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

CASE No. EXP/413/ICANN/30

PROF. ALAIN PELLET, INDEPENDENT OBJECTOR (FRANCE)

vs/

STEEL HILL, LLC

(USA)

This document is a copy 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.

### **Generic Top-Level Domain Name Dispute**

Administered by the International Centre for Expertise of the International Chamber of Commerce

Disputed Generic Top-Level Domain Name .medical

Ground for the Objection

Limited Public Interest Objection

Prof. Alain Pellet (Independent Objector)

Objector

vs/

Steel Hill, LLC

**Applicant** 

## **Expert Determination**

2 January 2014

### **Expert Panel**

Chair

Ms Teresa Cheng, SC

**Co-expert** 

Dr. Stephan Schill

Co-expert

Dr. Christoph Liebscher

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#### THE PARTIES AND COMPOSITION OF THE EXPERT PANEL

- 1. The Applicant is STEEL HILL, LLC ("Applicant"), whose contact persons are Mr. Daniel Schindler and Mr. Jon Nevett, and whose address is 10500 NE 8th Street, Suite 350, Bellevue, WA 98004, USA, email: steelhill@donuts.co.
- 2. The Applicant is represented by Mr. John M. Genga and Mr. Don C. Moody, THE IP & TECHNOLOGY LEGAL GROUP, P.C. dba New gTLD Disputes, whose address is 15260 Ventura Boulevard, Suite 1810, Sherman Oaks, CA 91403, USA, email: john@newgtlddisputes.com and don@newgtlddisputes.com.
- 3. The Objection is brought by the Independent Objector, Prof. Alain Pellet ("Objector"), whose address is 16, Avenue Alphonse de Neuville, 92380 Garches, France, email: courriel@alainpellet.eu.
- 4. The Independent Objector is represented by Ms Héloïse Bajer-Pellet whose address is 15, Rue de la Banque, 75002 Paris, France, email: avocat@bajer.fr; Mr. Daniel Müller whose address is 20, Avenue du Général de Gaulle, 78290 Croissy sur Seine, France, email: mail@muellerdaniel.eu; Mr. Phon van den Biesen whose address is De Groene Bocht, Keizersgracht 253, 1016 EB Amsterdam, The Netherlands,

email: phonvandenbiessen@vdbkadvocaten.eu; and Mr. Sam Wordsworth whose address is 24 Lincoln's Inn Fields, London, WC2A 3EG, United Kingdom, email: SWordsworth@essexcourt.net.

- 5. The members of the Expert Panel (the "Panel") in this case are:
  - Ms Teresa Cheng, SC (Chair), Des Voeux Chambers, 38/F
     Gloucester Tower, The Landmark, Central, Hong Kong, email:
     TeresaCheng@dvc.com.hk
  - Dr. Stephan Schill, Max Planck Institute for Comparative Public Law and International Law, Im Neuenheimer Feld 535, 69120
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  - Dr. Christoph Liebscher, Wolf Theiss Rechtsanwälte GmbH, Schubertring 6, 1010 Vienna, Austria, email: christoph.liebscher@wolftheiss.com.

#### **PROCEDURE**

- 6. This matter concerns a Limited Public Interest Objection against the generic Top-Level Domain ("gTLD") string .medical applied for by the Applicant. The dispute resolution service provider ("DRSP") is the International Centre for Expertise ("Centre") of the International Chamber of Commerce ("ICC").
- 7. This present proceeding is conducted subject to :

