staff's reliance on false or inaccurate relevant information.

The person or entity submitting such a Reconsideration Request is referred to as the Requestor.

Note: This is a brief summary of the relevant Bylaws provisions. For more information about ICANN's reconsideration process, please refer to [Article 4, Section 4.2 of the ICANN Bylaws](#) and the Reconsideration Website at <https://www.icann.org/resources/pages/accountability/reconsideration-en>.

This form is provided to assist a Requestor in submitting a Reconsideration Request, and identifies all required information needed for a complete Reconsideration Request. This template includes terms and conditions that shall be signed prior to submission of the Reconsideration Request.

Requestors may submit all facts necessary to demonstrate why the action/inaction should be reconsidered. However, argument shall be limited to 25 pages, double-spaced and in 12-point font. Requestors may submit all documentary evidence necessary to demonstrate why the action or inaction should be reconsidered, without limitation.

*For all fields in this template calling for a narrative discussion, the text field will wrap and will not be limited.*

Please submit completed form to [reconsideration@icann.org](mailto:reconsideration@icann.org).

**1. Requestors' Information**

Name: Merck KGaA

Representative: Dr. Torsten Bettinger

Address: Contact Information Redacted

Contact Information Redacted

Email: Contact Information Redacted

Phone Number (optional): Contact Information Redacted

and

Name: Merck Registry Holdings, Inc.

Representative: David Taylor, Hogan Lovells (Paris) LLP

Address: Contact Information Redacted

Email: Contact Information Redacted

Phone Number (optional): Contact Information Redacted

**2. Request for Reconsideration of:**

☐ Board action/inaction

☒ Staff action/inaction

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

The undersigned request that the Decision issued on September 30, 2019 (the "**Decision**") by ICANN Staff be reconsidered as it resolved that:

*"Thank you for providing the joint postponement request of the 23 October 2019 Auction for the .MERCK contention set. Unfortunately, ICANN cannot accommodate a subsequent postponement of the Auction Date as the .MERCK contention set had been previously postponed on 29 May 2019 from the original 17 June 2019 Auction Date (based on the mutual*

*request of each member in the contention set).*

*The MERCK contention set will be confirmed tomorrow, 1 October, for Auction on 23 October. Please note, there is still time to pursue and complete the self-resolution of the contention set. Members of the contention set may continue efforts to self-resolve the set prior to the Auction, subject to compliance with the anti-collusion provisions of the Auction Rules and Bidder Agreement up until the Deposit Deadline for the Auction (7 days prior to the Auction). All withdrawals as a result of self-resolution must be completed with ICANN no later than 16 October 2019".*

**(Exhibit 1, ICANN's decision denying deferment of the auction dating September 30, 2019 (the "Decision"))**

#### Factual Background

Merck KGaA and Merck Registry Holdings, Inc. (acting on behalf of its parent company Merck Sharp & Dohme Corp.), (hereinafter referred to as the "**Requestors**" or "**Applicants**") seek reconsideration of ICANN Staff's decision to dismiss the Requestors' request to defer the auction scheduled on October 23, 2019 to resolve the string contention for .MERCK.

Merck KGaA submitted an application for the new gTLD .MERCK (Application ID #1-980- 7217). Merck Registry Holdings, Inc., submitted both a community application (Application ID #1-1702-73085) and a standard application for the new gTLD .MERCK (Application ID #1-1702-28003).

All three applications have been placed by ICANN into a String Contention Set.

Merck KGaA and Merck Registry Holdings, Inc. were invited by ICANN to participate in an auction to resolve the string contention. The auction was preliminarily scheduled on July 17, 2019. **(Exhibit 2, Intent to Auction Notification dating May 3, 2019)**

However, as Merck KGaA and Merck Registry Holdings, Inc. had started settlement negotiations in order to self-resolve the contention set, the Requestors filed a mutual request to postpone the auction date on May 29, 2019. **(Exhibit 3, Applicants' mutual request to postpone the auction date dating May 29, 2019)**

On June 6, 2019, ICANN confirmed that it would accommodate the requested postponement. **(Exhibit 4, ICANN's acceptance of Applicants' Mutual Request to postpone dating June 6, 2019)**

On June 10, 2019, ICANN notified the Requestors that the auction had been postponed to October 23, 2019 and that the auction confirmation date was September 25, 2019. **(Exhibit 5, ICANN's notification of postponement of the auction to October 23, 2019 dating June 10, 2019)**

The Applicants were very appreciative of such a decision and continued with their negotiations and discussions. However, they later on agreed that it would be beneficial for them to obtain more time to pursue ongoing good-faith negotiations with the intention and desire of coming to an amicable solution themselves. Therefore, on September 5, 2019, Merck KGaA and Merck Registry Holdings, Inc. mutually requested another deferment of the auction, scheduled on October 23, 2019 for 9 months. **(Exhibit 6, Applicants' mutual request to defer the auction by 9 months, filed on September 5, 2019)**

On September 6, 2019, ICANN informed the Applicants that their request for a subsequent postponement of the auction was denied on the grounds that the Auction Date had been previously postponed from the original July 17, 2019 Auction Date to October 23, 2019. **(Exhibit 7, ICANN's denial of deferment of the auction dating September 6, 2019)**

On September 24, 2019, Merck KGaA and Merck Registry Holdings, Inc. submitted another request for a subsequent postponement of the auction, setting out the current settlement discussions between the Requestors, in particular the ongoing multi-jurisdictional litigation between them. **(Exhibit 8, Applicants' mutual request to defer the auction dating September 24, 2019)**

On September 30, 2019, ICANN again denied this Request. **(Exhibit 1, ICANN's decision denying deferment of the auction dating September 30, 2019)**

#### **4. Date of action/inaction:**

*(Note: If Board action, this is the date on which information about the challenged Board action is first published in a resolution, unless the posting of the resolution is not accompanied by a rationale. In that instance, the date is the date of the initial posting of the rationale.)*

ICANN's Staff acted on September 30, 2019 by deciding that a subsequent

postponement of the auction could not be accommodated.

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

*(Provide the date you learned of the action/that action would not be taken. If more than thirty days has passed from when the action was taken or not taken to when you learned of the action or inaction, please provide discussion of the gap of time.)*

ICANN's Staff decision that a subsequent postponement of the auction could not be accommodated was posted on ICANN's Global Support Portal on September 30, 2019. The Requestors were informed by e-mail about this posting on September 30, 2019 and accessed ICANN's Global Support Portal and became aware of the decision on September 30, 2019.

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

The Requestors are materially affected by the Decision as it limits the Applicants' ability to continue their efforts in discussing effectively and negotiating in good faith to self-resolve the set prior to the Last Resort Auction. ICANN's denial of a deferment of the auction therefore compels the Requestors to participate in an auction process.

Moreover, both Applicants have suffered direct financial harm related to the cost of preparation of the present Reconsideration Request and may suffer eventual harm from having to pursue an Independent Review Proceeding.

**7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.**

Apart from the Applicants involved in ICANN's Last Resort Auction, no other Applicants will be affected by the ICANN's Staff action.

**8. Detail of Board or Staff Action/Inaction – Required Information**

*Please provide a detailed explanation of the facts as you understand they were provided to the Board or the ICANN organization (acting through its Staff) prior to the action/inaction and the reasons why the Board's or Staff's action or inaction was: (i) contrary to ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies); (ii) taken or refused to be taken without*

*consideration of material information; or (iii) taken as a result of the Board's or Staff's reliance on false or inaccurate relevant information.*

*If your request relates to a Board or Staff action or inaction that you believe is contrary to established ICANN organization's policy(ies), the policies that are eligible to serve as the basis for a Reconsideration Request are those that are approved by the ICANN Board (after input from the community) that impact the community in some way. When reviewing Board or Staff action, the outcomes of prior Reconsideration Requests challenging the same or substantially similar action/inaction as inconsistent with established ICANN policy(ies) shall be of precedential value.*

*If your request relates to a Board or Staff action or inaction taken without consideration of material information, please provide a detailed explanation of the material information not considered by the Board or Staff. If that information was not presented to the Board or Staff, provide the reasons why you did not submit the material information before the Board or Staff acted or failed to act. "Material information" means facts that are material to the decision.*

*If your request relates to a Board or Staff action or inaction that you believe is taken as a result of Board's or Staff's reliance on false or inaccurate relevant information, provide a detailed explanation as to whether an opportunity existed to correct the material considered by the Board or Staff. If there was an opportunity to do so, provide the reasons that you did not provide submit corrections to the Board or Staff before the action/failure to act.*

*Reconsideration Requests are not meant for those who believe that the Board or Staff made the wrong decision when considering the information available. There has to be identification of material information that was in existence of the time of the decision and that was not considered by the Board of Staff in order to state a Reconsideration Request. Similarly, new information – information that was not yet in existence at the time of the decision – also is not a proper ground for reconsideration.*

*Reconsideration Requests are not available as a means to seek review of country code top-level domain ("ccTLD") delegations and re-delegations, issues relating to Internet numbering resources, or issues relating to protocol parameters.*

*Please keep this guidance in mind when submitting requests.*

***Provide the Required Detailed Explanation here: (You may attach additional sheets as necessary.)***

This Request relates to a Staff action, namely the rendering of the Decision, which is both (1) due to material information not considered by ICANN Staff and (2) contrary to ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies).

**(1) ICANN Staff has not considered certain material information**

ICANN Staff did not sufficiently analyze the legally-complex and politically-sensitive background.

