

**THE INTERNATIONAL CENTRE FOR EXPERTISE OF THE  
INTERNATIONAL CHAMBER OF COMMERCE**

CASE No. EXP/410/ICANN/27

PROF. ALAIN PELLET, INDEPENDENT OBJECTOR

(FRANCE)

vs/

HEXAP SAS

(FRANCE)

This document is an original of the Expert Determination rendered in conformity with the New gTLD Dispute Resolution Procedure as provided in Module 3 of the gTLD Applicant Guidebook from ICANN and the ICC Rules for Expertise.

**INTERNATIONAL CHAMBER OF COMMERCE**

**INTERNATIONAL CENTRE FOR EXPERTISE**

**CASE NO. EXP/410/ICANN/27**

*between*

**Prof. Alain Pellet, Independent Objector**

Objector

*and*

**HEXAP SAS**

Applicant

Under ICANN's *New gTLD Dispute Resolution Procedure* and the  
*Rules for Expertise of the International Chamber of Commerce*  
as supplemented by the *ICC Practice Note* of March 2012

**Re: Limited Public Interest Objection concerning Application 1-1192-28569 (.MED)**

Expert Panel: Prof. Fabien Gélinas (Chair)  
Mr. John Gaffney (Co-Expert)  
Prof. Guglielmo Verdirame (Co-Expert)

## TABLE OF CONTENTS

|  |           |
|--|-----------|
| <b>1. INTRODUCTION.....</b>  | <b>3</b>  |
| <b>2. AGREEMENT CONCERNING THE PROCEDURE.....</b>  | <b>4</b>  |
| <b>3. THE PARTIES AND THEIR COUNSEL.....</b>   | <b>5</b>  |
| <b>3.1. The Independent Objector.....</b>  | <b>5</b>  |
| <b>3.2. The Applicant.....</b>   | <b>7</b>  |
| <b>4. THE EXPERT PANEL .....</b>   | <b>8</b>  |
| <b>5. HISTORY OF THE PROCEEDINGS.....</b>  | <b>9</b>  |
| <b>6. SUMMARY OF THE PARTIES’ RESPECTIVE POSITIONS .....</b>                               | <b>12</b> |
| <b>6.1. The Independent Objector’s Objection .....</b>                                     | <b>13</b> |
| <b>6.2. The Applicant’s Response.....</b>  | <b>16</b> |
| <b>6.3. The Independent Objector’s Additional Statement .....</b>                          | <b>19</b> |
| <b>6.4. The Applicant’s Reply to the Independent Objector’s Additional Statement .....</b> | <b>20</b> |
| <b>7. ANALYSIS .....</b>   | <b>21</b> |
| <b>7.1. The “Quick Look” Procedure .....</b>   | <b>22</b> |
| <b>7.2. The Independent Objector’s Standing.....</b>                                       | <b>23</b> |
| <b>7.3. The Standards of Adjudication and Legal Principles .....</b>                       | <b>24</b> |
| <b>7.4. The Merits of the Objection.....</b>   | <b>28</b> |
| <b>7.5. The Alternative Remedy .....</b>   | <b>33</b> |
| <b>8. DETERMINATION .....</b>  | <b>34</b> |

## 1. INTRODUCTION

1. The Internet Corporation for Assigned Names and Numbers (“ICANN”) has launched a program for the introduction of new generic Top-Level Domain Names (“gTLDs”). Applicants may apply for new gTLDs, in accordance with terms and conditions set by ICANN, notably in the gTLD Applicant Guidebook (the “Guidebook”).<sup>1</sup>
2. The Guidebook contains, as an Attachment to Module 3, a New gTLD Dispute Resolution Procedure (the “Procedure”). The Procedure governs the resolution of disputes between an entity that applies for a new gTLD (an applicant) and an entity objecting to the application (an objector).
3. Dispute resolution proceedings are administered by a Dispute Resolution Service Provider (a “DRSP”) in accordance with the Procedure and the applicable DRSP rules. Four kinds of objections can be brought under the Guidebook: String Confusion, Existing Legal Rights, Limited Public Interest, and Community. The DRSP responsible for Limited Public Interest objections is the International Centre for Expertise of the International Chamber of Commerce (“ICC”), and the applicable DRSP rules are the Rules for Expertise of the ICC (the “Rules”), as supplemented by the ICC. In March 2012, the ICC supplemented the Rules by issuing a Practice Note on the Administration of Cases under the New gTLD Dispute Resolution Procedure (the “ICC Practice Note”).

---

<sup>1</sup> gTLD Applicant Guidebook, v. 2012-06-04, Module 3, available at <http://newgtlds.icann.org/en/applicants/agb> [hereinafter Guidebook].

4. According to section 3.2.5 of the Guidebook, the Independent Objector may file a formal objection to a gTLD application. The Independent Objector's role is to act not on behalf of any particular persons or entities, but rather in the best interests of the public who use the global Internet. Neither ICANN staff nor the ICANN Board of Directors has authority to direct or require the Independent Objector to file or not to file any particular objection. If the Independent Objector determines that an objection should be filed, he will initiate and file the objection in the public interest.
5. The Independent Objector may file objections against "highly objectionable" gTLD applications to which no objection has been filed. The Independent Objector is limited to filing two types of objections: (1) Limited Public Interest objections and (2) Community objections. The Independent Objector is granted standing to file objections on these enumerated grounds, notwithstanding the regular standing requirements imposed on others for such objections.
6. In light of the public interest goal noted above, the Independent Objector shall not object to an application unless at least one comment in opposition to the application is made in the public sphere.
7. These proceedings arise out of a Limited Public Interest objection (the "Objection") to HEXAP SAS's application for the .MED gTLD (the "Application").
8. The Objection to the Application was filed by the Independent Objector on 13 March 2013.

## **2. AGREEMENT CONCERNING THE PROCEDURE**

9. As stated in Article 1(d) of the Procedure, by applying for a new gTLD under the Guidebook, an applicant accepts the Procedure and the relevant DRSP rules governing

possible objections. Similarly, by filing an objection, an objector accepts the Procedure and the applicable rules.