- Module 3 of the ICANN gTLD Applicant Guidebook ("the Guidebook"),
- Attachment to Module 3 of the gTLD Applicant Guidebook, New gTLD Dispute Resolution Procedure ("Procedure"),
- Rules for Expertise of the ICC ("Rules"),
- Appendix III to the ICC Expertise Rules, Schedule of expertise costs for proceedings under the new gTLD dispute resolution procedure ("Appendix III"), and
- ICC Practice Note on the Administration of Cases ("ICC Practice Note").
- 8. The language of all submissions and proceedings is English, in accordance with Article 5(a) of the Procedure.
- 9. All communications by the parties, the Expert Panel and the Centre were submitted by way of email in accordance with Article 6(a) of the Procedure.
- 10. The Applicant submitted a gTLD application to ICANN (Application ID: 1-1561-23663) for the string .medical on 13 June 2012. Its purpose is described in the application as follows:
  - ".MEDICAL is a TLD attractive to registrants with affinity or professional interest in medicine and medical products and services. This is a broad and wide-ranging worldwide group that could include, but would not be limited to, doctors, nurses, hospitals, medical practices, scientists, researchers, educators, journalists, and others. It also includes individuals, businesses,

and professional organizations that support the practice of medicine, including hygienists, technicians, therapists, equipment manufacturers, suppliers, non-traditional medical practitioners, and many others. The .MEDICAL TLD also could serve as a useful forum for publication and exchange of scientific research and information."

- 11. The Objector submitted its Objection to the applied-for string medical on 12 March 2013 ("the Objection") to the Centre.
- 12. On 29 March 2013, the Centre registered the Objection for processing pursuant to Article 9(b) of the Procedure.
- 13. On 15 May 2013, the Applicant submitted its Response to the Objection to the Centre.
- 14. On 19 June 2013, the Centre appointed the three above mentioned members of the Panel in accordance with Article 13 of the Procedure.
- 15. On 31 July 2013, the Centre informed the Panel and the Parties that the estimated costs have been paid in full by each Party and confirmed the full constitution of the Panel.
- 16. Accordingly, the Centre proceeded with the transfer of the file to the Panel on the same day.
- 17. On 2 August 2013, the Objector requested to file an additional statement.

- 18. On 8 August 2013, the Applicant responded to the Objector's request.
- 19. In an email dated 12 August 2013, the Panel allowed the Objector's request. The email provides:
  - "1. The Objector may file an additional written statement on or before 19 August 2013.
  - 2. The Applicant may file a response to the Objector's additional written statement on or before 26 August 2013."
- 20. The Objector submitted an additional statement on 19 August 2013.
- 21. The Applicant submitted an additional statement in reply on 26 August 2013.
- 22. No hearing has taken place, nor was it requested by the Parties.
- 23. On 13 September 2013, that is, within the 45 day time provided for in Article 21(a) of the Procedure, the Expert Determination was submitted in draft form to the Centre for scrutiny in accordance with Article 21(b) of the Procedure.

#### **SUMMARY OF THE PARTIES' POSITIONS**

24. The Objector brings his Objection as a Limited Public Interest Objection. He contends that registration of the string .medical as a new gTLD is contrary to the right to health, which is recognized as a human right in various international legal instruments, including the International Covenant on Economic, Social, and Cultural Rights, the Universal Declaration of Human Rights and the International Health Regulations developed in the context of the World Health Organization ("WHO"), and which triggers a duty of governments to respect, protect and fulfill this human right. Inherent in the right to health, the Objector's argument continues, is the right to receive or have access to reliable and trustworthy information regards health and health-related information. as Governments, in turn, are under an obligation to organize and regulate the medical sector in order to guarantee that it is effective and does not jeopardize the essential elements of the right to health. This requires governments, inter alia, to be in a position to ensure that health-related information is reliable and trustworthy. Registration of the string ".medical" as a new gTLD, in turn, would compromise governments' obligations under the right to health, in particular their obligation to ensure the reliability and trustworthiness of health-related information if due consideration is not given to the right to health and appropriate mechanisms are not included to ensure that governments can fulfill their obligations under the human right to health.