ICANN Staff has failed to appreciate the full picture of the legal and political complexities. As already underlined to ICANN in the Applicants' request for deferment on September 24, 2019, both Applicants are involved in multi-jurisdictional litigation which is ongoing and is addressing what are extremely complex issues in law. Indeed, litigation is ongoing in Australia, China, Germany, Hong Kong, India, Mexico, Singapore, Switzerland, the United Kingdom and the United States. This shows how legally-complex and politically-sensitive this contention concerning the .MERCK gTLD is. Please find below sample evidence of the ongoing litigation between the Applicants:

- in the United States:
  - Complaint submitted by Merck Registry Holdings, Inc. on January 15, 2016:  
[https://www.mrknewsroom.com/sites/merck.newshq.businesswire.com/files/news\\_item/additional/Merck\\_Complaint\\_Filed\\_01-15-2016.pdf](https://www.mrknewsroom.com/sites/merck.newshq.businesswire.com/files/news_item/additional/Merck_Complaint_Filed_01-15-2016.pdf)
  - Answer submitted by Merck KGaA on April 14, 2016:  
[https://www.emdgroup.com/content/dam/web/corporate/non-images/company/who-we-are/us/Answer\\_Filed\\_MSD\\_EMD.pdf](https://www.emdgroup.com/content/dam/web/corporate/non-images/company/who-we-are/us/Answer_Filed_MSD_EMD.pdf)
- in the United Kingdom:
  - Latest Judgment in the United Kingdom by the Court of Appeal dating November 24, 2017:  
<https://www.bailii.org/ew/cases/EWCA/Civ/2017/1834.html>

- In Germany:
  - o Frankfurt Higher District Court second instance decision dating February 2, 2017:  
<https://www.rv.hessenrecht.hessen.de/bshe/document/LARE190018947>

Several judgements are due in the coming months, with expected decisions in the fourth quarter of 2019 in China and the United Kingdom, the outcome of which will ultimately have an impact on the ongoing settlement discussions between the Applicants. The relevance and impact of the above mentioned court proceedings for the resolution of the .MERCK gTLD contention cannot be overstated. As shown in the links quoted above, some of these proceedings directly relate to the use of the "Merck" name in the new gTLDs.

Under these circumstances the Applicants are actively looking for a solution for the .MERCK gTLD contention and are hopeful that they will be able to resolve their gTLD contention by voluntary agreement soon.

ICANN's amended and restated Articles of Incorporation as a California nonprofit public benefit corporation state that its public purpose is "lessening the burdens of government and promoting the global public interest in the operational stability of the Internet." It is difficult to understand how a forced auction mandated solely by ICANN and against the desires of all applicants is lessening the burdens of governments before these various national judicial processes can be concluded in their natural course.

We believe that ICANN shares the view that an auction should be a last resort, at which point there remains no other solution and where parties are otherwise unable to resolve their differences by voluntary agreement. However, as shown above, this mechanism is being imposed at a critical and pivotal time and the Requestors therefore believe that with a better analysis and grasp of the legally-complex and politically-sensitive background, ICANN would share the view that the better course of action would be to allow more time for a negotiated solution.

## **(2) The Decision is contrary to ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies)**

### **A) A Mechanism of "Last Resort"**

The name of the ICANN Auction is the mechanism of "Last Resort", i.e., it should only be used where there remains no other solution and where Applicants are otherwise unable to resolve their differences by voluntary agreement.

However, this is evidently not the case, as both Applicants are in agreement that they should be awarded more time to pursue ongoing discussions to resolve the contention amicably. Evidence that both Applicants are in agreement is illustrated by the fact that:

- both Applicants jointly submitted the first postponement request on May 29, 2019;
- both Applicants signed the second postponement request filed by Merck KGaA on September 5, 2019;
- both Applicants signed the third postponement request filed by Merck Registry Holdings, Inc. on September 24, 2019;
- both Applicants are submitting the present joint Reconsideration Request.

The above highlights that both Applicants are actively looking for an alternative solution and are adamant in resolving the contention concerning the .MERCK gTLD between themselves.

As highlighted in point (1) above, the mechanism of last resort is being imposed at a crucial and decisive moment. After many years of dispute, the Applicants are finally hopeful that they will be able to reach a global settlement agreement soon. The Applicants believe that ICANN shares the view that an auction should be the last resort.

This is confirmed by the Section 1.1.2.10 of the Applicant Guidebook, Module 4, and in particular, Section 4.1.3:

*"Applicants that are identified as being in contention are encouraged to reach a settlement or agreement among themselves that resolves the contention. This may occur at any stage of the process, once ICANN publicly posts the applications received and the preliminary contention sets on its website."*

The fact that self-resolving can occur at "any stage of the process", shows that private settlement is ICANN's preferred mechanism of resolving contentions and should be utilized before having to rely on ICANN-managed methods of contention resolution such as Auction of Last Resort.

Moreover, pursuant to Section 4.3 of the Applicant Guidebook:

*"It is expected that most cases of contention will be resolved by the community priority evaluation, or through voluntary agreement among the involved Applicants. Auction is a tie-breaker method for resolving string contention among the applications within a contention set, if the contention has not been resolved by other means."*

Under these circumstances, we believe that deferment of the auction would be the solution that most closely aligns with ICANN's Core Values and Commitments and the Applicant Guidebook.

Furthermore, other voices are also challenging the mechanics and the existence of an auction as a mechanism of last resort.

Firstly, in the Final Issue Report on New gTLD Subsequent Procedures<sup>1</sup>, the Discussion Group questioned whether additional analysis should be conducted to determine if auctions are the right mechanism of last resort. They noted that this may require defining the ideal characteristics of a mechanism of last resort. Their Report underlines that *"For those cases of contention that are not resolved through CPE [Community Priority Evaluation] or voluntary agreement, auction is the tie-breaker method of last resort"*. Their Report also identifies last resort auctions as likely to benefit applicants with the deepest pockets and makes it challenging for ICANN to achieve Article 1, Section 2.6 of its Bylaws (*"Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest"*).

Secondly, in the Supplemental Report on the new gTLD Subsequent Procedures Policy Development Process<sup>2</sup>, the Working Group debated both the pros and cons, considered alternative options and brainstormed possible solutions/ideas to reduce the overall need for using methods of last resort. The Working Group submitted preliminary implementation recommendations in which it considered whether there should be additional options for Applicants to voluntarily resolve contention sets by mutual agreement before being forced into an ICANN auction of last resort. Moreover, some participants in the Working Group also stressed that:

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<sup>1</sup> <https://gnso.icann.org/sites/default/files/file/field-file-attach/2016-12/subsequent-procedures-final-issue-04dec15-en.pdf>

<sup>2</sup> <https://gnso.icann.org/sites/default/files/file/field-file-attach/supplemental-report-01nov18-en.pdf>

*"auctions of last resort are inherently unfair and should be modified, restricted or modified. One of the main arguments is that auctions reward only those with the most amount of money rather than those that may best operate the TLD in the public interest".*

This shows that the proper use of the mechanism of Last Resort is still being analyzed and interpreted by many. Imposing it in a circumstance which is evidently not of last resort thus arguably taints the mechanism's future reputation and legitimacy.

Finally, it should be underlined that at this stage of the New gTLD Program it is impossible that an approval of our request to defer the auction would create a new precedent that may have a negative impact on the New gTLD application process.

## **B) ICANN Staff are not bound by Applicant Guidebook**

In the Decision issued on September 30, 2019, ICANN Staff denies the Applicants' mutual request to postpone the Auction Date on the grounds that it is bound by the Applicant Guidebook, which only allows for one extension that was granted to the Applicants on May 29, 2019 (from the original July 17, 2019 Auction date to October 23, 2019). The Requestors submit that this is in breach of the ICANN Bylaws.

*(i) ICANN can exercise its discretion as to whether to grant a subsequent postponement of the auction*

Firstly, ICANN Bylaws are the supreme governing rules of ICANN. There appears to be no legal basis for the ICANN Bylaws to be overruled by "guidelines" contained in the Applicant Guidebook. To base the decision on such a rigid and stringent interpretation of the Applicant Guidebook breaches not only the true spirit of ICANN's Missions and Commitments but also ICANN's Core Values, including the requirement to make *"decisions by applying documented policies neutrally and objectively with integrity and fairness"*.

Secondly, Paragraph 10 of ICANN's Auction Rules (v.2014.11.03) states that a "postponement is intended to be a one-time option". The use of this wording is critical, as in no way does it explicitly restrict the use of a postponement to a single occurrence. The Requestors submit that a second postponement is possible if ICANN sees fit. This, in our view, is more representative of the true

spirit of ICANN and its requirement to make decisions with integrity and fairness.

Furthermore, the Resolution 2013.07.13.NG04<sup>3</sup> of the New gTLD Program Committee (NGPC) resolved that:

*"in the interests of fairness and reasonableness, notwithstanding the deadlines set out in the Applicant Guidebook, in the future, the DRSPs (Dispute Resolution Service Provider) 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."*

**(Exhibit 9, copy of Resolution 2013.07.13.NG04 and its rationale)**

The NGPC clearly grants itself the flexibility and discretion when it comes to interpreting the Applicant Guidebook.

The rationale in Resolution 2013.07.13.NG04 quoted above was challenged in a Reconsideration Request submitted by Merck KGaA on 30 August 2013<sup>4</sup>. Both the Board Governance Committee (in its Recommendation of 10 October 2013<sup>5</sup>) and the NGPC (in its Resolution 2013.11.05.NG03<sup>6</sup>) concluded that not only was the grant of discretion in the Resolution 2013.07.13.NG04 just, in that it does not direct any DRSP to reverse any specific decision to accept or reject a late filing, but also that it is a general resolution that was not directed towards any one specific DRSP or any one specific dispute resolution proceeding.

By confirming the NGPC's rationale in Resolution 2013.07.03 and confirming its general applicability, the NGPC showed its true intention and desire to grant use of this discretion at the time and for the future.

**(Exhibit 10, copy of Resolution 2013.11.05.NG03 and its rationale)**

**(Exhibit 11, Recommendation of the Board Governance Committee dating 10 October 2013)**

In conclusion, such a decision to postpone should have been made in the light of ICANN's Core Values and Paragraph 10 of the Auction Rules as well as

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<sup>3</sup> <https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-07-13-en>

<sup>4</sup> <https://www.icann.org/en/system/files/files/request-merck-30aug13-en.pdf>

<sup>5</sup> <https://www.icann.org/en/system/files/files/recommendation-merck-10oct13-en.pdf>

<sup>6</sup> <https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-11-05-en#1.c>

coherently with the NGPC's prior resolutions (and in particular Resolution 2013.07.13.NG04 and Resolution 2013.11.05.NG03). Indeed they are, in our view, more representative of the true spirit of ICANN and its requirement to make decisions with integrity and fairness. It is therefore submitted that ICANN should share the view that restricting such a decision to postpone on the grounds of the Applicant Guidebook alone is in breach of the ICANN Bylaws.