10. Pursuant to Article 8 of the ICC Practice Note, by accepting the process defined in the Procedure, the “parties are deemed to have agreed that the expert determination shall be binding upon the parties” as provided in Article 12(3) of the Rules.
11. As provided in Article 4(d) of the Procedure, “the place of the proceedings, if relevant, shall be the location of the DRSP that is administering the proceedings.” In this case this place is Paris, France.
12. As provided in Article 5(a) of the Procedure, the language of the submissions and proceedings is English.
13. The Expert Determination Procedure to which the parties have agreed to submit this dispute provides a specific procedural framework that is different from typical legal proceedings. It involves brief submissions (which are subject to strict word limits) and an expedited schedule. Hence, while the important and complex matters at issue have received serious consideration by both the parties and the Panel within that framework, the Panel has endeavored to apply a principle of economy to the preparation of this document.

### **3. THE PARTIES AND THEIR COUNSEL**

#### **3.1. The Independent Objector**

14. Professor Alain Pellet is the Independent Objector selected by ICANN pursuant to

section 3.2.5 of the Guidebook (the “Independent Objector”).<sup>2</sup>

15. The contact information for the Independent Objector is as follows:

Prof. Alain Pellet, Independent Objector  
16, Avenue Alphonse de Neuville  
92380 Garches, France  
Email: courriel@alainpellet.eu  
contact@independent-objector-newgtlds.org

16. The Independent Objector is represented in these proceedings by:

Ms. Héloïse Bajer-Pellet  
15, Rue de la Banque  
75002 Paris, France  
Email: avocat@bajer.fr

Mr. Daniel Müller  
20, Avenue du Général de Gaulle  
78290 Croissy sur Seine, France  
Email: mail@muelderdaniel.eu

Mr. Phon van den Biesen  
De Groene Bocht, Keizersgracht 253  
1016 EB Amsterdam, the Netherlands  
Email: phonvandenbiesen@vdbkadvocaten.eu

Mr. Sam Wordsworth  
24 Lincoln’s Inn Fields

---

<sup>2</sup> See ICANN Press Release of 14 May 2012, *available at* <http://www.icann.org/en/news/announcements/announcement-14may12-en.htm>

London, WC2A 3EG, United Kingdom

Email: SWordsworth@essexcourt.net

### **3.2. The Applicant**

17. HEXAP SAS (“HEXAP” or the “Applicant”) is a limited liability company established by health care professionals, which provides Internet-based solutions for the health care sector.
18. The company is a special-purpose vehicle created with a view to participating in this gTLD application round. The team behind it claims more than a decade of experience in organizing related communities on the Internet. With SmallRegistry.net, for example, HEXAP states that its sister company, Promopixel, was entrusted by the French *Conseil National de l’Ordre des Médecins* to oversee and manage the Registry for the regulated sector-based subdomain “.Medecin.fr” in strict compliance with good medical practices. Promopixel also oversees and manages the Internet domain name identity of several other sector-based entities and regulated health professionals such as: chirurgiens-dentistes.fr (targeted at dental surgeons) and pharmacien.fr (targeted at pharmacists).
19. The contact information for the Applicant is as follows:  
  
HEXAP SAS  
Mr. Jérôme Lipowicz  
10 rue de la Paix  
75002 Paris, France  
Email: Office@Hexap.com
20. The Applicant is represented in these proceedings by:

Caprioli & Associés  
Mr. Jean-Christophe Vignes  
29, rue Mogador  
Paris, France  
Email: JC.Vignes@Caprioli-avocats.com

#### **4. THE EXPERT PANEL**

21. According to Article 13(b)(iii) of the Procedure, proceedings involving a Limited Public Interest objection are referred to a panel of three experts (the “Expert Panel” or “Panel”), recognized as eminent jurists of international reputation, one of whom shall be designated as the Chair. The Chair shall be of a nationality different from the nationalities of the Applicant and of the Independent Objector. Pursuant to Article 3(3) of Appendix I to the Rules, experts are appointed by the Chairman of the Standing Committee of the ICC International Centre for Expertise.
22. On 7 June 2013, each of the experts completed and filed a Declaration of Acceptance and Availability and Statement of Impartiality and Independence.
23. On 14 June 2013, the Chairman of the Standing Committee of the ICC International Centre for Expertise appointed the Panel pursuant to Article 3(3) of Appendix I to the Rules. Professor Fabien Gélinas, a Canadian national, was appointed as the Chair, and Mr. John Gaffney and Professor Guglielmo Verdirame were appointed as Co-Experts in accordance with Article 13(b)(iii) of the Procedure.
24. The experts’ contact details are as follows:

Prof. Fabien Gélinas  
McGill University, Faculty of Law

3644 Peel Street,  
Montreal (Quebec), H3A 1W9, Canada  
Email: fabien.gelinas@mcgill.ca

Mr. John Gaffney  
25 rue de Chazelles  
Paris 75017, France  
Email: jp\_gaffney@yahoo.com

Prof. Guglielmo Verdirame  
20 Essex Street  
London WC2R 3AL, United Kingdom  
Email: gverdirame@20essexst.com

25. After payment of the advance by both parties, the Panel received the file on 1 August 2013 and was deemed fully constituted on that date for the purpose of the Procedure.

## **5. HISTORY OF THE PROCEEDINGS**

26. This Objection relates to HEXAP's application to register the string .MED. The Application was posted on ICANN's website on 13 June 2012 and given ID Number 1-1192-28569 in the ICANN system.<sup>3</sup> The Application passed the initial evaluation process in accordance with subsection 1.1.2.5 of Module 1 of the Guidebook, which is independent from the dispute resolution process laid out in the Procedure.<sup>4</sup>

---

<sup>3</sup> <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1236>.

<sup>4</sup> The Application was given a pass by report dated 23 August 2013. The Report is available at <http://newgtlds.icann.org/sites/default/files/ier/pt42qvwk2iuro7ami3jgke2i/ie-1-1192-28569-en.pdf>.

