Merck KGaA's written summary of its telephonic presentation of September 4, 2018

Good afternoon.

I am Torsten Bettinger. I appreciate the opportunity to speak to you on behalf of my client, Merck KGaA.

Also on the line from Darmstadt on behalf of Merck KGaA is Jonas Koelle, General Counsel Trademarks.

Our firm is representing Merck KGaA in this matter because we believe that the EIU made fundamental mistakes in its evaluation of Merck's application for community priority status.

We believe that the EIU misapplied the "nexus requirement" contained in Module 4 of the AGB because it ignored material information during its analysis, and that this failure contradicts an established procedure.

As confirmed by the Council of Europe in its 2016 Report on ICANN's policies and procedures concerning community based applications, ICANN staff has never challenged or disagreed with the recommendations made by EIU Panels. ICANN staff merely verified the Panels' reports for completeness to ensure they are comprehensible for the ICANN community, they never reviewed or considered the scoring or the results and neither questioned nor rejected the Panel's conclusions.

As there is no appeal of substance or on merits available of the EIU's evaluation, my client is very concerned that the BAMC, relying on the FTI Reports when deciding its Request for Reconsideration, does not go into the merits of the decision by the EIU and, as in all previous Request for Reconsideration proceedings, will provide a mere 'rubber-stamping' of the EIU decision with respect to its .merck application.

The Council of Europe in its 2016 Report has made it perfectly clear, that a Request for Reconsideration of the EIU decision Process should not be regarded by the BAMC as an administrative "box ticking" exercise to see whether mention was made of the relevant policy or procedure by a third party service provider such as the EIU, but requires that the BAMC looks into how the relevant policy or procedure was actually applied by the EIU, and whether in doing so, the EIU correctly applied them.

The BAMC has argued many times that it is only authorized to determine if any policies or processes were violated during CPE, and that it has no authority to evaluate whether the CPE results are correct.

This view is fundamentally wrong. The EIU is merely a service provider to ICANN, assessing and recommending on applications, but ICANN is the decision maker. ICANN should therefore make sure that EIU recommendations comply with due process standards and do not violate ICANN's processes and policies before accepting it within the dispute resolution process.

The BAMC has the Duty to evaluate that the EIU exercised due diligence and care in having a reasonable amount of facts in front of them.

The ICANN community members, CBA Applicants, independent legal Experts, the ICANN Ombudsman, the Council of Europe and an Independent Review Panel of Experts have criticized the EIU process and FTI's Review Reports on all fronts:

(1) the Council of Europe, a leading human rights organization with an observer status within ICANN's Governmental Advisory Committee ("GAC"), has provided an in-depth analysis of the ICANN's policies and procedures from a human rights perspective finding that the current assessment by the EIU as a delegated decision maker on the metrics set out in the AGB and CPE guidelines is insufficient to live up to due process standards and determined the EIU inconsistently applied the CPE criteria.[1]

The Council of Europe, in particular questioned the application of the Nexus criterion, which is in dispute in this conflict.[2]

(2) Also the ICANN Ombudsman Chris LaHatte's Report, when looking at the complaint about the Reconsideration Process from dotgay LLC has raised issues of inconsistencies in the way the EIU has applied the CPE criteria and reminds ICANN that it has a commitment to principles of international law, including human rights, fairness and transparency.[3]

He also took to task the fact that the BAMC has a narrow view of its own jurisdiction in considering reconsideration requests and pointed out that "it has always been open to ICANN to reject an EIU recommendation.

(3) The community priority applicants' concerns with the CPE process are also supported by independent legal experts.

Professor Eskridge, Professor of Jurisprudence at the Yale Law School, performed an independent review of .DOTGAYs CPE and found that it

(a) shows an "incomplete understanding" of the CPE's criteria,
(b) contained "interpretive errors," and
(c) contained "errors of inconsistency and discrimination.[4]

(4) Furthermore, the Final Declaration of the Expert Panel in an Independent Review Process proceeding initiated by Dot Registry found that the BAMC

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[1] See Eve Salomon and Kinanya Pijl, "Applications to ICANN for Community-based New Generic Top Level Domains(gTLDs): Opportunities and challenges from a human rights perspective," Council of Europe Report DGI(2016)17 (Nov. 2017), pp. 41-57, https://rm.coe.int/16806be175

[2] See Council of Europe Report DGI(2016)17 (Nov. 2017), pp. 58-59.