*(ii) ICANN should have exercised its discretion as to whether to grant a subsequent postponement of the auction*

It seems that ICANN did not recognize that it has any discretion at all or intentionally omitted to exercise it.

As stated in Resolution 2013.07.13.NG04, the NGPC justified its decision on the basis that awarding discretion to review deadlines with reasonableness and fairness would have a positive impact on ICANN's accountability to the community. Indeed, the NGPC considers it is appropriate to review all applicable circumstances when taking decisions that have significant impact on participants within ICANN. Therefore, refusing our postponement request on the grounds of having to blindly comply with a strict interpretation of the Applicant Guidebook rules hinders ICANN's reputation for accountability.

In addition to this, under its auction model, ICANN will be the recipient of the proceeds from the auctioned .MERCK gTLD and thus the considerable financial windfall coming from whichever of the two brands wins. Considering the fact that both Applicants have rights in the name MERCK, the imposition of an auction simply sends the wrong message to the community and others observing the process.

Furthermore, ICANN, when deciding a joint request by two applicants of a contention set to postpone an auction, is obliged to weigh the public and private interests arising from the established facts. This was clearly not done because ICANN solely based its Decision on the grounds of the Applicant Guidebook and did not consider any other relevant interests and concerns.

Moreover, in the new gTLD application process, negotiations are the preferred method of conflict resolution, as opposed to forced resolution after a specific delay. This was for example the case with the applications for .VIN and .WINE and the imposed 60-day deadline where the GAC in its Communiqué stated that:

*"In the meantime concerned GAC members believe the applicants and interested parties should be encouraged to continue their negotiations with a view to reach an agreement on the matter."*

Finally, a delay in the auction of the .MERCK string would have no significant impact on ICANN's operations. Resolution of this dispute is not a condition precedent to any future expansion of the name space by ICANN. In fact there remain several other extensions that are the subject of ICANN Accountability Mechanisms, including .GCC which has been in Cooperative Engagement since February 2014. Unlike some of these other extensions which appear to be languishing in Cooperative Engagement purgatory, the Applicants to this contested string have been actively engaged in legal disputes in multiple jurisdictions.

Therefore, it is of utmost importance that the Applicants negotiate together in good faith so as to ensure that the agreement ultimately reached is fully balanced, thought through and transparent. Bearing in mind the complexity of the legal situation, this is not something that can be achieved under the pressure of the short deadline. It is respectfully submitted that the deadline of October 23, 2019 serves to work against the Applicants negotiating rather than encouraging it.

## **9. What are you asking ICANN to do now?**

*(Describe the specific steps you are asking ICANN to take. For example, should the action be reversed, cancelled or modified? If modified, how should it be modified?)*

The Requestors respectfully request from ICANN to:

- a) Reconsider and reverse the Decision;
- b) As part of its reconsideration, take into account the existing relevant material information which was not taken into proper consideration when rendering the Decision;
- c) Grant the necessary time to Applicants to reach a proper agreement before the proceeding to Last Resort Auction. More specifically, the Requestors reiterate its request for 9-month postponement of the Last Resort Auction.

## **10. Please state specifically the grounds under which you have the**

**standing and the right to assert this Reconsideration Request, and the grounds or justifications that support your request.**

*(Include in this discussion how the action or inaction complained of has resulted in material harm and adverse impact. To demonstrate material harm and adverse impact, the Requestor must be able to demonstrate well-known requirements: there must be a loss or injury suffered (financial or non-financial) that is a directly and causally connected to the Board's or Staff's action or inaction that is the basis of the Reconsideration Request. The Requestor must be able to set out the loss or injury and the direct nature of that harm in specific and particular details. The relief requested must be capable of reversing the harm alleged by the Requestor. Injury or harm caused by third Applicants as a result of acting in line with the Board's or Staff's decision/act is not a sufficient ground for reconsideration. Similarly, injury or harm that is only of a sufficient magnitude because it was exacerbated by the actions of a third party is also not a sufficient ground for reconsideration.)*

Under the language of the ICANN Bylaws, a Requestor may bring a case if it has been affected by:

- i. one or more Staff actions or inactions that contradict established ICANN policy(ies); or
- ii. one or more actions or inactions of the ICANN Staff 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
- iii. one or more actions or inactions of the ICANN Staff that are taken as a result of the Staff's reliance on false or inaccurate material information.

The Requestors submit that they have suffered real, tangible and legal harm by the series of violations made by the ICANN Staff in rendering the Decision, as detailed in sections 6 and 8 above, because the actions or inactions of the ICANN Staff have been taken or refused to be taken without consideration of the material information.

The deadline directly impacts the ongoing multi-jurisdictional dispute between the Applicants.

Given the time and efforts invested by the Applicants to try to find an amicable and balanced solution, the outcome of the Decision to refuse extension would negate these efforts and the costs put in the negotiations would be lost.

The Decision to refuse extension of the auction deadline thus contradicts ICANN policies requiring *inter alia*, fairness and neutral application of established policies.

**11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)**

☒ Yes

☐ No

**11a. If yes, is the causal connection between the circumstances of the Reconsideration Request and the harm substantially the same for all of the Requestors? Explain.**

We would like to reiterate that apart from the Applicants involved in ICANN's Last Resort Auction no other Applicants will be affected by the action.

Both the Requestors are materially affected in substantially the same way as the Decision to denial deferment of the deadline of the Last Resort Auction limits both the Applicants' ability to continue their efforts in negotiating and self-resolving the set prior to the Last Resort Auction. ICANN's denial of a deferment of the auction thus equally compels both the Requestors to participate in an auction process.

**12. Are you bringing this Reconsideration Request on an urgent basis pursuant to Article 4, Section 4.2(s) of the Bylaws?**

☐ Yes

☒ No

**12a. If yes, please explain why the matter is urgent for reconsideration.**

**13. Do you have any documents you want to provide to ICANN?**

If you do, please attach those documents to the email forwarding this request.

Note that all documents provided, including this Request, will be publicly posted on the Reconsideration Website at <https://www.icann.org/resources/pages/accountability/reconsideration-en>.

### **Terms and Conditions for Submission of Reconsideration Requests**

Reconsideration Requests from different Requestors may be considered in the same proceeding so long as: (i) the requests involve the same general action or inaction; and (ii) the Requestors are similarly affected by such action or inaction. In addition, consolidated filings may be appropriate if the alleged causal connection and the resulting harm is substantially the same for all of the Requestors. Every Requestor must be able to demonstrate that it has been materially harmed and adversely impacted by the action or inaction giving rise to the request.

The BAMC shall review each Reconsideration Request upon its receipt to determine if it is sufficiently stated. The BAMC may summarily dismiss a Reconsideration Request if: (i) the Requestor fails to meet the requirements for bringing a Reconsideration Request; or (ii) it is frivolous. The BAMC's summary dismissal of a Reconsideration Request shall be documented and promptly posted on the Reconsideration Website at <https://www.icann.org/resources/pages/accountability/reconsideration-en>.

Hearings are not required in the Reconsideration Process; however, Requestors may ask for the opportunity to be heard. The BAMC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing. The BAMC's decision on any such request is final.

For all Reconsideration Requests that are not summarily dismissed, except where the Ombudsman is required to recuse himself or herself and Community Reconsideration Requests, the Reconsideration Request shall be sent to the Ombudsman, who shall promptly proceed to review and consider the Reconsideration Request. The BAMC shall make a final recommendation to the Board with respect to a Reconsideration Request following its receipt of the Ombudsman's evaluation (or following receipt of the Reconsideration Request involving those matters for which the Ombudsman recuses himself or herself or the receipt of the Community Reconsideration Request, if applicable).

The final recommendation of the BAMC shall be documented and promptly (i.e., as soon as practicable) posted on the Reconsideration Website at <https://www.icann.org/resources/pages/accountability/reconsideration-en> and

shall address each of the arguments raised in the Reconsideration Request. The Requestor may file a 10-page (double-spaced, 12-point font) document, not including exhibits, in rebuttal to the BAMC's recommendation within 15 days of receipt of the recommendation, which shall also be promptly (i.e., as soon as practicable) posted to the ICANN Reconsideration Website and provided to the Board for its evaluation; provided, that such rebuttal shall: (i) be limited to rebutting or contradicting the issues raised in the BAMC's final recommendation; and (ii) not offer new evidence to support an argument made in the Requestor's original Reconsideration Request that the Requestor could have provided when the Requestor initially submitted the Reconsideration Request.

The ICANN Board shall not be bound to follow the recommendations of the BAMC. The ICANN Board's decision on the BAMC's recommendation is final and not subject to a Reconsideration Request.

By submitting my personal data, I agree that my personal data will be processed in accordance with the ICANN [Privacy Policy](#), and agree to abide by the website [Terms of Service](#).

Signed by their legal counsel, David Taylor of Hogan Lovells, on behalf of Merck Registry Holdings, Inc.:

Contact Information Redacted

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Print Name: David Taylor  
Date: October 14, 2019

and

Signed by their legal counsel, Torsten Bettinger of Bettinger Scheffelt Müller Partnerschaft mbH on behalf of Merck KGaA:

Contact Information Redacted

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Print Name: Torsten Bettinger  
Date: October 14, 2019

## **List of Exhibits**

- Exhibit 1** ICANN's decision denying deferment of the auction dating September 30, 2019 (the "**Decision**").
- Exhibit 2** ICANN's Intent to Auction Notification dating May 3, 2019.
- Exhibit 3** Applicants' mutual request to postpone the auction date dating May 29, 2019.
- Exhibit 4** ICANN's acceptance of Applicants' mutual request to postpone the auction date dating June 6, 2019.
- Exhibit 5** ICANN's notification of postponement of the auction to October 23, 2019 dating June 10, 2019.
- Exhibit 6** Applicants' mutual request to defer the auction by 9 months, filed on September 5, 2019.
- Exhibit 7** ICANN's denial of deferment of the auction dating September 6, 2019.
- Exhibit 8** Applicants' mutual request to defer the auction dating September 24, 2019.
- Exhibit 9** Copy of Resolution 2013.07.13.NG04 and its rationale.
- Exhibit 10** Copy of Resolution 2013.11.05.NG03 and its rationale.
- Exhibit 11** Recommendation of the Board Governance Committee dating October 10, 2013.