- 25. Further the Objector submits that the string medical is a sensitive string because of its relation to the human right to health and that the Applicant therefore should demonstrate its awareness of the duty to organise, set up and manage the gTLD string in question in such a way that the right to health, including the right to reliable and trustworthy information is respected and effectively and continuously enforced. The Objector submits that the Applicant has not so demonstrated. The Applicant, whilst providing for additional protections for this string, has not provided any insight on the consultation it has carried out and therefore has not demonstrated an awareness of the nature of health not being just a commodity, but a fundamental human right. The Public Interest Commitment filed by the Applicant does not, in the view of the Objector, remedy the absence of awareness of the nature of this string.
- 26. In addition, the Objector relies on the Early Warnings raised by some States and the WHO regarding the string .health, especially the letter from the WHO to ICANN dated 11 April 2012 whereby the WHO requested ICANN to postpone decisions on applications for new gTLDs, such as .health, in order to allow for consultations with the global health

community so that a satisfactory structure for health-related gTLDs can be set up.

- 27. For the above reasons, the Objector requests that the Panel finds that registration of the string .medical is contrary to principles of international law and should therefore be disallowed. In the alternative, the Objector asks the Panel to impose an alternative remedy, namely that this Objection be sustained pending further consultation and coordination with all stakeholders of the global health community in order to implement a management structure for health-related gTLDs that answers to concerns stemming from governments' obligations under the right to health.
- 28. The Applicant contends that the Objection is frivolous and an abuse of right and should be dismissed under the "quick look" procedure required for Limited Public Interest Objections by Section 3.2.2.3 of the Guidebook. It argues that the Objection is abusive because the Objector has brought multiple objections against the Applicant concerning new gTLDs related to health, while refraining from objecting to applications for new gTLDs concerning equally sensitive issues, such as children, financial topics, intellectual property, gambling and education. This is due, the Applicant contends, to the Objector's health bias by reason of his direct or indirect association with the WHO through professional and

personal contacts.

- 29. Applicant also points out that the Objection is ill-founded on the merits. It insists that the Panel's mandate is to review whether the applied-for "string" is "contrary" to any public interest and this string clearly has not violated any relevant legal norm of morality and public order that are recognized under principles of international law.
- 30. The burden of proof to show that an applied-for string is contrary to relevant principles of international law, the Applicant says, is on the Objector and that the latter has failed to adduce evidence to discharge this burden.

# STANDARDS APPLICABLE TO LIMITED PUBLIC INTEREST OBJECTIONS

- 31. According to Section 3.2.1 of the Guidebook ("Grounds for Objection"), the Limited Public Interest Objection should be upheld, if "[t]he applied-for gTLD string is contrary to generally accepted legal norms of morality and public order that are recognized under principles of international law."
- 32. Similarly, under Article 2 of the Procedure, a Limited Public Interest Objection is defined as an "objection that the string comprising

the potential new gTLD is contrary to generally accepted legal norms relating to morality and public order that are recognized under principles of international law."

33. Section 3.5 of the Guidebook sets out the Dispute Resolution Principles (Standards) applicable to all four grounds of objection and the opening words provide:

"Each panel will use appropriate general principles (standards) to evaluate the merits of each objection. The principles for adjudication on each type of objection are specified in the paragraphs that follow. The panel may also refer to other relevant rules of international law in connection with the standards.

The objector bears the burden of proof in each case.

The principles outlined below are subject to evolution based on ongoing consultation with DRSPs, legal experts, and the public."

34. The Standards for the Limited Public Interest Objection are set out in Section 3.5.3 of the Guidebook. It provides:

"An expert panel hearing a Limited Public Interest objection will consider whether the applied-for gTLD string is contrary to general principles of international law for morality and public order.

Examples of instruments containing such general principles include:

•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
- •Slavery Convention
- •Convention on the Prevention and Punishment of the Crime of Genocide
- •Convention on the Rights of the Child."
- 35. As stated in Section 3.5.3 of the Guidebook, the instruments listed are given as examples and explicitly do not constitute an exhaustive list. It is also provided that national laws not based on principles of international law are not a valid ground for a Limited Public Interest Objection.

#### 36. Section 3.5.3 of the Guidebook continues to provide:

"Under these principles, everyone has the right to freedom of expression, but the exercise of this right carries with it special duties and responsibilities. Accordingly, certain limited restrictions may apply.

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:

• ......

• 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.

The panel will conduct its analysis on the basis of the applied-for gTLD string itself. The panel may, if needed, use as additional context the intended purpose of the TLD as stated in the application."