27. On 12 March 2013, the Independent Objector filed the Objection to the Application with the DRSP. A copy of the Objection was transmitted to HEXAP on 13 March 2013. The requisite filing fee was paid to the DRSP, following Article 8(c) of the Procedure and Article 1 of Appendix III to the Rules.
28. Pursuant to Article 9 of the Procedure, the DRSP conducted an administrative review of the Objection for compliance with its Rules and with Articles 5 to 8 of the Procedure (Language, Communications and Time Limits, Filing of the Objection, and Content of the Objection). On 29 March 2013, the DRSP notified the parties that the Objection was compliant. On 12 April 2013, ICANN made a dispute announcement under Article 10 of the Procedure, listing the objections that had passed administrative review, including the Objection.
29. On 12 April 2013, the DRSP sought the comments of the parties on the possible consolidation of this case with two other cases in which the string .MED was at issue, as contemplated by Article 12 of the Procedure. On 19 April 2013, the DRSP notified the parties that the cases would not be consolidated.
30. On 17 May 2013, HEXAP filed a response to the Objection (the “Response”). A copy of the Response was transmitted to the Independent Objector on the same day. Pursuant to Article 11(f) of the Procedure, the Applicant also paid the requisite filing fee to the DRSP on the same day.
31. On 14 June 2013, the Chairman of the Standing committee of the ICC International Centre for Expertise appointed the Expert Panel pursuant to Article 13 of the Procedure and Article 9(5)(d) of the Rules.
32. On 21 June 2013, the DRSP informed the parties of the appointment of the Expert Panel and of the estimate of total costs in this matter. The parties were informed that the Panel would not be deemed fully constituted and the matter would not proceed until each of the parties had made advance payment of the estimated costs.

33. On 24 June 2013, HEXAP objected to the appointment of the Panel on the ground that the experts lacked medical expertise or expertise related to health or the medical sector, and requested the replacement of the Panel.
34. On 2 July 2013, pursuant to Article 11(4) of the Rules, the DRSP invited the Independent Objector and the experts to send their observations concerning the Applicant's objection and request.
35. On 29 July 2013, pursuant to Article 3(4)(A) of Appendix I to the Rules, the Chairman of the Standing Committee of the ICC International Centre for Expertise rejected the request for replacement of the Panel. The DRSP notified the parties and the experts of this decision on 31 July 2013.
36. On 1 August 2013, the DRSP informed the parties of the receipt of the necessary advance payment and transferred the file to the Panel. The Panel received the file and was deemed fully constituted on that date for the purpose of the Procedure.
37. On 2 August 2013, the Independent Objector requested leave from the Panel to file an additional written statement to address issues raised in the Applicant's Response.
38. On 5 August 2013, the Expert Panel wrote to the parties asking the Applicant to comment on the Independent Objector's request and seeking the parties' observations on the conduct of the proceedings generally and, in the event the Independent Objector's request were to be granted, the appropriate length and timing of any additional round of submissions.
39. The Applicant and the Independent Objector sent their observations on 7 and 9 August 2013 respectively.
40. On 12 August 2013, the Expert Panel informed the parties that it had conducted the "quick look" procedure contemplated in subsection 3.2.2.3 of Module 3 of the

Guidebook and had not found the Objection to be manifestly unfounded or an abuse of the right to object such that it should be summarily dismissed.

41. On the same day, in accordance with Article 17 of the Procedure, the Expert Panel granted the Independent Objector leave to submit an additional written statement within ten days and gave the Applicant the opportunity to reply within ten days of the Independent Objector's submission.
42. The Independent Objector submitted an additional written statement on 22 August 2013 and the Applicant, a reply on 30 August 2013.
43. As required by Article 5(a) of the Procedure, submissions and communications were made in English. In accordance with Article 6(a) of the Procedure, all communications in the proceedings were submitted electronically.
44. On 3 September 2013, the Panel notified the parties that it was moving into a deliberative phase. The Panel then considered the entire record and proceeded with the preparation of a draft Expert Determination.
45. On 4 September and 3 October 2013, the DRSP granted the Panel extensions for the submission of its draft Expert Determination to 5 and 12 October 2013 respectively.
46. On 12 October 2013, the Expert Determination was submitted in draft form to the DRSP for scrutiny in accordance with Article 12(6) of the Rules and Article 21(b) of the Procedure.

## **6. SUMMARY OF THE PARTIES' RESPECTIVE POSITIONS**

47. The Objection considered in these proceedings is a Limited Public Interest objection.

The Guidebook stipulates the applicable standards, or principles of adjudication, for a Limited Public Interest objection. In terms of standing, since the Independent Objector acts solely in the best interest of the public who use the global Internet, he shall not object to an application unless at least one comment in opposition to the application has been made in the public sphere. On the merits, the Independent Objector must demonstrate that the applied-for gTLD string is contrary to generally accepted legal norms of morality and public order that are recognized under principles of international law. The parties' respective positions concerning the application of these principles are summarized below.

### **6.1. The Independent Objector's Objection**

48. The Independent Objector argues that he has standing to bring this Objection because, as required by the Guidebook, at least one comment in opposition to the Application was made in the public sphere. In fact, several non-governmental organizations have submitted Public Comments with respect to all four of the applications for the .MED gTLD. Many of these comments express concern about the reliability and trustworthiness of a .MED gTLD that is run by a private enterprise. Although several of these comments were submitted under the heading "Community Objection", the rationale of the comments often refers to "public interest" and "public health", which fall within the parameters set for a Limited Public Interest objection.
49. The Independent Objector's position is that the applied-for gTLD string would be contrary to specific principles of international law as reflected in relevant international instruments of law.
50. The Independent Objector alleges that "med" as an abbreviation for "medical" and "medicine", as well as similar terms in multiple languages, is inextricably connected to health, since it refers to the goods, services, and facilities that are necessary for the effective fulfillment of the right to health. Therefore, the Independent Objector's

appreciation of the .MED gTLD is directly linked to his appreciation of the very concept of health.