**Subject:** Re: [Reconsideration Request] Reconsideration Request 19-4  
**Date:** Thursday, November 21, 2019 at 8:15:02 AM Pacific Standard Time  
**From:** reconsider on behalf of Herb Waye  
**To:** Reconsideration  
**CC:** ombudsman  
**Attachments:** ATT00001.txt

Reconsideration Request 19-4

Pursuant to Article 4, Section 4.2(l)(iii), I am recusing myself from consideration of Request 19-4.

Best regards,

Herb Waye  
ICANN Ombudsman

<https://www.icann.org/ombudsman> [icann.org]  
<https://www.facebook.com/ICANNOmbudsman> [facebook.com]  
Twitter: @IcannOmbudsman

ICANN Expected Standards of Behavior:

<https://www.icann.org/en/system/files/files/expected-standards-15sep16-en.pdf> [icann.org]

Community Anti-Harassment Policy

<https://www.icann.org/resources/pages/community-anti-harassment-policy-2017-03-24-en> [icann.org]

Confidentiality

All matters brought before the Ombudsman shall be treated as confidential. The Ombudsman shall also take all reasonable steps necessary to preserve the privacy of, and to avoid harm to, those parties not involved in the complaint being investigated by the Ombudsman. The Ombudsman shall only make inquiries about, or advise staff or Board members of the existence and identity of, a complainant in order to further the resolution of the complaint. The Ombudsman shall take all reasonable steps necessary to ensure that if staff and Board members are made aware of the existence and identity of a complainant, they agree to maintain the confidential nature of such information, except as necessary to further the resolution of a complaint

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**From:** Reconsideration <reconsideration@icann.org>

**Date:** Tuesday, November 19, 2019 at 11:02 PM

**To:** ombudsman <ombudsman@icann.org>

**Subject:** Reconsideration Request 19-4

Dear Herb,

ICANN recently received Reconsideration Request 19-4 which was submitted on 14 October 2019 by Merck KGaA and Merck Registry Holdings, Inc. (Requestors), seeking reconsideration of ICANN organization's denial of their mutual request for a second postponement of a string contention auction for the .MERCK string, for which the Requestors are the only two applicants. The Board Accountability Mechanisms Committee (BAMC) has determined that Request 19-4 is sufficiently stated pursuant to Article 4, Section 4.2(k) of the

ICANN Bylaws. Pursuant the Article 4, Section 4.2(I) of the ICANN Bylaws, a reconsideration request must be sent to the Ombudsman for consideration and evaluation if the request is not summarily dismissed following review by the BAMC to determine if the request is sufficiently stated. Specifically, [Section 4.2 \(I\) \[icann.org\]](#) states:

(I) For all Reconsideration Requests that are not summarily dismissed, except Reconsideration Requests described in [Section 4.2\(I\)\(iii\)](#) and Community Reconsideration Requests, the Reconsideration Request shall be sent to the Ombudsman, who shall promptly proceed to review and consider the Reconsideration Request.

(i) The Ombudsman shall be entitled to seek any outside expert assistance as the Ombudsman deems reasonably necessary to perform this task to the extent it is within the budget allocated to this task.

(ii) The Ombudsman shall submit to the Board Accountability Mechanisms Committee his or her substantive evaluation of the Reconsideration Request within 15 days of the Ombudsman's receipt of the Reconsideration Request. The Board Accountability Mechanisms Committee shall thereafter promptly proceed to review and consideration.

(iii) For those Reconsideration Requests involving matters for which the Ombudsman has, in advance of the filing of the Reconsideration Request, taken a position while performing his or her role as the Ombudsman pursuant to [Article 5](#) of these Bylaws, or involving the Ombudsman's conduct in some way, the Ombudsman shall recuse himself or herself and the Board Accountability Mechanisms Committee shall review the Reconsideration Request without involvement by the Ombudsman.

Please advise whether you are accepting Request 19-4 for evaluation or whether you are recusing yourself pursuant to the grounds for recusal set forth in Section 4.2(I)(iii). If you are accepting Request 19-4 for evaluation, please note that your substantive evaluation must be provided to the BAMC within 15 days of receipt of Request 19-4.

Best regards,  
ICANN  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

**RECOMMENDATION  
OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)  
RECONSIDERATION REQUEST 19-4  
19 December 2019**

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The Requestors, Merck KGaA and Merck Registry Holdings, Inc., seek reconsideration of ICANN organization’s denial of their mutual request for a second postponement of a string contention auction for the .MERCK generic top-level domain (gTLD) (Second Request). The Requestors are the only two applicants for the .MERCK gTLD.<sup>1</sup> The Requestors assert that ICANN Staff’s denial of the Second Request failed to consider material information.<sup>2</sup> The Requestors also assert that the denial of the Second Request contradicted ICANN org’s policies of: (i) favoring the voluntary settlement of string contention and treating auctions as a matter of last-resort;<sup>3</sup> and (ii) allowing for discretionary waiver of deadlines in the New gTLD Applicant Guidebook (Applicant Guidebook).<sup>4</sup> Finally, the Requestors assert that the denial of the Second Request was contrary to ICANN org’s Commitment to “[m]ake decisions by applying documented policies neutrally and objectively with integrity and fairness.”<sup>5</sup> The Requestors ask that the Second Request be granted, and that the auction date be postponed for nine months to allow them to consider settlement negotiations.<sup>6</sup>

**I. Brief Summary.**

The Requestors each submitted one or more applications for .MERCK, which were placed in a contention set. At the Requestors’ joint request submitted on 29 May 2019,<sup>7</sup> ICANN Staff granted a postponement of the first auction date for the .MERCK contention set, and later

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<sup>1</sup> Reconsideration Request 19-4, § 3, at Pg. 3, <https://www.icann.org/en/system/files/files/reconsideration-19-4-merck-request-redacted-14oct19-en.pdf>.

<sup>2</sup> Request 19-4, § 8, at Pg. 7–8.

<sup>3</sup> Request 19-4, § 8, at Pg. 9–11.

<sup>4</sup> Request 19-4, § 8, at Pg. 11–14.

<sup>5</sup> Request 19-4, § 8, at Pg. 11.

<sup>6</sup> Request 19-4, § 9, at Pg. 14.

<sup>7</sup> Request 19-4, § 3, at Pg. 3.

rescheduled the auction for 23 October 2019.<sup>8</sup> On 24 September 2019, Requestors then submitted the Second Request, jointly seeking a second postponement of the auction, asserting that they needed the additional time to negotiate a possible settlement.<sup>9</sup> ICANN Staff denied the Second Request on 30 September 2019, explaining that “ICANN cannot accommodate a subsequent postponement of the Auction Date as the .MERCK contention set had been previously postponed on 29 May 2019 from the original 17 June 2019 Auction Date.”<sup>10</sup>

The Requestors seek reconsideration of the denial of their Second Request, asserting that ICANN Staff failed to consider material information about the nature and status of their dispute and violated various ICANN org policies and Commitments. Based on its extensive review of all relevant materials, the BAMC concludes that ICANN Staff considered all material information in denying the second request, and that the denial did not violate the ICANN org policies and Commitments on which the Requestors rely. Rather, ICANN Staff applied an existing rule against granting second postponement requests that is clearly stated in the Applicant Guidebook and other ICANN org materials, and that is consistent with other ICANN policies and Commitments. Accordingly, the BAMC recommends that the Board deny Request 19-4.

## **II. Facts.**

### **A. Relevant Background on the New gTLD String Contention Process.**

Following a nearly two-year policy development process,<sup>11</sup> in 2007 the Generic Names Supporting Organization (GNSO) concluded that “ICANN must implement a process that allows

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<sup>8</sup> Request 19-4, Ex. 5, <https://www.icann.org/en/system/files/files/reconsideration-19-4-merck-exhibits-1-11-14oct19-en.pdf>.

<sup>9</sup> *Id.*, Ex. 8.

<sup>10</sup> *Id.*, Ex 1.

<sup>11</sup> <https://newgtlds.icann.org/en/about/program>.

the introduction of new [gTLDs].”<sup>12</sup> Accordingly, ICANN org established and implemented the New gTLD Program, “enabling the largest expansion of the [DNS].”<sup>13</sup>

“String contention” refers to the scenario in which there is more than one qualified application for the identical gTLD string or for similar gTLD strings.”<sup>14</sup> As part of the New gTLD Program, ICANN org has sometimes received more than one application for gTLD strings that are identical or so similar that they are likely to cause user confusion.<sup>15</sup> When that occurs, ICANN Staff applies a set of procedures called “String Contention Procedures” to determine which of the contending applications will be granted.<sup>16</sup>

Under the String Contention Procedures, ICANN Staff first identifies which applications are in contention with each other and publishes those contending applications in a “Contention Set.”<sup>17</sup> Contending applicants are then encouraged to reach a voluntary resolution of the string contention, which “may occur at any stage of the process” after contention sets have been posted.<sup>18</sup> If the contention set is not voluntarily resolved, any community-based applicants in the contention set may request a “community priority evaluation,” in which ICANN Staff evaluates whether the community-based application fulfills the community priority criteria.<sup>19</sup> If the community priority evaluation is not available, is not elected, or does not fully resolve the string contention, then the contention set (or what remains of it) is scheduled for an auction.<sup>20</sup>

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<sup>12</sup> GNSO Final Report: Introduction of New Generic Top-Level Domains, 8 Aug. 2007, [https://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-part-a-08aug07.htm#\\_Toc43798015](https://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-part-a-08aug07.htm#_Toc43798015).

