



New gTLD Program
Community Priority Evaluation Report
Report Date: 10 August 2016

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| Application ID: | 1-980-7217 |
| Applied-for String: | MERCK |
| Applicant Name: | Merck KGaA |

Overall Community Priority Evaluation Summary

| Community Priority Evaluation Result | Did Not Prevail |
|--|------------------------|
| <p>Thank you for your participation in the New gTLD Program. After careful consideration and extensive review of the information provided in your application, including documents of support, the Community Priority Evaluation panel determined that the application did not meet the requirements specified in the Applicant Guidebook. Your application did not prevail in Community Priority Evaluation.</p> <p>Your application may still resolve string contention through the other methods as described in Module 4 of the Applicant Guidebook.</p> | |

Panel Summary

| Overall Scoring | 11 Point(s) | |
|---|--------------------|-------------------|
| | Earned | Achievable |
| <u>Criteria</u> | | |
| #1: Community Establishment | 4 | 4 |
| #2: Nexus between Proposed String and Community | 0 | 4 |
| #3: Registration Policies | 4 | 4 |
| #4: Community Endorsement | 3 | 4 |
| Total | 11 | 16 |
| Minimum Required Total Score to Pass <u>14</u> | | |

| Criterion #1: Community Establishment | 4/4 Point(s) |
|--|---------------------|
| 1-A Delineation | 2/2 Point(s) |
| <p>The Community Priority Evaluation panel determined that the community as defined by the application met the criterion for Delineation as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook (AGB), as the community defined in the application demonstrates sufficient delineation, organization, and pre-existence. The application received a score of 2 out of 2 points under criterion 1-A: Delineation.</p> <p><u>Delineation</u> Two conditions must be met to fulfill the requirements for delineation: there must be a clear, straightforward membership definition and there must be awareness and recognition of a community (as defined by the application) among its members.</p> | |

According to the application:

The community served by the “.MERCK” TLD space is the collection of corporate entities, their affiliates and subsidiaries which together comprise the Merck Community. Membership in the Merck Community is clearly defined in the following manner.

Members of the Merck Community are the companies which are part of the Merck Group...To be recognized as a member of the Merck Community, a registrant must meet the Eligibility Requirements, which are as follows:

- the registrant is Merck KGaA or a company which is a fully owned subsidiary of Merck KGaA,
- the registrant uses “Merck” as the sole element or as a component of its company name, and
- the registrant uses as its umbrella brand the German figurative trademark No. 30130670, “MERCK”

According to the AGB, “Delineation relates to the membership of a community, where a clear and straightforward membership definition scores high, while an unclear, dispersed or unbound definition scores low.” As required by the AGB, the application shows a clear and straightforward membership definition, given the clarity of Merck KGaA’s own corporate structure, used by the applicant for the purposes of defining the proposed community. The membership is tightly delineated through the three requirements noted above and thus satisfies the AGB’s requirement for a clear and straightforward membership definition.

According to the AGB’s second Delineation criterion, “community” implies “more of cohesion than a mere commonality of interest” and there should be “an awareness and recognition of a community among its members.” The community as defined in the application has awareness and recognition among its members. This is because the community as defined consists entirely of Merck KGaA and its fully-owned subsidiaries. These members cohere by way of a shared corporate governance, financials, and mission statement. In addition, according to the application, “members of the Merck Community are engaged in activities concerning the manufacture, research, development, marketing or distribution of Merck-branded pharmaceuticals and laboratory equipment.”

The Panel determined that the community as defined in the application satisfies both of the conditions to fulfill the requirements for delineation.

Organization

Two conditions must be met to fulfill the requirements for organization: there must be at least one entity mainly dedicated to the community and there must be documented evidence of community activities.

According to the AGB, “*organized* implies that there is at least one entity mainly dedicated to the community, with documented evidence of community activities.” The applicant, Merck KGaA, is itself an organization that is expressly dedicated to its membership, i.e., the community as defined in the application. Merck KGaA has not organized itself or its members for the purposes of obtaining a TLD but represents the members of its defined community as a matter of its mission. Additionally, as required by the AGB, Merck KGaA demonstrates that it engages in community activities. These include common corporate activities such as an annual general meeting.

The Panel determined that the community as defined in the application satisfies both of the conditions to fulfill the requirements for organization.

Pre-existence

To fulfill the requirements for pre-existence, the community must have been active prior to September 2007 (when the new gTLD policy recommendations were completed) and must display an awareness and recognition of a community among its members.

