5A) Community Mechanism as a Sole Member Model

In developing a mechanism to empower the ICANN multistakeholder community, the CCWG-Accountability agreed on the following:

- To enhance ICANN's accountability.

- To be as restrained as possible in the degree of structural or organizing changes required in ICANN to create the mechanism for these powers.

- To organize the mechanism along the same lines as the community – that is, in line and compatible with the current SO/AC structures (without making it impossible to change these in future).

- To include the following powers which would be legally enforceable

    - Reconsider/reject budget or strategic/operating plans (CWG-Stewardship dependency - Budget)

    - Reconsider/reject changes to ICANN "standard" Bylaws

    - Approve changes to "Fundamental" Bylaws

    - Appoint and remove individual ICANN Directors (CWG-Stewardship dependency)

    - Recall the entire ICANN Board (CWG-Stewardship dependency)

    - Reconsider/reject Board decisions relating to reviews of the IANA functions; including ability to trigger a separation of PTI (CWG-Stewardship dependency)

- To address the CWG-Stewardship dependencies

The first CCWG-Accountability draft proposal presented the community mechanism as an SO/AC Membership Model.[1] However, there were significant concerns expressed in the Public Comment from 4 May – 3 June 2015, and in order to respond to the feedback received, the CCWG-Accountability initiated work on alternative solutions. At the Paris meeting on 17-18 July 2015, the CCWG-Accountability considered 3 distinct models:

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[1] For further detail on the proposed SO/AC Membership Model, please see the first draft proposal (Section 5.1.1). In addition, please refer to Appendix [G] that provides a comparison of the three models.

- The "Community Mechanism as Sole Member Model (CMSM)" as an alternative that builds upon the more favorable concepts in the other models and simplifies certain implementation aspects. Decisions of the SOs/ACs in the Community Mechanism would directly determine exercise of the rights of the Community Mechanism as Sole Member ("CMSM").
- The "Empowered SO/AC Designator Model" would formalize and expand upon the current roles of SOs and ACs in designating ICANN directors for exercise of community powers without a membership body but would not require legal personhood and would allow opt-in re legal status.
- The "Empowered SO/AC Membership Model" would rely on direct participation by SOs and ACs in a potential or actual membership body for exercise of community powers but would not require legal personhood and would allow opt-in re legal status.

Following discussions, and consultations with external legal counsel, the CCWG-Accountability concluded that it should proceed in its next public consultation only with the Community Mechanism as Sole Member Model (CMSM) given the understanding that:

- It provides the required legal enforceability that the Empowered SO/AC Designator Model could not.
- It removes the problematic requirement for some SOs/ACs that they become legal persons to participate in the Empowered SO/AC Membership Model.
- It avoids the problem of differential rights with respect to statutory rights of Members associated with the Empowered SO/AC Membership Model.
- It limits the issues related to the statutory rights of members associated with the Empowered SO/AC Membership Model which would allow members to dissolve corporation and bring derivative suits.

The subsections below explain the Sole Member Model.

5A.1 The Community Mechanism: Sole Member Model

As the name implies the Sole Member Model (CMSM) would have ICANN become a California public benefit corporation (also known as a not-for-profit corporation in some jurisdictions) with only one member (ICANN currently is a California public benefit corporation without members).

As required by law the member in this model would have to be a legal person and it is expected that it would be created as an Unincorporated Association (UA) given this type of legal person has few requirements for operating (e.g. no need for officers or directors) and is simple to create.

Only ICANN SOs and ACs could participate in this Member. Participating in the Member would allow the participating SOs/ACs, as a group, to provide instructions to the Member to use its powers (such as approving a change to the ICANN Bylaws). The SOs and ACs that wish to participate in the Member would simply indicate they wish to do so at the time of its

creation and would not be required to make any changes to their current SO/AC structure to enable this. SOs or ACs choosing not to participate initially, or new SOs or ACs that could be created at a later date, could choose to participate in the Member at any time but this would require the current participants to approve this and the Bylaws to be amended to reflect their participation.

The SOs/ACs that participate in the Member would do so according to a set of rules described in the ICANN Bylaws that would be created specifically for this purpose. The SOs/ACs could only instruct the Member to exercise its powers as a group and would do so by using a voting mechanism as defined in the Bylaws (the exception to acting as a group is related to the appointing and removing individual directors – see next paragraph for details). The rules would describe the number of votes each SO/AC would have in this process and the minimum number of votes required to instruct the Member to exercise a power. Each power could have a different minimum number of votes required to instruct the Member (e.g. approving a Bylaw change could require a minimum of 66% support vs. approving a fundamental Bylaw change could require a minimum of 75% support). Each SO/AC would be responsible for defining their processes for voting under these rules.