<sup>13</sup> <https://newgtlds.icann.org/en/about/program>.

<sup>14</sup> New gTLD Applicant Guidebook (Applicant Guidebook), Module 1, § 1.1.2.10.

<sup>15</sup> *Id.*, Module 4, § 4.1.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*, Module 4, § 4.1.1.

<sup>18</sup> *Id.*, Module 4, § 4.1.3.

<sup>19</sup> *Id.*, Module 4, § 4.2.2.

<sup>20</sup> *Id.*, Module 4, § 4.3.

“Auction is a tie-breaker method for resolving string contention among the applications within a contention set, if the contention has not been resolved by other means.”<sup>21</sup> Where an auction is required, contending applicants receive an Intent to Auction notice stating when the auction will be held.<sup>22</sup> The auction date may be postponed, if all members of the contention set submit a timely joint request for postponement.<sup>23</sup> But postponement “is a one-time option; ICANN will grant no more than one such request for each set of contending applications.”<sup>24</sup> When the auction is ultimately held, “the auctioneer successively increases the prices associated with applications within the contention set, and applicants indicate their willingness to pay these prices.”<sup>25</sup> Once enough applicants have chosen to exit the auction that the remaining applications are no longer in string contention, the auction concludes and the remaining applicant or applicants pay the resulting prices and proceed towards delegation of their respective gTLDs.<sup>26</sup>

## **B. Relevant Background on the Requestors’ Disputes Over .MERCK**

The Requestors each have trademark rights involving the word “Merck,” which have been and continue to be the subject of litigation in multiple jurisdictions for many decades.<sup>27</sup> The dispute between them regarding the .MERCK gTLD has also produced multiple ICANN Reconsideration Requests, and one Independent Review Process.<sup>28</sup> Both Requestors applied for

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<sup>21</sup> *Id.*

<sup>22</sup> Auction Rules for New gTLDs (Auction Rules) ¶ 8 (11 Nov. 2014).

<sup>23</sup> Auction Rules ¶ 10.

<sup>24</sup> Applicant Guidebook, Module 4, § 4.2.2.

<sup>25</sup> *Id.*, Module 4, § 4.3.1.

<sup>26</sup> *Id.*

<sup>27</sup> Request 19-4 § 8, at Pg. 7–8.

<sup>28</sup> See Request 16-13 (Merck KGaA requesting reconsideration of ICANN Staff’s decision not to take action on Merck KGaA’s complaint against the .pharmacy registrar for awarding merck.pharmacy to Merck Sharp and Dohme Corp. instead of to it); Request 16-12 (Merck KGaA requesting reconsideration of ICANN’s acceptance of Community Priority Evaluation Report concerning the .MERCK new gTLD), Request 14-9 (Merck KGaA requesting reconsideration of ICANN’s acceptance of Expert Determinations concerning its Legal Rights Objection to Merck Registry Holdings, Inc.’s and MSD Registry Holdings, Inc.’s new gTLD applications); Request 13-8 (Merck KGaA requesting reconsideration of ICANN’s role in the acceptance of a late-filed community objection by

the .MERCK string, and were placed into a string contention set. The .MERCK contention set was scheduled for an ICANN auction on 17 July 2019.<sup>29</sup> On 29 May 2019, Requestors filed a mutual request to postpone the auction date, explaining that they “intend[ed] to resolve string contention in an agreement among themselves,” and that “[s]ettlement negotiations are planned for July 2019.”<sup>30</sup> ICANN Staff accepted the mutual request to postpone the initial auction.<sup>31</sup> The auction was rescheduled for 23 October 2019.<sup>32</sup>

On 5 September 2019, the Requestors sought a second extension of the auction date, stating that “[i]n order to be able to continue their negotiations to resolve the conflict amicably, both parties hereby request a deferment of the auction for nine months.”<sup>33</sup> ICANN Staff denied the request on 6 September.<sup>34</sup> ICANN Staff explained:

Thank you for providing the postponement request of the 23 October 2019 Auction for the .MERCK contention set. Unfortunately, ICANN cannot accommodate a subsequent postponement of the Auction Date as the .MERCK contention set had been previously postponed on 29 May 2019 from the original 17 June 2019 Auction Date (based on the mutual request of each member in the contention set). The MERCK contention set remains scheduled for Auction on 23 October 2019. Please note, there is still time to pursue and complete the self-resolution of the contention set. Members of the contention set may continue efforts to self-resolve the set prior to the Auction, subject to compliance with the anti-collusion provisions of the Auction Rules and Bidder Agreement up until the Deposit Deadline for the Auction (7 days prior to the Auction).<sup>35</sup>

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Merck & Co. to Merck KGaA’s new gTLD applications); Independent Review Proceeding *Merck KGaA v. ICANN (.MERCK/MERCKMSD)* (independent review proceeding concerning Request 14-9).

<sup>29</sup> Request 19-4, Ex. 2.

<sup>30</sup> *Id.*, Ex. 3.

<sup>31</sup> *Id.*, Exs. 4, 5.

<sup>32</sup> *Id.*, Ex. 5.

<sup>33</sup> *Id.*, Ex. 6.

<sup>34</sup> *Id.*, Ex. 7.

<sup>35</sup> *Id.*, Ex. 7.

Dissatisfied with this response, the Requestors submitted the Second Request, a second, more detailed request for an extension of the auction date, on 24 September.<sup>36</sup> The Requestors referred to the ongoing “multijurisdictional litigation” between them involving “extremely complex issues in law,” and asserted that “[s]everal judgments are due in the coming months, and the outcome of the litigation will ultimately have an impact on which of us will operate the <.merck> new gTLD and how.”<sup>37</sup> The Requestors continued:

The applicants are in the process of ongoing settlement discussions, actively looking for a solution and are hopeful that they will be able to reach a global settlement agreement soon and therefore resolve the issues between us and the contention concerning the <.merck> gTLD . . . .

In order to be able to continue their negotiations to resolve the conflict amicably, we would re-iterate our request for a 9 month postponement. . . .

Apart from the applicants, no other applicant has applied for the gTLD <.merck>. Therefore, there are no third parties affected by our requested deferment of the auction.

Under these circumstances, we believe that deferment of the auction would be the solution that most closely aligns with ICANN’s core values and commitments, pursuant to which settlement at any stage is encouraged, whereas auctions are considered to be a mechanism of last resort where parties are otherwise unable to resolve their differences by voluntary agreement.<sup>38</sup>

On 30 September, ICANN Staff responded and again denied the request.<sup>39</sup> ICANN Staff explained: “Unfortunately, ICANN cannot accommodate a subsequent postponement of the Auction Date as the .MERCK contention set had been previously postponed on 29 May 2019

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<sup>36</sup> *Id.*, Ex. 8.

<sup>37</sup> *Id.*, Ex. 8.

<sup>38</sup> *Id.*, Ex. 8.

<sup>39</sup> *Id.*, Ex. 1.

from the original 17 June 2019 Auction Date (based on the mutual request of each member in the contention set).”<sup>40</sup>

On 14 October 2019, the Requestors submitted Request 19-4. The Requestors claim that ICANN Staff failed to consider material information and contradicted ICANN’s Commitments and Core Values, as well as established ICANN policies, in denying their request for a second postponement of the auction. Pursuant to ICANN procedures, the 23 October 2019 Auction date was postponed pending resolution of Request 19-4.<sup>41</sup>

Pursuant to Article 4, Section 4.2(1) of the Bylaws, ICANN org transmitted Request 19-4 to the Ombudsman for consideration, and the Ombudsman recused himself.<sup>42</sup>

### **III. Issues Presented.**

The issues are as follows:

1. Whether ICANN Staff failed to consider material information when it denied the Requestors’ second request for a second postponement of the .MERCK contention set auction;
2. Whether ICANN Staff violated established ICANN policies favoring voluntary settlement of string contentions and allowing for discretionary waiver of deadlines when it denied the Requestors’ second request for a second postponement of the .MERCK contention set auction; and
3. Whether ICANN Staff violated ICANN’s Commitments to “[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly” when it denied the Requestors’ second request for a second postponement of the .MERCK contention set auction.

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<sup>40</sup> *Id.*, Ex. 1.

<sup>41</sup> <https://newgtlds.icann.org/en/applicants/advisories/application-contention-set-14mar14-en>.

<sup>42</sup> Ombudsman Action Regarding Request 19-4, <https://www.icann.org/en/system/files/files/reconsideration-19-4-merck-kgaa-ombudsman-action-21nov19-en.pdf>.

#### **IV. The Relevant Standards for Reconsideration Requests.**

Articles 4.2(a) and (c) of ICANN’s Bylaws provide in relevant part that any entity “may submit a request for reconsideration or review of an ICANN action or inaction . . . to the extent the Requestor has been adversely affected by:

- (i) One or more Board or Staff actions or inactions that contradict ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies);
- (ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board’s or Staff’s consideration at the time of action or refusal to act; or
- (iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board’s or Staff’s reliance on false or inaccurate relevant information.”<sup>43</sup>

Request 19-4 seeks reconsideration of ICANN Staff action on the grounds that the action taken contradicted established ICANN policies and ICANN’s Commitments and Core Values and failed to consider material information. The BAMC has reviewed the Request and now provides a recommendation to the Board.<sup>44</sup> Denial of a Request for Reconsideration of ICANN Staff action is appropriate if the BAMC recommends and the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.<sup>45</sup>

#### **V. Analysis and Rationale.**

##### **A. ICANN Staff Did Not Fail to Consider Material Information.**

The Requestors assert that ICANN Staff failed to consider material information when it denied the Requestors’ second request for a second postponement of the .MERCK contention set auction.<sup>46</sup> In particular, the Requestors contend that ICANN Staff disregarded the history of multijurisdictional litigation between them concerning the “Merck” trademark, the fact that

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<sup>43</sup> ICANN Bylaws, 28 November 2019, Art. 4 § 4.2(a) and (c).