37. Section 3.2.2 of the Guidebook sets out provisions governing the Standing to Object. In relation to Limited Public Interest Objections, Section 3.2.2.3 provides:

"Anyone may file a Limited Public Interest Objection. Due to the inclusive standing base, however, objectors are subject to a "quick look" procedure designed to identify and eliminate frivolous and/or abusive objections. An objection found to be manifestly unfounded and/or an abuse of the right to object may be dismissed at any time.

A Limited Public Interest objection would be manifestly unfounded if it did not fall within one of the categories that have been defined as the grounds for such an objection (see subsection 3.5.3).

A Limited Public Interest objection that is manifestly unfounded 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. For example, multiple objections filed by the same or related parties against a single applicant may constitute harassment of the applicant, rather than a legitimate defense of legal norms that are recognized under general principles of international law. An objection that attacks the applicant, rather than the applied-for string, could be an abuse of the right to object.

The quick look is the Panel's first task, after its appointment by the DRSP and is a review on the merits of the objection. The dismissal of an objection that is manifestly unfounded and/or an abuse of the right to object would be an Expert Determination, rendered in accordance with Article 21 of the New gTLD Dispute Resolution Procedure.

In the case where the quick look review does lead to the dismissal of the objection, the proceedings that normally follow the initial submissions (including payment of the full advance on costs) will not take place, and it is currently contemplated that the filing fee paid by the applicant would be refunded, pursuant to Procedure Article 14(e)."

## FINDINGS UNDER THE "QUICK LOOK" PROCEDURE

- 38. In case of a Limited Public Interest Objection, the Panel has to be satisfied under the "quick look" procedure that the objection is not frivolous, that is manifestly unfounded, and/or abusive.
- 39. The Applicant contends that the Objection should be dismissed under this quick look procedure because:

- (1) The Objection is manifestly unfounded in that it does not fall within one of the categories that have been defined as the grounds for a Limited Public Interest Objection as set out in Section 3.5.3 of the Guidebook.
- (2) The Objection amounts to an abuse of the right to object as the Objector has filed multiple objections against the Applicant and related parties, while not objecting to applications on other non-health related, but equally sensitive issues, arguably resulting from the Objector's direct or indirect association with the WHO.
- 40. Furthermore, the Applicant emphasizes that the quick look procedure was introduced as a screening standard similar to the one in Article 35(3) of the European Convention on Human Rights, which renders "inadmissible any individual application ... incompatible with the provisions of the Convention ..., manifestly ill-founded, or an abuse of the right of application."
- 41. The Objector, by contrast, points out that the Objection is clearly not manifestly unfounded or abusive and refers the Panel to the Safeguard Advice issued by ICANN's Governmental Advisory Committee ("GAC") on 11 April 2013, which recommend additional safeguards for the

operation of a whole range of sensitive gTLDs. In this context, the Objector points out that the string .medical is part of Category One of the GAC's Advice requiring additional safeguards to be put in place by the ICANN Board.

- 42. In the Panel's view, the right to health is a settled and undisputed principle of international law as reflected and evidenced in the various international instruments of law cited by the Objector. Akin to the right to health is the right to ensure the reliability and trustworthiness of health-related information. Therefore, it cannot be said that the Objection is manifestly unfounded for not falling within one of the categories identified in Section 3.5.3 of the Guidebook. On the contrary, the right to health is, inter alia, based on instruments expressly mentioned in Section 3.5.3 of the Guidebook, including the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights. As regards its substance, the present Objection therefore passes under the quick look procedure and requires the Panel to proceed to an assessment of the merits of the Objection.
- 43. As to the other criteria for the quick look procedure, the Applicant refers to the large number of objections raised by the Objector to applications made by it and its related parties, while not objecting to new gTLD applications that are equally sensitive, for example those relating

to children, financial topics, intellectual property, gambling and education. However, the Panel is not persuaded that those applications were attacking the Applicant. The mere fact that objections were raised by an objector against a single applicant does not, *per se*, constitute a ground to conclude that there is an abuse of the right to object. Rather, as the Objector has clarified, he has raised several objections against applications by Applicant not in order to target the latter, but because they all involved health-sensitive strings.