The community as defined in the application, i.e., Merck KGaA and its wholly-owned subsidiaries, was active prior to September 2007 as required by the AGB, section 4.2.3. In 1668 the Merck family began its pharmaceutical business, which has since evolved into a multinational corporation. As discussed above, Merck's membership, in addition to being active prior to 2007, demonstrates the AGB's requirements for awareness and recognition.

The Panel determined that the community as defined in the application fulfills the requirements for pre-existence.

1-B Extension

2/2 Point(s)

The Panel determined that the community as identified in the application met the criterion for Extension specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB, as the application fulfilled the requirements for the size and longevity of the community. The application received a score of 2 out of 2 points under criterion 1-B: Extension.

Size

Two conditions must be met to fulfill the requirements for size: the community must be of considerable size and must display an awareness and recognition of a community among its members.

The community as defined in the application is of considerable size. According to the applicant's website, the company employs around 50,000 people in 68 countries. Additionally, as discussed above, the community defined by the application demonstrates the recognition and awareness required by the AGB.

The Panel determined that the community as defined in the application satisfies both of the conditions to fulfill the requirements for size.

Longevity

Two conditions must be met to fulfill the requirements for longevity: the community must demonstrate longevity and must display an awareness and recognition of a community among its members.

The community as defined in the application demonstrates longevity. Merck KGaA has been in existence for over 300 years, is a publicly traded company, and invested €1.7 billion in research and development in 2015¹. There is clear evidence that the company intends to operate in the future. Additionally, as discussed above, the community defined by the application demonstrates the recognition and awareness required by the AGB.

The Panel determined that the community as defined in the application satisfies both of the conditions to fulfill the requirements for longevity.

Criterion #2: Nexus between Proposed String and Community

0/4 Point(s)

2-A Nexus

0/3 Point(s)

The Panel determined that the application did not meet the criterion for Nexus as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB. The string does not identify or match the name of the community as defined in the application, nor is it a well-known short-form or abbreviation of the community. The application received a score of 0 out of 3 points under criterion 2-A: Nexus.

To receive the maximum score for Nexus, the applied-for string must match the name of the community or be a well-known short-form or abbreviation of the community name. To receive a partial score for Nexus (of 2 out of 3 points; 1 point is not possible), the applied-for string must identify the community. "Identify means that the applied-for string should closely describe the community or the community members, without over-reaching substantially beyond the community."

According to the application:

¹ See http://www.emdgroup.com/m.group.us/emd/images/Merck-Infographic-USA_v3_tcm2252_143783.pdf?Version=

The applied-for “.MERCK” string is identical to the Merck Community’s distinctive corporate name and globally famous trademark. The individual companies which comprise the Merck Community actively self-identify as members of the Merck Community, and utilize the Merck name within their own corporate titles. Members of the public recognize the name Merck as corresponding to the Merck Community and its constituent members.

According to the AGB, “identify means that the applied for string closely describes the community or the community members, *without over-reaching substantially beyond the community*” (AGB, 4.2.3, emphasis added), and the applied-for string must at least identify the community for full or partial credit. Although the string Merck matches the name of the community as defined by the applicant, it also matches the name of another corporate entity known as “Merck” within the US and Canada². This US-based company, Merck & Co, Inc., operates in the pharmaceutical, vaccines, and animal health industry, has 68,000 employees, and had revenue of US\$39.5 billion in 2015. It is therefore a substantial entity also known by the name “Merck”. The Panel has therefore determined that the string is “over-reaching substantially beyond the community” (AGB) it defines because the applied-for string also identifies a substantial entity—Merck in the US and Canada—that is not part of the community defined by the applicant.

The Panel determined that the applied-for string does not match or identify the community or the community members as defined in the application. It therefore does not meet the requirements for Nexus.

2-B Uniqueness

0/1 Point(s)

The Panel determined that the application did not meet the criterion for Uniqueness as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB, as the string does not score a 2 or a 3 on Nexus. The application received a score of 0 out of 1 point under criterion 2-B: Uniqueness.

To fulfill the requirements for Uniqueness, the string must have no other significant meaning beyond identifying the community described in the application and it must also score a 2 or a 3 on Nexus. The string as defined in the application does not demonstrate uniqueness as the string does not score a 2 or a 3 on Nexus and is therefore ineligible for a score of 1 for Uniqueness. This is based on the Panel’s determination that the applied-for string “.MERCK” does not identify the community defined by the application according to AGB standards. Therefore, since the string does not identify the community, it cannot be said to “have no other significant meaning *beyond identifying the community*” (AGB, emphasis added). The Panel determined that the applied-for string does not satisfy the condition to fulfill the requirements for Uniqueness.