<sup>44</sup> *See id.* at § 4.2(e).

<sup>45</sup> *Id.*

<sup>46</sup> Request 19-4 § 8, at Pg. 7–8.

judgments in several pending cases were “due in the coming months,” and the fact that the Requestors were “hopeful” that they would be able to resolve their contention over .MERCK by voluntary agreement “soon.”<sup>47</sup> The Requestors submitted much of this information to ICANN Staff in support of the Second Request.<sup>48</sup>

As an initial matter, the Requestors do not present any evidence to support their apparent belief that ICANN Staff failed to consider information about the history of their dispute, their pending litigation, and their hope that they could resolve their contention voluntarily if given more time when it denied the Second Request. The Requestors’ long and contentious history is well known to ICANN Staff, because of the Requestors’ many submissions setting forth that history through various objection proceedings as part of the New gTLD Program as well as the numerous accountability mechanisms filed by the Requestors.<sup>49</sup> In the message denying the Second Request, ICANN Staff wrote, “[p]lease note, there is still time to pursue and complete the self-resolution of the contention set,” showing that ICANN Staff was aware of and had considered the Requestors’ ongoing efforts at voluntary settlement.<sup>50</sup>

More significantly, however, whether or not ICANN Staff considered such information, the information was not material or relevant to ICANN Staff’s decision on the Second Request. ICANN Staff denied the Second Request in accordance with the process established under the Applicant Guidebook regarding requests for postponements of contention set resolution auctions, which provides:

[i]f all parties agree and present a joint request, ICANN may postpone the auction for a three-month period while the parties attempt to reach a settlement before proceeding to auction. *This is*

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<sup>47</sup> *Id.* § 8, at Pg. 7–8.

<sup>48</sup> *Id.*, Ex. 8.

<sup>49</sup> See materials cited in n.28, *supra*.

<sup>50</sup> Request 19-4, Ex. 1.

*a one-time option; ICANN will grant no more than one such request for each set of contending applications.*<sup>51</sup>

ICANN’s “Auction Date Advancement/Postponement Request Form” explicitly states “ICANN may accommodate **one** postponement request per contention set.”<sup>52</sup> The prior version of the Auction Rules for New gTLDs effective until 26 February 2014, also specified that “[a] postponement is intended to be a one-time option.”<sup>53</sup> ICANN Staff’s message to Requestors denying their Second Request made clear that the rule against second postponements was the reason for the denial, explaining that “ICANN cannot accommodate a subsequent postponement of the Auction Date as the .MERCK contention set had been previously postponed on 29 May 2019 from the original 17 June 2019 Auction Date (based on the mutual request of each member in the contention set).”<sup>54</sup> Reconsideration is therefore not warranted based on a failure to consider material information.

#### **B. ICANN Staff Did Not Violate ICANN Policies Favoring Voluntary Settlements.**

The Requestors next assert that ICANN Staff’s denial of the Second Request violated ICANN org’s policies favoring voluntary settlements of contention sets and treating contention-set auctions as a means of last resort only.<sup>55</sup> The Requestors point out that the Applicant Guidebook states that

Applicants that are identified as being in contention are encouraged to reach a settlement or agreement among themselves that resolves the contention. This may occur at any stage of the

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<sup>51</sup> Applicant Guidebook § 4.2.2 (emphasis added).

<sup>52</sup> <https://newgtlds.icann.org/en/applicants/auctions/date-advancement-postponement-form-09nov17-en.pdf> (emphasis in original).

<sup>53</sup> Auction Rules for New gTLDs (12 Dec. 2013), ¶ 10, <http://newgtlds.icann.org/en/applicants/auctions/rules-12dec13-en.pdf>. The current version of the Auction Rules for New gTLDs, effective 3 November 2014, does not directly refer to the one-postponement limit, but they refer to the Auction Date Advancement/Postponement Request Form, which in turn does describe that limit. See Auction Rules for New gTLDs (3 Nov. 2014), ¶ 10, <https://newgtlds.icann.org/en/applicants/auctions/rules-03nov14-en.pdf>.

<sup>54</sup> Request 19-4, Ex. 1.

<sup>55</sup> Request 19-4 § 8, at Pg. 8–11.

process, once ICANN publicly posts the applications received and the preliminary contention sets on its website.<sup>56</sup>

The Requestors also rely on the statement in the Applicant Guidebook that:

It is expected that most cases of contention will be resolved by the community priority evaluation, or through voluntary agreement among the involved Applicants. Auction is a tie-breaker method for resolving string contention among the applications within a contention set, if the contention has not been resolved by other means.<sup>57</sup>

The Requestors argue that granting the Second Request and allowing further settlement discussions would have furthered ICANN's pro-settlement policy and been consistent with the policy of treating auction as a tie-breaker method only, and that denying the Second Request violated those policies.<sup>58</sup>

The denial of the Second Request, and ICANN's rule against second postponements of contention set auctions more broadly, is consistent with and does not violate ICANN's policy favoring the voluntary resolution of string contentions and treating auction as a tie-breaker method only. The rule against second postponements does not prevent settlements, but merely prevents parties from indefinitely prolonging gTLD disputes, by providing a hard deadline (the second auction date) by which they must either settle or proceed to auction. As ICANN Staff explained in denying the Second Request, the denial still left the Requestors with "time to pursue and complete the self-resolution of the contention set," as they could "continue efforts to self-resolve the set" up until 7 October 2019, seven days before the auction date.<sup>59</sup> By that time, the Requestors had known for more than three years that they were competing applicants for the .MERCK gTLD; they could have attempted to resolve their competing applications throughout

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<sup>56</sup> *Id.* § 8, at Pg. 9; Applicant Guidebook Module 4, § 4.1.3.

<sup>57</sup> *Id.*, § 8, at Pg. 10; Applicant Guidebook Module 4, § 4.3.

<sup>58</sup> *Id.*, § 8, at Pg. 10.

<sup>59</sup> *Id.*, Ex. 1.

those three years.<sup>60</sup> And the Requestors have had more than five months to voluntarily resolve their competing applications since the auction for the contention set was first scheduled on 2 May 2019.<sup>61</sup> Contrary to Requestors' arguments, this use of the auction process to provide a backstop if settlement efforts fail after a reasonable time is consistent both with ICANN's pro-settlement policy and with its designation of auctions as a method of last resort to resolve string contention. Accordingly, reconsideration is not warranted.

**C. The Use of a Rule Against Second Postponement Requests Is Consistent with ICANN's Commitments.**

The Requestors also assert that ICANN's Commitments require that ICANN Staff have discretion to depart from any ICANN policy against second postponements of string contention auctions, and that ICANN Staff's failure to recognize and use that discretion violated ICANN's Commitments.<sup>62</sup> The Requestors further contend that ICANN Staff's denial of the Second Request violated ICANN's Commitment to make "decisions by applying documented policies neutrally and objectively with integrity and fairness."<sup>63</sup> The Requestors argue that applying case-by-case discretion to requests for second postponements of string contention auctions would be more consistent with this value than is ICANN org's rule of always denying them.

As support, the Requestors rely on a resolution of the New gTLD Program Committee, 2013.07.13.NG04, which provided that:

in the interests of fairness and reasonableness, notwithstanding the deadlines set out in the Applicant Guidebook, in the future, the DRSPs (Dispute Resolution Service Provider) 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

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<sup>60</sup> See Request 16-12, at 7–8 (Aug. 25, 2016).

<sup>61</sup> Request 19-4, Ex. 2.

<sup>62</sup> Request 19-4, § 8, at Pg. 11–14.

<sup>63</sup> *Id.*, § 8, at Pg. 11; ICANN Bylaws § 1.2(b)(v).

whether to grant extensions, or deviate from the deadlines set forth in the Applicant Guidebook.<sup>64</sup>

The Requestors also rely on the text of the prior version of the Auction Rules quoted above, stating that “postponement is intended to be a one-time option,”<sup>65</sup> which the Requestors contend leaves open the possibility of a second postponement.

Resolution 2013.07.13.NG04 does not support the Requestors’ assertion that ICANN Commitments require the exercise of case-by-case discretion concerning requests for second postponements of string contention auctions. Resolution 2013.07.13.NG04 concerned a different issue that did not involve auctions at all: whether dispute resolution providers should have discretion to consider materials filed after a filing deadline.<sup>66</sup> In that context, the New gTLD Program Committee decided that granting dispute resolution providers the discretion to overlook minor violations of filing deadlines better served “fairness and reasonableness” than applying a categorical rule.<sup>67</sup> But nowhere does the resolution suggest that categorical rules of all sorts are always and everywhere a violation of ICANN’s Commitments.<sup>68</sup> The resolution does not even say that strictly applying filing deadlines would violate ICANN’s Commitments, only that allowing for discretion was preferable under those circumstances.<sup>69</sup> And nothing about the resolution addressed the entirely distinct context of multiple postponements of contention set auctions.<sup>70</sup>

Nor do the Auction Rules support the Requestors’ position that ICANN Commitments require the application of case-by-case discretion. The Auction Rules supplement the Applicant

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<sup>64</sup> Request 19-4, Ex. 9; New gTLD Program Committee Resolution 2013.07.13.NG04.

<sup>65</sup> Auction Rules for New gTLDs (12 Dec. 2013), ¶ 10, <http://newgtlds.icann.org/en/applicants/auctions/rules-12dec13-en.pdf>.