51. The Independent Objector submits that health was recognized as a fundamental human right in international law for the first time in 1948, in the Universal Declaration of Human Rights. Since then, several instruments of international law have confirmed the human rights status of health, most notably the International Covenant on Economic, Social and Cultural Rights.<sup>5</sup> The Independent Objector argues that the promotion and protection of international health is inherent in the due respect of generally accepted legal norms of public order that are recognized under fundamental principles of international law.
52. The right to health was defined by the United Nations Committee on Economic, Social and Cultural Rights (the “Committee”) as “a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health.” The Committee lists health care as the very first element covered by the right to health while interpreting the right to health as extending not only to health care but also to the underlying determinants including access to health-related education and information. In addition, the Committee observes that states should also ensure that third parties do not limit people’s access to health-related information and services.
53. The Independent Objector also refers to the case law of regional human rights courts confirming that access to information is an essential element of specific human rights.
54. The Independent Objector is of the view that any entity applying for a .MED gTLD should demonstrate awareness of its duty to see to it that this gTLD is organized, set up, and managed in such a way that the right to health, with all of the implications

---

<sup>5</sup> International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, *Treaty Series*, Vol. 993, No. I-14531.

discussed above, including the necessity of reliability and trustworthiness of medical information, is fully respected and, consequently, should demonstrate that this duty will be effectively and continuously implemented. In addition, the Applicant should demonstrate how, given the public interest at stake, the policies and decision making of the Applicant will be properly connected to the public authorities, national as well as international, that are under a legal obligation to respect, protect, and fulfill the right to health. In the view of the Independent Objector, these are requirements that are fully justified given the specific principles of international law as reflected in the relevant international instruments of law discussed above.

55. From the Application, it is clear that the goal of the applied-for – community-based – gTLD is to become a worldwide trusted source for medical-related information and that the eligibility for domain operating will be restricted in accordance with quality-related standards. It is also clear that it is the Applicant that will make all relevant policy decisions. In the view of the Independent Objector, the Application does not provide for any views on the international nature of this undertaking, while for a gTLD, the world at large seems to be the natural environment, as is confirmed by the Applicant.
56. The Independent Objector submits that more importantly the Applicant does not demonstrate awareness of the fact that “med”, referring to medical services and to medical-related information as essential elements, is not only a “term” but that it also represents a fundamental right, indissociable from the right to health, which involves extensive obligations for national and international public authorities across the globe as well as for citizens and private enterprises. Providing medical related information on a worldwide basis might interfere with the efforts of public authorities to fulfill their obligations, while for developing countries, “there is a growing concern that an unrestricted health gTLD will bypass regulatory controls.” The Application is silent on these aspects of fundamental importance.
57. The Independent Objector submits that the present Application does not meet the

standards that have to be applied to a highly sensitive gTLD and finds that the launch of this applied-for .MED gTLD would, indeed, be contrary to specific principles of international law as reflected in relevant international instruments of law.

58. In the alternative, the Independent Objector objects to the Application as long as the Applicant has not – after consultation and coordination with all stakeholders of the health community, including states and competent international organizations – provided solutions for the serious objections raised above.
59. For these reasons the Independent Objector asks the Expert Panel to hold that the Objection is valid and to uphold the present Objection against the Application. In the alternative, the Independent Objector requests the Expert Panel to hold that the Objection is valid as long as the Applicant has not provided solutions for the serious objections raised above.
60. In addition, the Independent Objector requests that his advance payment of costs be refunded in accordance with Article 14(e) of the Procedure.

## **6.2. The Applicant's Response**

61. The Applicant's position is that the Objection should not be granted. HEXAP is proposing a community-based gTLD, for which it has obtained support from various organizations representing different sectors of the health care industry. The mission and purpose for the .MED gTLD, as stated in the Application, are as follows:
  - (1) to federate certified and licensed practitioners in the health care sector under a clear, common, and easy to remember identifier on the Internet;
  - (2) to provide stakeholders within the health care sector with a platform on which they can disseminate information in relation to medical topics, and offer products and services to businesses, consumers and, more in particular, patients;

(3) to provide Internet users in general, looking for genuine and reliable medical information, products and services with a clear and unambiguous identifier which provides them access to such information.

62. The Application states that the .MED gTLD is intended to be:

- an exclusive namespace where registrations are only opened to licensed health care professionals and with eligibility rules;
- a new zone protected by colleagues who validate the authenticity and qualifications of registrants; and
- an application serving patients' interests with unambiguous and verified contact details of the licensed health care WHOIS service providing professional details on registrants.

63. The Applicant first questions the validity of the proceedings. It claims that the Independent Objector is only entitled to submit a Limited Public Interest objection if at least one comment in opposition to the application is made in the public sphere. However, HEXAP's Application for the .MED gTLD was not directly the object of any Limited Public Interest Comment.

64. In HEXAP's view, not only does the Independent Objector seem to take into account all comments against all different .MED strings in an attempt to validate his Objection against HEXAP, he has knowingly chosen to submit a Limited Public Interest objection instead of a Community one against HEXAP, all the while basing his claims solely on third parties' comments, which all mention "community" as the only ground for their objection.

65. With respect to merits, the Applicant submits that, while other applicants have applied for the .MED string, amongst more than a hundred other extensions, the team behind HEXAP is dedicated and has invested its decades of experience in the medical sector

toward the success of one single, top-level domain. Indeed, HEXAP emphasizes its experience in organizing health sector communities on the Internet and in managing regulated, sector-based subdomains such as “Medecin.fr”.