44. Moreover, the Panel is of the view that the Objector is, in principle, free to choose the issue areas, which he considers to be affected by new gTLD application, and disregard other areas that may be sensitive as well, unless that selection is done to target specific applicants. A possible subject-matter related health-bias of the Objector is therefore not relevant for constituting an abuse of right. In the view of the Panel, the Objector's choice of health-related, rather than other sensitive issues, does also not need to be viewed any differently, that is as an abuse of right, given the Objector's past professional contacts with the WHO or the alleged contacts between his legal assistant and a consultant to the WHO who may have advocated in other ICANN proceedings against the Applicant. These contacts may account for the specific sensitivity of the Objector's towards health-related issues, but do not compromise the Objector's

objection as abusive in the sense of targeting the applicant.

45. As a consequence, the Panel concludes that the Objection is not to be dismissed under the quick look procedure and must proceed to a full review of the merits.

#### FINDINGS ON THE MERITS OF THE OBJECTION

- 46. In making its assessment of the merits of the Objector's Objection, the Panel first has to ascertain the subject matter to be considered in this objection procedure is it the string itself or the way the contents potentially available under that string are implemented, including the application of measures to ensure the reliability and trustworthiness of health-related information available under the domain medical?
- 47. Applicant considers that for the Objection to be successful this requires that "the Objector [must] identify anything about the string, or regarding how the Applicant plans to administer it, that runs contrary to any specific principle of international law" (Applicant's Response, p. 8 emphases in the original). The Objector, by contrast, considers that it is sufficient that "the objections raised are based on the applied-for gTLD string itself in context with the appreciation of the stated intended purpose as it may be derived from the description of its position the

"any Applicant applying for a Medical TLD should demonstrate awareness of its duty to see to it that this TLD is organized, set up and managed in such a way that the right to health with all of the implications discussed above, including the necessity of reliability and trustworthiness, 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" (Objection, pp. 12-13).

48. In the Panel's view, the definition and elaboration of the Limited Public Interest Objection all refer to the consideration of the applied-for gTLD string itself. In particular, the last paragraph in subsection 3.5.3 of the Guidebook reiterates that the Panel will conduct its analysis on the basis of the applied-for gTLD string itself. Whilst the Panel may, if needed, use as additional context the intended purpose of the gTLD as stated in the Application (see the last sentence in Section 3.5.3 of the Guidebook), the starting point must be the applied-for gTLD string itself. It is only necessary, in the Panel's view, to refer to the intended purpose of the gTLD as an additional context if the consideration of the string itself does not allow the Panel to come to a view one way or another. This would be the case, for example, if the word to be used as a string does not have a clear meaning, or if the intended purpose shows beyond doubt that the applied for string is intended to be used for a purpose that is contrary

to generally accepted legal norms relating to morality and public order that are recognized under principles of international law.

- 49. Therefore, the starting point, the Panel concludes, must be whether the string .medical is contrary to general principles of international law for morality and public order, not whether the internet content potentially available under that string conforms to such principles. The subject matter for the determination of the Panel, in other words, is the applied-for gTLD string .medical itself, not the way Applicant intends to manage that string.
- 50. As regards substance, in this procedure, the Panel is to consider whether the string is contrary to generally accepted legal norms of morality and public order that are recognized under principles of international law. Although the right to health is indisputably protected under international law and although the applied-for string is closely related to health, the registration of the string medical as a new gTLD does not violate the right to health and any obligations of governments that may arise from it. The definition, standard and test stipulated in the Guidebook and Procedure do not call for the investigation into the measures adopted in, for instance, ensuring that only reliable and trustworthy information will be available. The last paragraph of Section 3.5.3 only provides for a discretion conferred on the Panel to use the

intended purpose of the TLD as an additional context, if needed, to determine whether the string is contrary to generally accepted legal norms of morality and public order that are recognized under principles of international law. It does not extend the Panel's mandate to review the appropriateness of the measures suggested by Applicant in the management of the string.