<sup>66</sup> New gTLD Program Committee Resolution 2013.07.13.NG04.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

Guidebook; they do not create new rules superseding those in the Applicant Guidebook. And the Applicant Guidebook states unequivocally that postponement “is a one-time option; ICANN will grant no more than one such request for each set of contending applications.”<sup>71</sup> In any event, the use of a categorical policy against second postponements is entirely consistent with the statement in the prior version of the Auction Rules that “postponement is intended to be a one-time option.”<sup>72</sup>

Finally, ICANN Staff’s enforcement of a rule against second postponements does not violate ICANN’s Commitment to make “decisions by applying documented policies neutrally and objectively with integrity and fairness,”<sup>73</sup> the sole Commitment or Core Value that the Requestors identify. As the remainder of that Commitment makes clear, it is an antidiscrimination provision, precluding ICANN org from “singling out any particular party for discriminatory treatment.”<sup>74</sup> ICANN org’s existing rule treats every request for a second postponement equally, by providing that all such requests will be denied, and is therefore “neutral[],” “objective[],” and “fair.”<sup>75</sup>

Neither ICANN’s Commitment to apply policies neutrally (nor any other Commitment) precludes the use of rules like ICANN’s rule on second postponements or requires the use of case-by-case discretion in all instances. That Commitment therefore does not require that ICANN Staff make a discretionary, case-by-case determination as to whether to accept each request for a second postponement of a string contention auction received, rather than applying a blanket rule that no subsequent postponements are allowed. Reconsideration is not warranted.

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<sup>71</sup> Applicant Guidebook Module 4, § 4.2.2.

<sup>72</sup> Auction Rules for New gTLDs (12 Dec. 2013), ¶ 10, <http://newgtlds.icann.org/en/applicants/auctions/rules-12dec13-en.pdf>.

<sup>73</sup> ICANN Bylaws Art. 1, § 1.2(a).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

**D. The Requestors' Disagreement with the Rule Against Second Postponements of Auctions is not a Basis for Reconsideration.**

Finally, the Requestors dispute the merits of ICANN org's rule denying second postponements in all cases. Requestors contend that the rule "hinders ICANN's reputation for accountability" and state that ICANN org will receive the proceeds from the .MERCK auction.<sup>76</sup> The Requesters argue that a second postponement of the .MERCK auction will not harm ICANN org or anyone else, as they are the only two applicants for the .MERCK gTLD and disputes over other gTLDs have been pending for longer.<sup>77</sup> Elsewhere, Requestors also question the use of the auction process more broadly.<sup>78</sup> But these arguments amount only to disagreement with ICANN org's decision to follow a rule against second postponements of auctions. They do not show that the rule that ICANN follows is contrary to ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies), or otherwise provide a basis for reconsideration of the denial of the Second Request, which was consistent with that existing rule.<sup>79</sup> Moreover, any challenge to the Applicant Guidebook is time-barred, as the Applicant Guidebook was approved in 2012, far more than 30 days before Requestors submitted Request 19-4.<sup>80</sup> The Requestors' arguments about the merits of ICANN's rule against second postponements therefore provide no basis for reconsideration of the denial of the Second Request.

**VI. Recommendation.**

The BAMC has considered the merits of Request 19-4, and, based on the foregoing, concludes that ICANN Staff did not fail to consider material information or violate ICANN's Commitments, Core Values or established ICANN policy(ies) in its denial of Requestors'

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<sup>76</sup> Request 19-4, § 8, at Pg. 13.

<sup>77</sup> *Id.*, § 8, at Pg. 8, 14.

<sup>78</sup> *Id.*, § 8, at Pg. 10.

<sup>79</sup> ICANN Bylaws, Art. 4, § 4.2(c).

<sup>80</sup> *See* Applicant Guidebook, Cover; ICANN Bylaws, Art. 4, § 4.2(g).

request for a second postponement of the .MERCK string contention auction. Accordingly, the BAMC recommends that the Board deny Request 19-4.

The BAMC does note that the auction date has been placed on hold pending the consideration of this Request,<sup>81</sup> and that it has now been nearly two months since the second scheduled auction would have been held had the Requestors not filed Request 19-4, five months since the first auction would have been held and nearly nine months since the Requestors were first told an auction would be scheduled. Further, there will be more lapse of time since this recommendation now has to go to the Board for consideration. And, even if the Board accepts this BAMC recommendation, it will be additional months before an auction can be re-scheduled and held. Accordingly, the delay the Requestors seek in order to have time to reach private resolution has nearly been achieved by virtue of their first postponement and their filing of Request 19-4.

Notwithstanding the above, the BAMC recommends that the Board ask ICANN org to seek an update from the Requestors on: (i) whether the Requestors have received any of the court rulings that the Requestors stated were expected this year that they indicated would assist them in resolving their dispute; and (ii) what progress, if any, the Requestors have made toward settlement. If the Requestors jointly declare they have made progress since filing Request 19-4 and that they are very close to private resolution, the BAMC recommends that the Board ask ICANN org to consider providing the Requestors with some form of discretionary relief that could allow them to finalize a settlement.

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<sup>81</sup> See Update on Application Status and Contention Sets, “On Hold,” <https://newgtlds.icann.org/en/applicants/advisories/application-contention-set-14mar14-en>.

## **Joint Rebuttal to the BAMC's Recommendation on Reconsideration Request 19-4**

Merck KGaA and Merck Registry Holdings, Inc. (acting on behalf of its parent company Merck Sharp & Dohme Corp.) (hereinafter referred to as the "Requestors", "Applicants" or "Parties") submit this Joint Rebuttal to the Board Accountability Mechanisms Committee's ("BAMC") Recommendation issued on 19 December 2019 (the "Recommendation") on Reconsideration Request 19-4. The Recommendation concerns ICANN's decision ("the Decision") to dismiss the Requestors' second mutual request to defer the Last Resort Auction to resolve the string contention for .MERCK generic top-level domain (gTLD).

### **BRIEF SUMMARY**

The Requestors, the sole parties in the .MERCK contention set, are materially affected by the Decision as it limits the Applicants' ability to continue their efforts in discussing effectively and negotiating in good faith. The principal reason which led the Applicants to mutually request the postponement of the auction is the fact that the Requestors prefer to resolve not only the new gTLD issue but also integrally connected far broader dispute which is before numerous courts of law in ten jurisdictions subsequent to the Parties' applications for the new gTLD .MERCK in 2012. Because of ICANN's denial of the postponement request, the Parties are being forced into an auction rather than being allowed to continue towards resolving the .MERCK and broader dispute.

In their Recommendations, the BAMC concludes that *"ICANN Staff did not fail to consider material information or violate ICANN's Commitments, Core Values or established ICANN policy(ies) in its denial of Requestors' request for a second postponement of the .MERCK string contention auction."*

However, notwithstanding the above, the BAMC "*recommends that the Board ask ICANN org to seek an update from the Requestors on: (i) whether the Requestors have received any of the court rulings that the Requestors stated were expected this year that they indicated would assist them in resolving their dispute; and (ii) what progress, if any, the Requestors have made toward settlement. If the Requestors jointly declare they had made progress since filing Request 19-4 and that they are very close to private resolution, the BAMC recommends that the Board ask ICANN org to consider providing the Requestors with some form of discretionary relief that could allow them to finalize a settlement.*"

Despite the fact that the Requestors cannot fully agree with the arguments raised by the BAMC in support of the rejection of the Reconsideration Request 19-4 (**Section 1**), the Applicants are very appreciative of the BAMC's Recommendation to seek an update from the Requestors concerning the ongoing multijurisdictional litigation and proposing to the Board to consider providing the Applicants with the possibility to reach an amicable solution (**Section 2**). The Requestors have not yet received such request from ICANN org and are therefore proactively providing an update.

1. **SECTION 1: BAMC'S RECOMMENDATION TO REFUSE THE RECONSIDERATION REQUEST 19-4**

The Requestors submit that ICANN Staff did fail to consider material information (**Section 1.1**) and did violate ICANN policies favoring voluntary settlements (**Section 1.2**). Moreover, contrary to the BAMC's statements, the use of a rule against second postponement requests is inconsistent with ICANN's Commitments (**Section 1.3**). Finally, the Requestors do not challenge the Applicant Guidebook itself, but the motivation of the ICANN Staff who refused the second postponement of the auction (**Section 1.4**).

## 1.1 ICANN Staff Did Fail to Consider Material Information

In their Recommendation, the BAMC states that "[a]s an initial matter, the Requestors do not present any evidence to support their apparent belief that ICANN Staff failed to consider information about the history of their dispute, their pending litigation, and their hope that they could resolve their contention voluntarily if given more time when it denied the Second Request." (p. 9) The Requestors respectfully submit that strictly speaking, the only element they are required to present in any reconsideration request is "a detailed explanation of the material information not considered by the Board or Staff."<sup>1</sup> They are not required to present any evidence to support their belief that ICANN Staff failed to consider that material information. In fact, it is almost impossible to prove a non-consideration of any sort of argument in any kind of dispute. Analogously to the UDRP, the task of "proving a negative" is often impossible, requiring information that is primarily within the knowledge of the opponent.<sup>2</sup>

However, an indication that ICANN Staff failed to properly consider the information about the history of the dispute and pending litigation is highlighted by the BAMC's statement: "[t]he Requestors each have trademark rights involving the word 'Merck,' which have been and continue to be the subject of litigation in multiple jurisdictions for many decades." (p. 4) The Requestors submit that all of the current court cases have commenced after the applications for .MERCK in 2012. It is incorrect to consider that the two Parties have been in litigation in multiple jurisdictions for many decades. They have in fact coexisted for many decades until the new gTLD procedure came about. Court cases are pending since 2013.