66. The Applicant further submits it is the only remaining .MED applicant that has elected to be community-based in order to ensure that the necessary limitations and safeguards are in place to specifically address the significant issues currently raised by the availability of medical content on the Internet.
67. The Applicant states that it and its founders have always been aware of their duty to see to it that this gTLD is organized, set up, and managed in such a way that the right to health, with all of its implications, including the necessary reliability and trustworthiness of medical information, is fully respected.
68. The Applicant stresses that it applied for the .MED and not the .HEALTH gTLD. Although “health” and “med” may be part of the same realm, these notions should not be used interchangeably. While the Applicant states that it has the utmost respect for, and wishes to protect, the right to health, only health itself may represent a fundamental right and not medicine, medical products or medical information.
69. The Applicant agrees with the principle of a right to health. In order to ensure that .MED will be, and will remain for the foreseeable future, a reliable, trustworthy, safe, and secure space, the Applicant states that it intends to devise policies that will contain clear guidelines and rules in relation to
  - the types of domain names that will be registered;
  - who will be entitled to select which domain names will be registered;
  - who will be entitled to register such domain names;
  - who will be entitled to use such domain names; and
  - which types of use of such domain names will be allowed or recommended.
70. The Applicant does not disagree with the Independent Objector’s characterization of

the risks currently existing for patients trying to inform themselves on the “.COM” Internet. The Applicant’s .MED Application has been specifically devised to provide an organized alternative and a workable solution to which all public and private health stakeholders will be able to contribute.

71. The Applicant’s community-based .MED top level domain will be in the best interests of the public who use the global Internet. In that spirit, under the guidance of the Expert Panel, the Applicant would be more than willing to work towards solutions for the objections raised by the Independent Objector, by ICANN’s Governmental Advisory Committee (“GAC”), or by any other interested and legitimate third party.
72. The Applicant requests that, for all of the above reasons, the Objection be dismissed.

### **6.3. The Independent Objector’s Additional Statement**

73. The Independent Objector argues that the only requirement provided by the Guidebook is the pre-existence of at least one comment in the public sphere. If that precondition is fulfilled, then, it is the Independent Objector’s choice whether to submit an objection or not, whether to submit a Limited Public Interest objection or a Community objection or whether to submit an objection of both categories against an applied-for gTLD. The Independent Objector maintains that the Applicant’s assumption that the Independent Objector would only be entitled to submit a Limited Public Interest objection if public comments based on the same grounds have been previously submitted does not have a basis in the Guidebook.
74. The Independent Objector notes that the Applicant repeatedly states that .MED is not the same as .HEALTH. However, the Independent Objector observes that his position that “med” as an abbreviation for “medical” and “medicine” is inextricably connected to health has recently been confirmed by the Safeguard Advice issued by ICANN’s Governmental Advisory Committee. In this document, the GAC advises that extensive

additional safeguards should be put in place for a whole range of gTLDs, including the .MED. Also, the GAC advises that registration restrictions for particular strings, including .MED, may be imposed so long as they are appropriate for the types of risks associated with the gTLD. The GAC's Safeguard Advice confirms the sensitivity of all health-related strings, among them .MED.

75. The Independent Objector also relies on a recent resolution adopted by the Sixty-sixth World Health Assembly on "eHealth standardization and interoperability" which, the Independent Objector submits, it in effect confirms and supports his concerns raised in relation to the applied-for and other health-related gTLDs. In this Resolution, the World Health Assembly emphasizes that health-related global top-level domain names should be operated in a way that protects public health. In the view of the Independent Objector, this Resolution demonstrates the value of the alternative remedy sought by the Independent Objector.
76. The Independent Objector submits that the Applicant reacted positively to the alternative remedy requested by the Independent Objector in his Objection.

#### **6.4. The Applicant's Reply to the Independent Objector's Additional Statement**

77. In its Reply, the Applicant stresses that the Application did not receive any Limited Public Interest comment in the public sphere, as required under section 3.2.3. of the Guidebook. The Applicant submits that the Independent Objector's assumption that a Public Comment on Community grounds can induce a Limited Public Interest objection is incorrect.
78. The Applicant submits that none of the three public comments contain grounds for a Limited Public Interest objection that are directly addressed to the Application. A Limited Public objection cannot possibly be motivated by general grounds that are not consistent with the very content and purpose of the Application.

79. The Applicant recalls that although both “health” and “medical” may be part of the same realm, the two notions should not be used interchangeably. If, as alleged by the Independent Objector, health-related domain names should not be treated as belonging to a different category than a .HEALTH gTLD, then the Applicant questions why the Independent Objector did not file objections to all health-related strings.
80. The Applicant also addresses the GAC Advice, by saying that since its Application is the only Community application, it is backed up by strong support from community representatives and is the only health-related application that already implements and exceeds the required safeguards with no amendment.
81. The Applicant argues that it expressed similar concerns to those raised in the World Health Organization statement of 27 May 2013, regarding health-related gTLDs and their general lack of policies and thus acknowledged and encouraged the crucial need for safeguards’ implementation, as part of its current practices.
82. The Applicant concludes by reiterating that it would be more than willing to work towards solutions for the objections raised, under guidance from the Expert Panel.

## **7. ANALYSIS**

83. In the following section, the standards of adjudication and relevant legal principles for a Limited Public Interest objection are discussed in detail and applied to the facts of the case. In applying the standards the Panel is mindful that the Independent Objector bears the burden of proof in respect of both standing and merits.<sup>6</sup> If he has standing, the Independent Objector must show that the applied-for gTLD string is contrary to generally accepted legal norms of morality and public order that are recognized under principles of international law.

---

<sup>6</sup> Guidebook, s. 3.5; Procedure, art. 20(c).

84. It should be noted that the Expert Panel comes to this Determination applying a principle of judicial economy arising out of the nature of these proceedings, which involve brief submissions (which are subject to strict word limits) and an expedited schedule for their disposal. Hence, while the issues raised are complex and have received serious consideration by both the parties and the Panel, the Panel's Determination will be correspondingly brief.

### **7.1. The “Quick Look” Procedure**

85. Subsection 3.2.2.3 of the Guidebook provides that anyone may file a Limited Public Interest objection. Due to this inclusive standing base, however, objectors are subject to a “quick look” procedure designed to identify and eliminate frivolous or abusive objections. An objection found to be manifestly unfounded or an abuse of the right to object may be dismissed at any time.

