

## **Comments and advice regarding the drafting of the CCWG Executive Summary.**

These comments, suggestions and advice arise from the draft Executive Summary of the CCWG report which is being prepared for a second Public Consultation in the next few days and follow on from the discussion in two CCWG conference calls on Thursday 30 July 2015.

### **1. A Self-Contained Executive Summary**

The Executive Summary should be self-contained and self-explanatory. The main reason for this is that most readers outside the CWG/CCWG/IGC groups will read the Summary, and nothing else. Furthermore, before any further public consultation can take place, the Summary will have to be translated and published in multiple languages. With this in view please reduce the amount of in-speak, in the interests of normal colloquial usage:

- please remove references to 'Work Streams'; speak of before this, and after that, and of work still to be done;
- please clarify the hierarchy of the various manifestations of the 'communities'. See 'Definitions' below,
- please clarify the changes in the balance of power that are proposed. For instance, point 4, page 2, does not admit that an SO can initiate the removal of a NomCom appointee.

### **2. Definitions**

The Summary and the documents as a whole require a rigorous and consistent set of Definitions, particularly those with legal implications. Including all acronyms.

For instance, we have about ten versions of the concept of the 'community' referred to in the Executive Summary alone (See Annexe). Presumably some of these ambiguities are carried over into the main text.

The same principle applies to a number of other concepts which recur in these texts. Such as Stewardship, multistakeholder, accountability, transparency, ....

### **3. The personal roles of the appointed delegates**

The political responsibilities arising from the proposed system, its implications for human resources and for the ICANN budget have not yet been addressed by CCWG.

The proposed system imposes substantial new obligations on several groups of participants. In most cases, in these new circumstances, responsible execution of their roles, as they have been re-defined, will require additional time and presence both to do the necessary work and – in some circumstances - to survive in the face of intrusive if not hostile surveillance in the name of accountability. In general this will lead to a demand if not a requirement that all these new senior roles in ICANN be (a) full time and (b) remunerated accordingly.

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Specifically:

- **ICANN Board members:** the degree of accountability that is required towards the 'community' will lead to far closer cross checking of proposals emanating from the President and Staff than is presently the case. Confidence between the Board and the Staff will decline. Individual Board members (however elected or appointed) will have to spend much more time on ICANN business. So be it, but expect (a) fewer qualified people to take the professional and personal risks of ICANN Board membership, (b) demands for increased remuneration and staff support to carry out their increased responsibilities and (c) recognition that an ICANN Board position is a full time obligation. Which is in any event probably necessary to avoid conflicts of interest.

- **Members of the 'Community Mechanism Sole Member':** It is not yet clear what might become the personal responsibilities of the appointed members of this new entity. However, the idea that they are in the shadowy background to be wheeled out should the need arise, may be summarily rejected. If this group of AC/SO is to be effective at all, those individuals will have to be as well informed as Board members and even more closely in touch with the 'community at large' to which they are answerable. Otherwise (a) there will not be mutual respect and accountability between the Board, Staff and the Sole Member, (b) the delegates to the Sole Member will be perceived as a façade at the beck and call of certain AC/SO and (c) they will be out of touch with what is really going on in ICANN.

I would expect that the delegates to the Sole Member to require access to information and remuneration at least on a par with that enjoyed by Board members, and a dedicated secretariat within the ICANN staff. Should the Sole Member be effectively called upon to act by virtue of any of the new powers to be conferred upon the 'community', then their roles would rapidly escalate towards a full time commitment, which would have to be remunerated accordingly. Which is in any event probably necessary to avoid conflicts of interest.

- **Independent Appeal Mechanism:** A seven member Standing Panel is proposed. These people will have to be fully up to date and up to speed on a wide range of ICANN-related issues on a permanent basis. They cannot be asked to just 'drop in' for the purposes of any particular appeal. Their appointment would not be without cost. It is not clear how the new IRP proposal would be accessible at lower aggregate cost, although the costs to the plaintiffs could be subsidised. In any event, in the light of recent disputes, it would be essential that both the Standing Panel and the panels of independent arbitrators would have to be diversely multistakeholder and multinational by profession and jurisdiction. Quite a tall order, but there you go, budget included.<sup>1</sup>

4. **'The Executive':** The Summary assimilates the ICANN Board of Directors to the Executive of ICANN. This requires some explanation because it is counter-intuitive. Most people considering ICANN would regard the President and the Staff as the Executive. The Board of Directors is the government. i.e. to pursue this imperfect analogy, the Cabinet.

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1. Having now read the latest re-draft of **4) Appeals Mechanisms**, I think there is no inconsistency with the above comments, particularly regarding costs, budget and independence. The document refers to the costs of maintaining the service (including Panelist salaries).

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To relegate the Board to the Executive implies a substantial shift of political power away from the Board (appointed and elected) towards an 'Empowered Community' – as yet to be defined, unless it is coterminous with the Sole Member - which has no experience in exercising such responsibilities and which would have to devote far more time and resources to do so in the future. This should be made very clear.

### 5. Specific comments

- ***the backstop***: the reference to the backstop in the second paragraph is a perception of the authors with little foundation. As an interested participant over an extended period of time, it has never occurred to me that NTIA would exercise its contractual relationship in the manner implied. On the contrary, (a) the global official community, including – no doubt – NTIA itself, has been acutely aware of the risks to the stability and security of the Internet and the DNS in the event of transferring the contract and (b) politically and diplomatically, any move in that sense would have involved the global official community at a high level: for instance in the EU, agreement to the initial US decision to transfer IANA to ICANN went up to the Council of Ministers.
- ***legal personality***: 'personhood' exists, but it means something different. Not here. What we need here is 'legal personality'.
- ***diversity***: please move this bullet up to the top of the page. In Chapter 5B delete references to diversity relating to the Interim Board. The appointing authorities will have to follow their own obligations to ensure diversity.
- ***human rights***: the matter is still under discussion in CCWG;
- ***government's participation***: on page 3, delete 'assessing':

### 6. The balance of power in the proposed system

Chapter 5B 'Community Powers' of the draft main report describes a very substantial shift of power from the ICANN Board to the 'community' as variously expressed in the document. The Executive Summary could usefully be more explicit and more frank about what is envisaged. One may note that the accountability powers to be vested in the 'community' largely exceed any powers that NTIA ever exercised, whether or not they were implicitly held by NTIA at the time.

In particular, the draft provision (para. 32) that any SO or AC could petition for the removal of a director appointed by the Nominating Committee should be made explicit, as it would fundamentally shift the balance of power between the representatives of the commercial operators and the independent directors.

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Xàbia, 31 July 2015

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### ANNEXE – The 'Communities'

The following concepts and references, taken from the draft Executive Summary, require some rationalisation and definitions. This is essential in so far as certain concepts whether legal, political or procedural will - depending on their definition and interpretation – give rise in practice to quite distinct outcomes. Viz:

- global multistakeholder community
- broad public support (*who?*)
- Empowered Community (i.e. The People) - (*all of us?*)
- enshrining the community review processes
- multistakeholder community (*sans 'global'*)
- community wide discussion
- community driven process
- the community itself
- the Community Mechanism (now in Upper Case)
- approval by the community (But under 'Fundamental Bylaws, see Power #3', which may or may not refer to the Empowered Community, i.e. the People).