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<sup>1</sup> Reconsideration Request Form Version as of 21 September 2018, Section "Detail of Board or Staff Action/Inaction – Required Information"

<sup>2</sup> Paragraph 2.1 of WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition ("WIPO Jurisprudential Overview 3.0") at <https://www.wipo.int/amc/en/domains/search/overview3.0/>

The BAMC further continued: "*[i]n the message denying the Second Request, ICANN Staff wrote, "[p]lease note, there is still time to pursue and complete the self-resolution of the contention set," showing that ICANN Staff was aware of and had considered the Requestors' ongoing efforts at voluntary settlement.*" (p. 9) This quoted fragment of the Decision (issued on 30 September 2019) also specified that "*[a]ll withdrawals as a result of self-resolution must be completed with ICANN no later than 16 October 2019*". Therefore, by saying "*there is still time to pursue and complete the self-resolution of the contention set*", ICANN Staff meant giving the Requestors approx. two weeks to reach an amicable solution. Contrary to what BAMC states, the Requestors' opinion is that the quoted-above phrase shows that ICANN Staff did not understand the full extent of the Applicants' ongoing efforts at voluntary settlement of the .MERCK contention set which are necessarily entwined with the ongoing multijurisdictional litigation. This is a perfect example of the tail wagging the dog as any settlement of the .MERCK gTLD dispute is integrally connected to the ongoing litigation. The Parties are therefore seeking resolution of the entire dispute not just the .MERCK new gTLD dispute and that is a complex and interdependent process. The proposed period of two weeks by ICANN Staff is completely inadequate and underlines the failure to consider the material information.

## **1.2 ICANN Staff Did Violate ICANN Policies Favoring Voluntary Settlements**

The BAMC quotes Applicant Guidebook, Module 4, § 4.2.2 in the following way: "*ICANN Staff denied the Second Request in accordance with the process established under the Applicant Guidebook regarding requests for postponements of contention set resolution auctions, which provides: [i]f all parties agree and present a joint request, ICANN may postpone the auction for a three-month period while the parties attempt to reach a settlement before proceeding to auction. This is a one-time option; ICANN will grant no*

*more than one such request for each set of contending applications."* (p. 9) The Requestors submit that this fragment of the Applicant Guidebook is not applicable to them. In fact, the above-quoted fragment is inserted in the Section of the Applicant Guidebook entitled "Community Priority Evaluation" (CPE) and merits to be quoted in its totality:

*"If more than one community-based application is found to meet the criteria, the remaining contention between them will be resolved as follows:*

- In the case where the applications are in indirect contention with one another (see subsection 4.1.1), they will both be allowed to proceed to the next stage. In this case, applications that are in direct contention with any of these community-based applications will be eliminated.*
- In the case where the applications are in direct contention with one another, these applicants will proceed to an auction. If all parties agree and present a joint request, ICANN may postpone the auction for a three-month period while the parties attempt to reach a settlement before proceeding to auction. This is a one-time option; ICANN will grant no more than one such request for each set of contending applications.*

*If none of the community-based applications are found to meet the criteria, then all of the parties in the contention set (both standard and community-based applicants) will proceed to an auction."*

Given that none of the community-based applications in the .MERCK contention string - neither Merck KGaA nor Merck Registry Holdings, Inc. - were found to meet the criteria of the CPE, according to the above, the rule about the extension being a "one-time option" only is inapplicable. It is thus submitted that restricting the Decision to postpone on the grounds of the Applicant Guidebook is in breach of ICANN's Core Values, including the

requirement to make "decisions by applying documented policies neutrally and objectively with integrity and fairness".

Moreover, as the BAMC correctly notes, the prior version of the Auction Rules for New gTLDs which specified that "[a] postponement is intended to be a one-time option" was effective until 26 February 2014. It should be noted that the current version of the Auction Rules for New gTLDs does not mention at all that the postponement is a "one-time option". Given that the similar rule announced in the Applicant Guidebook is inapplicable to the Requestors since neither party passed the CPE (as discussed above) and given that in the current version of the Auction Rules for New gTLDs a "one-time option" rule is not included, the only text on which the BAMC is founding its analysis is the postponement form.

Finally, the BAMC states that: *"the Requestors have had more than five months to voluntarily resolve their competing applications since the auction for the contention set was first scheduled on 2 May 2019."* (p. 12). The Parties submit that they have sought to resolve the .MERCK contention set during this time in good faith. However, and as we have sought to set out to ICANN, the picture is far more complex given the litigation which has ensued since 2013.

### **1.3 The Use of a Rule Against Second Postponement Requests Is Inconsistent with ICANN's Commitments.**

BAMC indicates that *"Resolution 2013.07.13.NG04 does not support the Requestors' assertion that ICANN Commitments require the exercise of case-by-case discretion concerning requests for second postponements of string contention auctions."* (p. 13) The Applicants respectfully submit that they did not imply that the Resolution 2013.07.13.NG04 concerns postponement requests in new gTLD application process. Our reference to this Resolution was to underline an example of flexibility and discretion that has been applied

when interpreting the Applicant Guidebook when considered necessary. The Parties submit, given the uniqueness of the circumstances here where they are completely aligned, that such flexibility and discretion is indeed necessary.

Moreover, while commenting on the Resolution 2013.07.13.NG04, the BAMC stated that: *"[i]n that context, the New gTLD Program Committee decided that granting dispute resolution providers the discretion to overlook minor violations of filing deadlines better served "fairness and reasonableness" than applying a categorical rule."* (p. 13) The Applicants respectfully submit that in our situation, in the interest of fairness and reasonableness, there is good reason not to apply the categorical rule of only one postponement, if such rule is actually applicable given neither party passed the CPE (as discussed above).

Further, the BAMC also stated: *"[a]s the remainder of that Commitment makes clear, it is an antidiscrimination provision, precluding ICANN org from "singling out any particular party for discriminatory treatment." ICANN org's existing rule treats every request for a second postponement equally, by providing that all such requests will be denied, and is therefore "neutral" "objective" and "fair."*" (p. 14) The Applicants submit that the question here is who is suffering discriminatory treatment. The provision specifically aims at preventing discrimination *"singling out any particular party"*. Both parties heartily agree that there should be no discrimination in favour of one at the expense of the other. That would be biased, subjective and unfair. However, by not allowing the request ICANN is not discriminating against either of the parties, it is in fact discriminating against them both since they are in complete alignment to postpone the auction until they have resolved the ongoing and interlinked multijurisdictional litigation. This is a unique set of circumstances where both Applicants involved seek postponement and have proposed a realistic

timetable. Instead they appear to be falling afoul of, as per the BAMC decision top of page 14: "the use of a categorical policy against second postponements".

Finally, the BAMC indicated that *"[t]hat Commitment therefore does not require that ICANN Staff make a discretionary, case-by-case determination as to whether to accept each request for a second postponement of a string contention auction received, rather than applying a blanket rule that no subsequent postponements are allowed."* (p. 14) Whilst there might not be a requirement to do so, surely it is incumbent upon ICANN to apply the discretion in the appropriate circumstances such as the current situation.

#### **1.4 The Requestors' Disagreement With the Motivation of the ICANN Staff in Rendering of the Decision.**

The BAMC stated that *"[t]he Requestors argue that a second postponement of the .MERCK auction will not harm ICANN org or anyone else, as they are the only two applicants for the .MERCK gTLD and disputes over other gTLDs have been pending for longer. Elsewhere, Requestors also question the use of the auction process more broadly. But these arguments amount only to disagreement with ICANN org's decision to follow a rule against second postponements of auctions. They do not [...] provide a basis for reconsideration of the denial of the Second Request, which was consistent with that existing rule. Moreover, any challenge to the Applicant Guidebook is time-barred [...]"* (p. 15) Our arguments included in the Reconsideration Request that the BAMC comments on in the above-quoted fragment actually refer to the motivation of ICANN Staff to deny the second postponement of the auction. They are therefore not intended to challenge the Applicant Guidebook but the Decision itself. The Requestors' claim is therefore not time-barred.

2. **UPDATE ON THE ONGOING MULTIJURISDICTIONAL LITIGATION AND BAMC's  
RECOMMENDATION TO GRANT THE REQUESTORS WITH A FORM OF DISCRETIONARY RELIEF**

Both Applicants are grateful to the BAMC for having recommended that the Board ask ICANN org to seek an update from the Requestors on whether the Requestors have received any of the court rulings which would assist them in resolving their dispute. As underlined in the Reconsideration Request 19-4, the litigation is ongoing in Australia, China, Germany, Hong Kong, India, Mexico, Singapore, Switzerland, the United Kingdom and the United States. Contrary to initial expectations, the judgements in China and in the United Kingdom were not rendered in the fourth quarter of 2019. As a consequence, the updated calendar of the upcoming events of significance for the ongoing negotiations concerning .MERCK would be the following:

- Australia: trial in July 2020;
- China: final trial hearing and a first instance decision in H1 2020;
- India: completion of the hearings approx. by March or April 2020;
- Switzerland: second instance decision approx. in February 2020;
- US: status update on settlement talks and litigation schedule on January 29, 2020;  
and
- UK: decision on the remitted issues in H1 2020.

In September 2019, the Applicants mutually requested the deferment of the auction (scheduled on October 23, 2019) for nine months. Despite the fact that we don't have full control of the multiple jurisdictions mentioned above, we initially anticipated that nine months would be a realistic delay and so we reiterate our request. Given that the first

applications for .MERCK in June 2012 were seven years ago and given numerous disputes on the contention set as well as the litigation that was spurred from the applications, the Parties are indeed very close to the resolution. Once we have the above-mentioned decisions and hearings, we will be in a better position to seek to finalize a settlement. As such, we would request a relief until at a minimum the end of H1 2020 and thus the end of June 2020, but ideally the end of August 2020 so as to take into consideration the Australian trial. Such discretionary relief would be a far better use of everybody's time and resources, including ICANN's, than pursuing the next stage in the accountability process of filing a Request for Independent Review.

### Conclusion

Based on the foregoing and on the reasons expressed in Reconsideration Request 19-4, Applicants request that the Board provide them with a discretionary relief until the end of August 2020 that could allow them to finalize a settlement. As proposed by the BAMC, on Request of the Board, the Applicants can provide the Board with a more detailed update on the court rulings which are expected in January 2020 and the progress they have made toward settlement.

Signed by their legal counsel, David Taylor of Hogan Lovells, on behalf of Merck Registry Holdings, Inc.:	Signed by their legal counsel, Torsten Bettinger of Bettinger Scheffelt Müller Partnerschaft mbH on behalf of Merck KGaA:
Print Name: David Taylor Date: January 3, 2020	Print Name: Torsten Bettinger Date: January 3, 2020