[3] Chris LaHatte, "Dot Gay Report" (27 July 2016), http://www.lahatte.co nz/2016/07/dot-gay-report.html

[4] Letter from A. Ali on behalf of dotgay to the ICANN Board, attaching the Second Expert Opinion of Professor William N. Eskridge, Jr. (31 Jan. 2018), in Response to FTI Consulting, Inc.'s Independent Review of the Community Priority Evaluation Process https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf.

failed to make the proper determination as to whether ICANN staff and the EIU complied with ICANN's bylaws in turning down the application, and failed to be transparent about its reconsideration process.

The IRP found that both the EIU and ICANN staff were required to follow ICANN's bylaws, and that the BGC was required to "exercise due diligence and care in having a reasonable amount of facts in front of them" to examine "whether the EIU or ICANN staff engaged in unjustified discrimination or failed to fulfill transparency obligations" under those bylaws.[5]

(5) And finally, even ICANN—through some of its Board Members and Vice Chair of the GAC have acknowledged the inconsistencies and unfairness in the CPE process.[6]

Despite being aware of these problems with the CPE Process Review Reports, the ICANN Board nonetheless fully acknowledged and accepted them and then directed the BAMC to "move forward with consideration of the remaining Reconsideration Requests relating to the CPE process," which includes Merck's Request for Reconsideration 16-12.

The BAMC's reliance on the fallacious CPE Process Review Reports will therefore directly affect the BAMC's consideration of my client's Request for Reconsideration 16-12.

In its request for reconsideration of the CPE Report and the telephonic presentation of March 29, 2018 my client already specified in detail that in evaluating the community status of its application for <.merck> the EIU Report:

(1) made fundamental interpretive errors by misreading the Nexus Criterion laid out in in ICANN's Applicant Guidebook ("AGB");

(2) ignored important evidence that supports Full credit under the Nexus Criterion.

These arguments are not undermined by FTI's CPE Process reports.

First, FTI Report Scope 2 completely failed to evaluate whether EIU Panel committed interpretive errors by applying the "Nexus Criterion" laid out in ICANN's Applicant Guidebook.

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[5] Dot Registry v. ICANN, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (July 29, 2016), 93-101, https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf

[6] Letter from Christine Willett to Jamie Baxter (16 May 2017), p. 2, https://www.icann.org/en/system/files/correspondence/willett-to-baxter-et-al-16may17-en.pdf, Approved Board Resolutions, Special Meeting of the ICANN Board (17 Sep. 2016), https://www.icann.org/resources/board-material/resolutions-2016-09-17-en

Second, FTI Report Scope 3 by identifying the reference material that EIU consulted in its evaluation of the Nexus factor of the .Merck evaluation revealed that EIU has only consulted three Wikipedia websites for the evaluation of the Nexus factor and thus backs Merck KGaA's claim that the CPE process was grossly inadequate and that the EIU failed to conduct proper due diligence and research in its assessment.

Let me briefly summarize our argument again:

As set forth in the AGB, the Nexus Criterion is measured by two sub-criteria "Nexus" and "Uniqueness.

An application may receive a maximum of four points under the Nexus criterion, which includes up to three points for "Nexus" and one point for "Uniqueness".

An application merits 3 points if "the string matches the name of the community or is a well-known short-form or abbreviation of the community."

For a score of 3, the essential aspect is that the applied-for string is commonly known by others as the identification/name of the community."

"Identify" means that "the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community."

Applying these criteria to Merck KGaA's application for <.merck> the EIU Panel awarded Merck KGaA 0 out of 4 possible points for Criterion #2, including 0 out of 3 possible points for the nexus element

As it is without question that the applied for Merck string is identical to the Merck's community's distinctive corporate name and globally famous trademark, the decisive question was whether the string "merck" is over-reaching substantially beyond the community.

It is also obvious that the term "overreaching substantially beyond the community cannot be construed as meaning there cannot be another entity with the same name.

This cannot be the definition in the Applicant Guidebook and the CPE guidelines take this fact into consideration as they state "since the evaluation takes place to resolve contention there will obviously be other applications, community based and/or standard with identical or confusingly similar strings in the contention set to resolve, so the string will clearly not be "unique" in the sense of "alone".