86. The quick look was the Panel's first task after its appointment by the DRSP and involved an initial review on the merits of the Objection in the light of the requirements of subsection 3.2.2.3 of the Guidebook. A Limited Public Interest objection would be manifestly unfounded if it did not fall within one of the categories defined as the grounds for such an objection at section 3.5.3 of the Guidebook. A Limited Public Interest objection may also be an abuse of the right to object. An objection may be framed to fall within one of the accepted categories for Limited Public Interest objections, but other facts may clearly show that the objection is abusive.

87. On 13 August 2013, the Expert Panel informed the parties that it had conducted the “quick look” procedure contemplated in subsection 3.2.2.3 of the Guidebook and had not found the Objection to be manifestly unfounded or an abuse of the right to object such that it should be summarily dismissed.

## 7.2. The Independent Objector's Standing

88. Section 3.2.5 of the Guidebook provides that a formal objection to a gTLD application may be filed by the Independent Objector on the grounds of Limited Public Interest or Community. The Independent Objector may file a Limited Public Interest objection to an application even if a Community objection has been filed, and vice versa. The Independent Objector may file an objection notwithstanding the fact that a String Confusion objection or a Legal Rights objection has also been filed in respect of that application. Absent extraordinary circumstances, the Independent Objector is not permitted to file an objection to an application where an objection has already been filed on the same ground. There is no issue here in any of these respects because this Objection was brought on the ground of Limited Public Interest and no other objection has been filed on the same ground.
89. One question which arises in this case is whether the requirement of a public comment has been met. In section 3.2.5, the Guidebook states that “in light of the public interest goal” associated with his role, “the Independent Objector shall not object to an application unless at least one comment in opposition to the application is made in the public sphere.”
90. In this case it is common ground that three comments were made to ICANN concerning the Application (as distinguished from the string). The Applicant argues that these comments should be discounted for the purpose of allowing the Independent Objector to bring a Limited Public Interest objection because the comments were not filed under the heading “Limited Public Interest” in the ICANN public comment system. The Independent Objector argues that although there must be “at least one comment in opposition to the application ... made in the public sphere,” there is no requirement that this comment be filed under the relevant heading.
91. The Panel agrees with the Independent Objector on this point. The Guidebook does not require that the necessary comment should be formally characterized as a Limited

Public Interest comment if the Independent Objector is to be allowed to object upon that ground. Manifestly, the headings under which comments are filed in the ICANN system are not a reliable indicator of their content. In fact, the comments that were filed in respect of the Application do touch upon issues related to the Limited Public Interest ground of objection.<sup>7</sup> The Panel therefore concludes that the public comment requirement imposed by the Guidebook has been met in this case.

92. One last point bears mention before turning to the merits of the Objection. According to section 3.2.5 of the Guidebook, “the Independent Objector may file objections against ‘highly objectionable’ gTLD applications.” Conceivably, this could be viewed as raising a question of standing. The parties have not addressed it as such, however. In fact, the parties’ submissions do not address the question whether the Application is “highly objectionable” other than by discussing the application of the principles of adjudication governing the merits.

### **7.3. The Standards of Adjudication and Legal Principles**

93. Section 3.5 of the Guidebook provides that each panel will use appropriate general principles (standards) to evaluate the merits of each objection, while Article 20(a) of the Procedure obliges each panel to apply the standards that have been defined by ICANN. In addition, pursuant to Article 20(b) of the Procedure, the Panel “may refer to and base its findings upon the statements and documents submitted and any rules or principles that it determines to be applicable.”
94. In the case of a Limited Public Interest objection, section 3.5.3 of the Guidebook specifies that an expert panel will consider “whether the applied-for gTLD string is contrary to general principles of international law for morality and public order”.

---

<sup>7</sup> <https://gtldcomment.icann.org/comments-feedback/applicationcomment/viewcomments>.

95. The Guidebook provides that “the Panel will conduct its analysis on the basis of the applied-for gTLD string itself” but, as emphasized by the Independent Objector, “may, if needed, use as additional context the intended purpose of the gTLD as stated in the Application.” The Panel will thus proceed on that basis.
96. Section 3.5.3 of the Guidebook provides useful guidance concerning “the general principles of international law for morality and public order” which it contemplates:

Examples of instruments containing such general principles include, but are not limited to:

- The Universal Declaration of Human Rights (UDHR);
- The International Covenant on Civil and Political Rights (ICCPR);
- The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);
- The International Convention on the Elimination of All Forms of Racial Discrimination;
- Declaration on the Elimination of Violence against Women;
- The International Covenant on Economic, Social, and Cultural Rights;
- The Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment;
- The International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families;
- The Slavery Convention;
- The Convention on the Prevention and Punishment of the Crime of Genocide; and
- The Convention on the Rights of the Child.

97. The Guidebook notes that these instruments “are included to serve as examples, rather than an exhaustive list,” and that they “vary in their ratification status.” The Guidebook also observes that “states may limit the scope of certain provisions through reservations and declarations indicating how they will interpret and apply certain provisions.”
98. One principle which finds express mention in section 3.5.3 of the Guidebook is freedom of expression. The Guidebook however adds that “the exercise of this right carries with it special duties and responsibilities” and that “certain limited restrictions may apply.”
99. The following part of section 3.5.3. elaborates on the grounds upon which an applied-for gTLD string may be considered contrary to generally accepted legal norms relating to morality and public order that are recognized under principles of international law are. Four such grounds are identified:
- Incitement to or promotion of violent lawless action;
  - Incitement to or promotion of discrimination based upon race, color, gender, ethnicity, religion or national origin, or other similar types of discrimination that violate generally accepted legal norms recognized under principles of international law;
  - Incitement to or promotion of child pornography or other sexual abuse of children;  
or
  - A determination that an applied-for gTLD string would be contrary to specific principles of international law as reflected in relevant international instruments of law.”
100. The present Objection is based upon the fourth ground, namely that the string, in the context of the Application, would be contrary to specific principles of international law as reflected in relevant international instruments of law.

