

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.

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 .MERCCK gTLD is. Please find below sample evidence of the ongoing litigation between the Applicants:

- in the United States:
 - o 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)
 - o 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:
 - o 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 Procedures¹, 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 Process², 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:

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

² <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.NG04³ 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 2013⁴. Both the Board Governance Committee (in its Recommendation of 10 October 2013⁵) and the NGPC (in its Resolution 2013.11.05.NG03⁶) 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

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

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

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

⁶ <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 contended 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

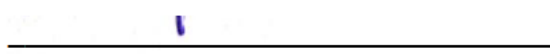
shall address each of the arguments raised in the Reconsideration Request. The Requestor may file a 10-page (double-spaced, 12-point font) document, not including exhibits, in rebuttal to the BAMC's recommendation within 15 days of receipt of the recommendation, which shall also be promptly (i.e., as 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.:

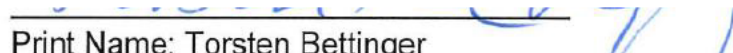
Contact Information Redacted


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


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.