The CPE is only done in cases where multiple applications for the identical string compete.

It therefore appears that the core argument of the EIU in denying community status is that there is another substantial company that uses the name Merck.

I read from the EIU report:

> "although the string Merck matches the name of the community as defined by the applicant, it also matches the name of another corporate entity known as "Merck" within the US and Canada and that "this US-based company, Merck &

Co, Inc., operates in the pharmaceutical, vaccines, and animal health industry, has 68,000 employees, and had revenue of US$39.5 billion in 2015."[7]

The Panel determined that the string is "over-reaching substantially beyond the community" because the applied-for string also identifies a substantial entity—Merck in the US and Canada—that is not part of the community defined by the applicant.

As the FTI Report Scope 3[8] revealed the CPE Report did not reflect any references to research or reference material for its evaluation of the Nexus criterion and only consulted three Wikipedia websites and a Bloomberg article which is no longer available on the Internet:

- a Wikipedia article on Merck Sharp & Dohme's
- aWikipedia article on Merck KGaA's; and
- a Bloomberg article published under the URL Bloomberg a-tale-of-two-companies which is no longer available on the Internet.

This factual and legal analysis is deficient. It ignores contractual relationship between the two entities, the territorial limited rights of Merck & CO and the territorially restricted use of the applied for community gTLD.

The CPE Report does not devote a single word to the relationship between the two companies and the fact that the two companies currently exercise their rights in the "Merck" trademark and company name under a reciprocal use agreement, which has been in force since the 1930s.

Merck & Co.'s rights are territorially limited to two countries within North America, whereas Merck KGaA Merck KGaA's community covers 99% of the world's jurisdictions, is home to 95% of the world's population and that the community has existed for 348 years.

Merck & Co. is prohibited by contract and existing trademark and name rights from using the name "MERCK" on the internet and otherwise in almost all countries.

A copy of the currently-valid agreement, signed in 1970, had been submitted to ICANN in connection with Merck KGaA's legal rights objection against MSD's application for <.merck> as well as in connection with an Independent Review Process file by Merck KGaA against ICANN

Not taking note of this agreement and Merck & Co.'s contractual obligations to refrain from all use the name Merck outside the US and Canada, the EIU inevitably came to the erroneous conclusion that the string <.merck> is excessively broad and identifies another substantial corporate entity.

The CPE Report also makes no mention of the fact that Merck KGaA explicitly stated in its application and in a Public Interest Commitment that it will take all necessary

[7] New gTLD Program, Community Priority Evaluation Report, Report Date: 10 August 2016, Application ID: 1-980-7217 Applied-for String: MERCK (Applicant Merck KGaA), p. 4.

[8] FTI Reports on the Review of the Community Priority Evaluation Process (Scope 3) https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf

measures, including geo-targeting, to avoid internet access by users in the few territories in which Merck & Co. has trademark rights.

By providing a public interest commitment not to use it in the two territories where Merck & Co. has rights, including restricting internet access. Merck KGaA has, on the face of its application, eliminated "over-reaching".

FTI's CPE Process Review Reports do not address any of these issues raised in Merck KGaA's Request for Reconsideration nor do they reevaluate EIU's application of the Nexus criteria or assess the propriety or reasonableness of the research undertaken by the CPE provider.

With regard to the Nexus Requirements FTI limited itself to observing that

I read form the FTI Report (Scope 2):

> "the applied- for string did not identify the community as it substantially overreached the community as defined in the application by indicating a wider or related community of which the applicant is a part but is not specific to the applicant's community".[9]

And then, two pages later, without further arguments and analysis, the FTI states its observation that "CPE Provider engaged in a consistent evaluation process that strictly adhered to the criteria and requirements set forth in the Applicant Guidebook and CPE Guidelines and that there were no instances where the CPE Provider's evaluation process deviated from the applicable guidelines pertaining to the Nexus-criterion".

FTI then concludes that the CPE Provider "consistently applied the Nexus criterion in all CPEs and that "the scoring decisions were based on the same rationale, namely a failure to satisfy the requirements that are set forth in the Applicant Guidebook and CPE Guidelines.