101. The four grounds are similar insofar as they all correspond to a notion of contrariety to generally accepted norms of morality and public order. If a situation of contrariety to international law does not relate to morality and public order, then an objection cannot stand. At the same time, the Panel notes that the fourth ground is different from the first three in an important way. The first three grounds each provide a specific basis for a finding that the string is “contrary to generally accepted legal norms relating to morality and public order that are recognized under principles of international law.” They refer to specific actions deemed contrary to the relevant norms, i.e., “incitement to or promotion of [...] violent, lawless action”, “discrimination” and “sexual abuse of children”. The fourth ground, by contrast, leaves open the scope of further possible substantive violations, but imposes an important requirement: the string must be contrary to specific principles of international law that rise to the level of generally accepted legal norms relating to morality and public order.
102. Under the overall requirement of contrariety “to generally accepted legal norms relating to morality and public order that are recognized under principles of international law”, the fourth ground leaves it to the discretion of the Expert Panel to determine if the applied-for gTLD is contrary to a specific principle or principles of international law relating to morality and public order. The three preceding grounds provide context which may assist the Expert Panel in determining the kinds of principles of international law that are sufficiently specific, and the kinds of grounds considered sufficiently serious, to restrict the right to freedom of expression of the Applicant.
103. The Panel notes that the first three grounds mentioned in section 3.5.3 could potentially afford a basis for necessary and proportionate restrictions on free expression under international law, in terms, for example, of Article 19(3)(b) and Article 20(2) of the ICCPR. There are other grounds on which free expression may be limited, i.e.: respect for the rights or reputations of others, national security, public order, public health or morals. In the Panel’s view, the reference to “morality” and “public order” in the first paragraph of section 3.5.3 of the Guidebook does not

exclude limitations of free expression on such other grounds as are mentioned in the ICCPR. While also accepting that – as underscored in section 3.5.3 of the Guidebook – state practice on the interpretation of these provisions (including the right to free expression) varies, in the Panel’s view there is a specific principle of international law, reflected in relevant international legal instruments, which permits limitation of free expression on public health grounds.

#### **7.4. The Merits of the Objection**

104. The Independent Objector alleges that the applied-for gTLD string, viewed in context with the intended purpose of the gTLD as stated in the Application, would be contrary to a specific principle of international law as reflected in relevant international instruments of law, namely the right to health. He argues that his appreciation of the .MED gTLD is directly linked to his appreciation of the concept of health, since the abbreviation “med” for medical and medicine is inextricably connected to health. On the other hand, the Applicant emphasizes that it has applied for the .MED and not the .HEALTH string and that although these two terms are part of the same realm, they should not be used interchangeably.<sup>8</sup> The Applicant stresses that only “health” itself may represent a fundamental right, not medicine nor medical products or medical information. In his Additional Statement, the Independent Objector relies on a Resolution adopted by the Sixty-sixth World Health Assembly on 27 May 2013 to argue that health-related domain names should not be treated as belonging to a different category from the .HEALTH gTLD.
105. The Panel fails to see how one could conceive of a human right to health that would entirely exclude, as suggested by the Applicant, any component of medicine, medical products and medical information. Even if the Panel were to accept for the sake of argument that the .HEALTH string should be treated differently in respect of the right

---

<sup>8</sup> Response, p. 10.

to health, the objective connection between “medical” and “medicine” – and thus “med” – on one side and “health” on the other is sufficient to justify the association proposed by the Independent Objector. The question remains, however, whether the string at issue here would be contrary to specific principles of international law.

106. The Independent Objector lists several instruments of international law that confirm the existence of a right to health and concludes that the promotion and protection of health is inherent to the due respect of generally accepted legal norms of public order that are recognized under fundamental principles of international law. He argues that the right to health extends to access to reliable and trustworthy health-related education and information.
107. According to the Independent Objector, the Applicant should demonstrate how its policies and decision-making will be properly connected to the public authorities, national as well as international, that are under a public international law obligation to respect, protect and fulfill the right to health.
108. The Applicant agrees with the right to health in principle, and with the notion that access to reliable and trustworthy health-related information is part of that right. The Applicant also agrees that public authorities play a role in the proposed operation of the gTLD through the licensing requirement the Applicant intends to impose on registrants.
109. The Independent Objector has framed his Objection in terms of the right to health rather than in terms of public health as a valid ground for limiting freedom of expression. There are analytical differences between the right to health as an individual human right (enshrined, for example, in Article 12 of the International Covenant Economic, Social, and Cultural Rights (“ICESCR”)) and public health as a ground for limiting freedom of expression (in terms, for example, of Article 19 of the ICCPR). It is worth exploring these differences to cast light on the state of international law in this area.

110. The United Nations Committee on Economic, Social and Cultural Rights has defined the right to health as the right to the highest attainable standard of physical and mental health.<sup>9</sup> In the interpretation of the Committee on Economic, Social and Cultural Rights, the right to health also includes the right to receive and have access to information about health.<sup>10</sup> As the terms of Article 12 of the ICESCR indicate, the principal obligor is the state. The Independent Objector has however stressed that “not only public authorities, but also the private sector have responsibilities vis-à-vis the protection of human rights.” The Panel does not consider it necessary to come to a definitive view on the question of the extent to which, if any, non-state actors may be bound by international human rights obligations, because, as explained below, the right to health question can be resolved by reference to the content of the right.
111. Where public health appears as a ground for restricting freedom of expression, as for example in the case of Article 19 of the ICCPR, it has permissive rather than obligatory effects. States are permitted to limit the exercise of free expression on public health grounds. But they are not obliged to do so – at least not in terms of Article 19 of the ICCPR.
112. It is conceivable that an obligation to restrict freedom of expression may arise as part of a state’s obligation vis-à-vis the right to health. But such a restriction would still have to satisfy the conditions in the limitation clause in Article 19 (or other equivalent provisions protecting free expression). A restriction of free expression cannot be justified solely on the basis of its purported positive consequences on the right to health. To do so would result in endless expansions in the permissible limitations of freedom of expression by reference to consequentialist arguments about the impact that a particular restriction could have on the enjoyment of other rights. Moreover, such restrictions must be both necessary and proportionate.