Criterion #3: Registration Policies

4/4 Point(s)

3-A Eligibility

1/1 Point(s)

The Panel determined that the application met the criterion for Eligibility as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB, as eligibility is restricted to community members. The application received a maximum score of 1 point under criterion 3-A: Eligibility.

To fulfill the requirements for Eligibility, the registration policies must restrict the eligibility of prospective registrants to community members. According to the application:

To be recognized as a member of the Merck Community, a Registrant must meet the Eligibility Requirements, which are:

- the Registrant is either Merck KGaA, the Registry Operator of the gTLD “.MERCK,” or is a company which is a fully owned subsidiary of Merck KGaA,
- the Registrant uses “Merck” as the sole element or as a component of its company name, and
- the Registrant uses as its umbrella brand the German figurative trademark No. 30130670, “MERCK”

² The company is known as MSD outside of the US and Canada.

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| <p>The application therefore demonstrates adherence to the AGB’s requirement by restricting domain registration to entities who are members of the community defined by the application. The Panel determined that the application satisfies the condition to fulfill the requirements for Eligibility.</p> | |
| <p>3-B Name Selection</p> | <p><i>1/1 Point(s)</i></p> |
| <p>The Panel determined that the application met the criterion for Name Selection as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as name selection rules are consistent with the articulated community-based purpose of the applied-for TLD. The application received a score of 1 out of 1 point under criterion 3-B: Name Selection.</p> | |
| <p>According to the application:</p> | |
| <p>The Merck Community anticipates having an ample supply of relevant domain names available for its use, which will assist in the marketing of Merck products, the delivery of Merck products and services, and the development of new services...Once registered, individual domain names within the “.MERCK” space may be used to provide specific information relevant to particular geographic locations, product lines or research activities. For instance, patients seeking information about a particular medication might search for the name of the drug at PRODUCTNAME.MERCK, or research professionals inquiring about new laboratory equipment might begin their search at EQUIPMENTNAME.MERCK. Thus, “.MERCK” domains will indicate clearly to consumers the content available at the corresponding websites, providing users with an enhanced Internet experience.</p> | |
| <p>Therefore, the Panel determined that the application fulfilled the requirements for Name Selection rules that are consistent with the applicant’s community-based purpose, which is to “enhance communication within, and to raise awareness, heighten confidence, and ensure integrity of information concerning the activities and products of the Merck Community worldwide.”</p> | |
| <p>3-C Content and Use</p> | <p><i>1/1 Point(s)</i></p> |
| <p>The Panel determined that the application met the criterion for Content and Use as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the content and use rules included are consistent with the articulated community-based purpose of the applied-for TLD. The application therefore received a score of 1 point under criterion 3-C: Content and Use.</p> | |
| <p>To fulfill the requirements for Content and Use, the registration policies for content and use must be consistent with the articulated community-based purpose of the applied-for gTLD. According to the application:</p> | |
| <p>Once registered, individual domain names within the “.MERCK” space may be used to provide specific information relevant to particular geographic locations, product lines or research activities...</p> | |
| <p>All “.MERCK” domain names shall be used:</p> <ul style="list-style-type: none"> - to further the mission and purpose of the Merck Community; - to display only content related to the Merck Community’s activities | |
| <p>The application therefore demonstrates adherence to the AGB’s requirement of content and use rules that are consistent with the application’s community-based purpose, which is to “enhance communication within, and to raise awareness, heighten confidence, and ensure integrity of information concerning the activities and products of the Merck Community worldwide.”</p> | |
| <p>3-D Enforcement</p> | <p><i>1/1 Point(s)</i></p> |
| <p>The Panel determined that the application meets the criterion for Enforcement as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB. The application provides specific enforcement measures and outlines a coherent and appropriate appeals mechanisms. The application received a score of 1 point under criterion 3-D: Enforcement.</p> | |

Two conditions must be met to fulfill the requirements for Enforcement: the registration policies must include specific enforcement measures constituting a coherent set, and there must be appropriate appeals mechanisms. According to the application:

Merck KGaA will monitor the space and shall have the right to revoke any domain name registration or re-allocate any domain name registration to a different Community member should Merck KGaA deem such action appropriate for the benefit of the Community.

Merck KGaA will “police” the Merck Community’s online space, which will reduce the risk of abuse. Merck KGaA will operate a verification system to prevent the misuse of Membership IDs and to ensure compliance with the “.MERCK” Registration Restrictions and Use Policy...Merck KGaA, as the Registry Operator, is responsible to the members of the Merck Community for the effective management of the “.MERCK” space, and accordingly will reserve the right in the “.MERCK” Registration Restrictions and Use Policy to make changes to domain name registrations (including their cancellation or transfer) as deemed necessary in the best interests of the Community at large. Any registrant who disagrees with a decision taken by Merck KGaA regarding a registration will have recourse under the MEFRP.