I regret to say, but this is not a "compliance investigation" which FTI claims to have done but a mere description of its outcomes.

The FTI report does not evaluate or analyze the questions of whether EIU properly applied the Nexus criterion to the <.merck> application and whether the CPE report was based upon sufficient empirical evidence.

FTI's normative conclusion that it found no evidence that the CPE Provider's evaluation process or reports deviated in any way from the applicable guideline" is not based on any interpretative analysis of the nexus criterion nor on an investigation of whether the EIU ignored important facts that supported a full credit under the Nexus Criterion.

As much as the EIU, FTI showed no interest in or knowledge of the contractual relationship between Merck KGaA and Merck & Co. and the fact that the corporate

[9] FTI Reports on the Review of the Community Priority Evaluation Process (Scope 2), https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf.

entity which used the name Merck is prohibited by contract and existing trademark and name rights from using that name “MERCK” on the Internet and in almost all countries of the world except the U.S. and Canada.

As much as the EIU, FTI makes no mention of the Public Interest Commitment that it will take all necessary measures, including geo-targeting, to avoid internet access by users in the few territories in which Merck & Co. has rights in the trademark Merck.

Also the FTI personnel who conducted the review did not rely upon the substance of the reference material, assess the reasonableness of the research undertaken by the CPE Provider or take into consideration the information and materials provided by Merck KGaA.

Accordingly, the FTI Report 2 provides no useful information and has no significance with respect to Merck KGaA’s Request for Reconsideration against EIU’s CPE Report on its <.merck> application.

In contrast, the FTI Scope 3 Report reveals that EIU’s personnel were completely ignorant of the contractual obligations between Merck KGaA and Merck & Co. and Merck KGaA’s Public Interest Commitment.

It is obvious that this was grossly inadequate and that the EIU failed to conduct proper due diligence and research in its assessment.

However, the FTI did not raise the question about whether the evidence assembled by the EIU supported its conclusion. Indeed, FTI itself sates that it did not

(1) reevaluate the CPE Applications,

(2) assess the propriety or reasonableness of the research undertaken by the CPE Provider,

(3) interview Merck KGaA or take into consideration the information and materials provided by Merck KGaA (see FTI Report Scope 3 p. 7).

Merck KGaA therefore cannot see how the Board can rely on the FTI’s review and still comply with the requirements of ICANN’s Bylaws that decision must be made by applying documented policies neutrally and objectively, with integrity and fairness.

What are we asking the BAMC to do after this hearing?

Please do your due diligence.

1. Closely review all the information regarding the Merck application, including Merck’s Public Interest Commitment, the Coexistence Agreement between Merck KGaA and Merck & Co and all other facts we brought to your attention today and which are relevant for the evaluation of the Requestor’s community priority status.

Under reference to the FTI Reports, the BAMC cannot claim to have discharged its duty to provide due diligence and accountability

2. Set aside the CPE Panel's report and have new members be appointed to conduct a new CPE for the Requestor's application.

3. Transmit all the information regarding the Merck application, including the Requestor's Public Interest Commitment, the Coexistence Agreement between the Requestor and Merck & Co and the information brought to your during the application process and the following proceedings to the new evaluators.

4. Ensure procedural fairness and disclose the process with which ICANN interacted with the CPE.

I thank you very much again for the opportunity to make this presentation today.

I will pass the word now to Jonas Kölle who would like to make some brief final remarks.

Mr. Jonas Kölle's statement:

„Our company Merck is a science and technology driven company and around for 350 years. The curiosity of the Merck founding family, which has remained the majority owner to this very day made Merck what it is today.

In 2012 we applied for ".merck" as we trusted and believed in the benefits a ".merck" space would bring to internet community, especially to our stakeholders in the fields of pharmaceuticals, chemicals and life sciences, a much regulated field of science and industry.

Today, despite all our investments and efforts, ".merck" is still not delegated to Merck, the company owned by the Merck founding family. After six years of discussions with ICANN and its accountability bodies we only can conclude that ICANN's accountability mechanisms do not serve their purpose.

As outlined by Dr. Bettinger, not only today but over the course of our application process, we fulfill all criteria set by the applicant guidebook for delegation of ".merck" to our company. I therefore request ICANN to correct the mistakes made in the process and ensure a fair treatment."