---

<sup>9</sup> United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 14, *The right to the highest attainable standard of health* (art.12 of the Covenant on Economic, Social and Cultural Rights), 11 August 2000, E/C. 12/2000/4, para.9.

<sup>10</sup> *Id.*, para. 11.

113. Furthermore, as the Independent Objector has himself noted, the information-related element of the right to health is the right to *have access* to information that is reliable and trustworthy. It does not follow from this right that a state has a duty to censor all information on health that is not deemed reliable and trustworthy.
114. The above analysis of the relationship between the right to health, freedom of expression and public health as a ground for limiting free expression informs the approach of the Panel. The Panel accepts that the right to health is a specific principle of international law, but that right has to be considered in light of the right to freedom of expression and of the limited grounds upon which it is permissible to restrict this right.
115. Starting from those premises, the Independent Objector bears the burden of proving that the applied-for gTLD string, in light of the Application, would be “contrary” to the right to health, that a restriction on freedom of expression would be permissible under section 3.5.3 of the Guidebook, and hence that the Objection should be sustained (Article 20 of the Procedure). The Panel finds that the Independent Objector has failed to discharge his burden of proof in this case.
116. The Independent Objector has not established how the right to health requires that the operation of the string must “be properly connected to ... public authorities who are under a legal obligation to protect the right to health.” He affirms, but fails to establish, that the right to health prohibits the dissemination of health-related information, on a commercial basis or otherwise.
117. The Independent Objector claims that the private sector has responsibilities vis-à-vis the protection of human rights, but links these responsibilities to the idea of a possible interference with the obligations imposed on public authorities by international law: “[p]roviding medical related information on a worldwide basis”, he writes, “*might* interfere with efforts of public authorities to fulfill their obligations” under international law. (emphasis added)

118. The Independent Objector has not demonstrated to the Panel’s satisfaction that the capacity or efforts of public authorities to fulfill their international obligations by protecting and promoting the right to health would be affected by the applied-for gTLD string and, furthermore, how such alleged interference by the applied-for gTLD string (in the context of the intended purpose thereof) would be contrary to a specific principle of international law relating to public morality, public health or public order..
119. Even if the Panel were to assume, *arguendo*, that the capacity and efforts of public authorities to protect and to promote the right to health might be adversely affected, it would still be necessary to show that morality and public order – or any of the other grounds on which limitations of free expression are justifiable under international law – are engaged in a way that justifies a limitation on freedom of expression. Free expression cannot be limited merely on the grounds of policy convenience. As noted earlier, the threshold for a permissible restriction is higher. In the case of public health, the restriction must also be shown to be necessary to the protection of public health. The Independent Objector does not meet this necessity test.
120. Even if one were to consider the Independent Objector’s case exclusively on right to health grounds, and not take into account the principles governing the limitation of freedom of expression, the Objection would have to fail. In fact, in the view of the Committee on Economic, Social and Cultural Rights, information accessibility in relation to the right to health “includes the right to seek, receive and impart information and ideas concerning health issues.” It does not include the right to be protected from the mere risk of misleading or unreliable information. Had there been proof of a significant risk of dissemination of misleading or unreliable information, or a deliberate intention to this effect, the Panel’s assessment may well have differed. But the Independent Objector has offered no such evidence. For its part, the Applicant has provided various assurances, most notably in relation to the administration of the gTLD.
121. The Panel thus finds that the Independent Objector has failed to bridge the large gap

between, on the one hand, his bare allegation that the capacity or efforts of states to fulfill their obligations under the right to health might be affected by the applied-for gTLD, and, on the other hand, a demonstration of how such a scenario would amount to contrariety to general principles of international law for morality and public order. The Objection must therefore fail.

### **7.5. The Alternative Remedy**

122. In the event the Objection is not successful, the Independent Objector seeks an alternative remedy. He asks this Panel “to hold the present Objection is valid as long as the Applicant has not provided solutions for the serious objections raised”. The Procedure indicates quite clearly that the available remedies are “limited to the success or dismissal of an Objection and to the refund by the DRSP to the prevailing party, as determined by the Panel in its Expert Determination, of its advance payment(s) of costs pursuant to Article 14(e) of this Procedure and any relevant provisions of the applicable DRSP Rules.” The Panel finds that there is no basis in the Procedure for the alternative remedy sought by the Independent Objector.
123. This does not take away from the serious concerns raised by the Independent Objector. However, the very difficult policy questions surrounding the delegation and operation of health-related strings are not matters for this Panel to decide. It was not in particular this Panel’s task to decide on matters of public interest broadly defined, although the expression “Limited Public Interest” might suggest otherwise. This Panel was asked only to determine whether the Objection could be sustained on the basis that the applied-for gTLD string (in the context of its intended purpose) was contrary to general principles of international law for morality or public order. It was not, in other words, the task of this Panel to determine whether granting the Application advances the public interest in a more general sense. This Panel’s task was to impartially apply the tests as they are found in the Guidebook and as they may be understood from a consideration of the broader context in which they came to be formulated.

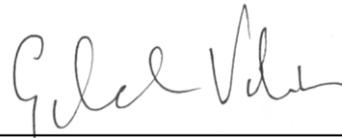
## 8. DETERMINATION

124. For the reasons provided above and in accordance with Article 21(d) of the Procedure, the Panel

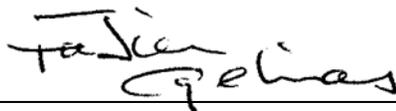
- DISMISSES the Limited Public Interest Objection to HEXAP SAS's Application for the string .MED brought by the Independent Objector;
- DECLARES that the prevailing party for the purpose of cost advance refund under Article 14(e) of the Procedure is HEXAP SAS; and
- DISMISSES all other requests in these proceedings.



Mr. John Gaffney  
Co-Expert of the Expert Panel



Professor Guglielmo Verdirame  
Co-Expert of the Expert Panel



Professor Fabien Gélinas  
Chair of the Expert Panel

Date: 19 December 2013