Dispute Resolution: A number of dispute resolution mechanisms will be available to third parties and/or Merck Community members including the: Trademark Post-Delegation Dispute Resolution Procedure, Registry Restrictions Dispute Resolution Procedure, Uniform Domain Name Dispute Resolution Policy, Uniform Rapid Suspension System, Charter Eligibility Dispute Resolution Policy, and the .MERCK Eligibility and Functionality Reconsideration Policy.

The applicant outlined policies that include specific enforcement measures constituting a coherent set and an appeals mechanism. The Panel determined that the application satisfies both of the two conditions to fulfill the requirements for Enforcement and therefore scores 1 point.

Criterion #4: Community Endorsement

3/4 Point(s)

Support for or opposition to a CPE gTLD application may come by way of an application comment on ICANN’s website, attachment to the application, or by correspondence with ICANN. The Panel reviews these comments and documents and as applicable attempts to verify them as per the guidelines published on the ICANN CPE website. Further details and procedures regarding the review and verification process may be found at <http://newgtlds.icann.org/en/applicants/cpe>. The table below summarizes the review and verification of all support for and opposition to the Merck KGaA application for the string “Merck”.

Summary of Review & Verification of Support/Opposition Materials as of 16 May 2016

| | Total Received and Reviewed | Total Valid for Verification | Verification Attempted | Successfully Verified |
|----------------------|-----------------------------|------------------------------|------------------------|-----------------------|
| Application Comments | 1 | 0 | 0 | 0 |
| Attachments to 20(f) | 14 | 11 | 11 | 8 |
| Correspondence | 13 ³ | 12 | 12 | 8 |
| Grand Total | 28 | 23 | 23 | 16 |

³ 12 letters were contained in a single piece of correspondence.

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| 4-A Support | 2/2 Point(s) |
| <p>The Community Priority Evaluation panel determined that the application fully met the criterion for Support specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the applicant had documented support from the recognized community institution(s)/member organization(s).</p> <p>The application received a maximum score of 2 points under criterion 4-A: Support. To receive the maximum score for Support, the applicant is, or has documented support from, the recognized community institution(s)/member organization(s), or has otherwise documented authority to represent the community. “Recognized” means those institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community. To receive a partial score for Support, the applicant must have documented support from at least one group with relevance.</p> <p>Because the applicant, Merck KGaA, is applying for a gTLD intended for use by itself and its wholly-owned subsidiaries, the Panel determined that the applicant was itself the recognized community institution/member organization. A recognized community institution or member organization is one which not only (1) represents the entirety of the community as defined by the application, but is also (2) recognized by the same community as its representative. Merck KGaA, as the parent company, meets these standards. The Community Priority Evaluation Panel determined that the applicant therefore satisfies the requirements for full credit for Support.</p> | |
| 4-B Opposition | 1/2 Point(s) |
| <p>The Community Priority Evaluation panel has determined that the application partially met the criterion for Opposition specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application received no relevant opposition. The application received a score of 1 out of 2 points under criterion 4-B: Opposition.</p> <p>To receive the maximum score for Opposition, the application must not have received any opposition of relevance. To receive a partial score for Opposition, the application must have received opposition from, at most, one relevant group of non-negligible size. The Community Priority Evaluation panel has determined that there is opposition from one relevant group of non-negligible size. The applicant was subject to a legal rights objection (LRO)⁴ from Merck & Co, Inc. The latter asserts trademark rights for .Merck, to which it contends the gTLD string is identical. As discussed under section 2-A Nexus, although the string Merck matches the name of the community as defined by the applicant, it also matches the name of another corporate entity known as “Merck” within the US and Canada (Merck & Co, Inc.)⁵. The Panel has determined that the opposition demonstrated by the LRO is therefore relevant. The Panel considered Merck & Co, Inc.’s opposition to be inclusive of the letters of opposition submitted by a number of its subsidiaries, which the Panel determined to be one relevant group of non-negligible size. The applicant partially met the requirements for Opposition.</p> | |

Disclaimer: Please note that these Community Priority Evaluation results do not necessarily determine the final result of the application. In limited cases the results might be subject to change. These results do not constitute a waiver or amendment of any provision of the AGB or the Registry Agreement. For updated application status and complete details on the program, please refer to the AGB and the ICANN New gTLDs microsite at <newgtlds.icann.org>.

⁴ <https://newgtlds.icann.org/sites/default/files/drsp/25sep13/determination-1-1-980-7217-en.pdf>

⁵ The company is known as MSD outside of the US and Canada.