51. The Panel accepts that the string .medical is connected to health and that under fundamental principles of international law, there is a right to health. However, the applied-for gTLD string does not infringe such right. Whilst there are international instruments and principles of international law providing for the promotion and protection of health, this right is not inconsistent with the applied-for gTLD string, as it does not hinder obligations of governments to protect, respect and fulfill the human right to health. The real complaint of the Objector relates to the right of individuals to receive or have access to reliable and trustworthy health-related information. The lack of protective measures to ensure the reliability and trustworthiness of such information, as suggested by the Objector, might be contrary to such rights and obligations under it, but they are unrelated to whether the string .medical itself is contrary to some legal norms of morality and public order that are recognized by principles of international law.

- 52. According to the Panel's view stated at the end of paragraph 48 above, the intended purpose will not only be considered to establish, if necessary, the meaning of the string, but also to verify whether the intended purpose, beyond doubt, violates the norms pertinent to this Expert Determination. The Applicant's stated intention does not indicate that the right to health is to be adversely affected nor the obligation or right to provide or access reliable and trustworthy health-related information hindered.
- 53. The Objector refers to the statements of the WHO and the World Health Assembly on the string health as well as the GAC Beijing Communiqué dated 11 April 2013. The GAC's advice on safeguards on sensitive strings, including the string medical, will be a matter for the ICANN Board to adopt, implement and enforce. Indeed the Panel notes that Applicant will be under a contractual obligation to adopt GAC's advice as directed by ICANN. It is a matter for ICANN to develop, implement and enforce such advice as it deems fit. It is not a matter for the Panel to decide in the present expert determination process.
- 54. In consequence, the way in which the gTLD string .medical is set up, organised and managed is not within the purview of this Panel under the Limited Public Interest Objection.

- 55. The Panel turns now to the alternative ground relied on by the Objector. The WHO in its letter of 11 April 2012 to ICANN reiterates the need for consultation with stakeholders of the global health community before allowing the application regarding the string health. The Objector suggests that similarly due regard should be paid to the need for consultation with the global health community in relation to the medical gTLD. Short of finding that the registration of the string is contrary to generally accepted legal norms of morality and public order that are recognized under principles of international law, the Objector, as an alternative remedy, requests the Panel to conditionally uphold the Objection as long as the Applicant has not provided solutions for the health-related concerns addressed in the Objection.
- 56. Under Article 21(d) of the Procedure, the remedies available in any proceeding before a Panel shall be limited to the success or dismissal of an Objection and the refund of the advance made to the DRSP of any cost advances. It does not empower the Panel to grant a conditional dismissal. Furthermore, the conditions the Applicant has to satisfy in the management of .medical in order to meet concerns arising from the right to health have not been stated with clarity by the Objector. Given the power of ICANN to enforce the implementation of measures and the limited power of this Panel in this procedure, the Panel concludes that it

has no power to make a conditional determination, upholding the Objection pending compliance with any conditions, the content of which in any event are unclear.

- 57. In the light of the above, the Panel holds that the Objection is to be dismissed and that registration of .medical as a new gTLD is not contrary to generally accepted legal norms of morality and public order that are recognized under principles of international law.
- 58. Pursuant to Article 21(d) of the Procedure, the Panel holds that the Costs paid under Article 14 of the Procedure shall be refunded to the Applicant.

#### **DISPOSITIVE PART**

- 59. In the light of the above and in accordance with Art. 21(d) of the Procedure, the Panel hereby renders the following Expert Determination:
  - i. The Objection of the Independent Objector is dismissed;
  - ii. The Applicant STEEL HILL, LLC prevails;
  - iii. The Applicant's advance payment of Costs shall be refunded by the Centre.

Date: 2/1/2014

Dr. Christoph Liebscher Co-expert of the Expert Panel · / / / /

Dr. Stephan Schill Co-expert of the Expert Panel Ms Teresa Cheng, SC Chair of the Expert Panel