As a membership organization ICANN directors have to be appointed or removed by the Member. In order to maintain the current arrangements for the appointment of directors, which is a requirement, the Member rules would require the Member to use its power to appoint or remove a director to/from the ICANN Board on the instructions of the specific SO/AC/NomCom responsible for appointing that director as per the current ICANN Bylaws, without requiring a vote.

Early indications are that the ASO, ccNSO, GNSO and ALAC would be the initial set of participants in the member (however all SOs/ACs can decide to participate until the creation of the Member or at a later date). Each of these SOs/ACs would have 5 votes on any proposal to instruct the member (for a total of 20 votes). There is no requirement or expectation than a participating SO/AC cast all its votes identically for a given issue (meaning all 5 in support or all 5 against).

These rules would describe the voting requirement

The Community Mechanism in which SOs/ACs participate to exercise community powers would be the Sole Member of ICANN. Decisions of the SOs/ACs in the Community Mechanism would directly determine exercise of the rights of the Community Mechanism as Sole Member ("CMSM").

ICANN Bylaws would establish CMSM as the Sole Member of ICANN with legal personhood (most probably an Unincorporated Association or UA) and describe the composition and powers of the CMSM:

  • Composition would include the same SOs/ACs now contemplated to participate in the models described herein; No legal personhood would be required for SOs/ACs (SO and ACs would not require any modifications to their current structures).

- The SOs/ACs and the NomCom would cause the CMSM to elect and remove the respective chosen ICANN directors each SO/AC and NomCom is entitled to select and remove.

- SOs/ACs could only exercise powers as a group (voting in the Community Mechanism as Sole Member with the weighted voting contemplated).

- The decisions, rights and powers of the CMSM could be enforced through the internal IRP process with the force of binding arbitration, further backed if necessary through judicial proceedings.

SOs/ACs could exercise the proposed community powers as soon as these are adopted in the Bylaws.

All of the existing functions and work of the SO/ACs would continue being done within the framework of the ICANN Bylaws. For example, the mechanism for instructing the member's actions would be a community voting mechanism of all the participating SO/ACs that would be coded into the bylaws.

There would be no need for individuals or organizations to change the ways in which they participate in ICANN or the SO/ACs as a result of creating the member as an unincorporated association. SO/ACs would have the choice of opting in and participating in this new accountability system at any time, or to simply keep on doing what they do today. It is important to note that SO/ACs would have to officially signify their choice to participate or not given the Bylaws would need to be adjusted to recognize their participating in setting the voting limits. If an SO/AC decides to participate there is no requirement for it to vote.

Therefore, the Sole Member Model provides all of the powers, the rights and the enforceability that were sought in the SO/AC Membership Model, and removes the concerns associated with SO/ACs needing to be legal persons under the original Empowered SO/AC Membership Model.

Please see the additional detail that explains this model set out in Appendix G.

5A.2 Influence in the Community Mechanism

The CCWG-Accountability considered the decision weights of the various parts of the community. The following table sets out the community voting mechanism most supported approach within the CCWG-Accountability.

COMMUNITY SEGMENT	COMMUNITY MECHANISM "VOTES"
ASO	5
ccNSO	5
GNSO	5

At-Large	5

Each participating SO/AC would have 5 fractional votes. Although each SO/AC has a specific number of votes, those votes may be subdivided, within limits, however the SO/AC decided and, in particular, fractional votes are allowed. This allows voting capability to be allocated within the SO/AC. Such allotment would be done through a formal decision of the SO/AC. The SO/AC or the appropriate sub-group shall designate the individuals exercising the community rights.

The community mechanism gives the bulk of influence on an equal basis between the three SOs for which ICANN deals with policy development and the At-Large Advisory Committee (which was structurally designed to represent Internet users within ICANN). If another AC chooses to join at a later stage, they would receive an equal amount of votes.

The logic for 5 "votes" in the community mechanism for the higher number is to allow for greater diversity of views, including the ability to represent all the ICANN regions in each participating group.

In addition, the likelihood of capture and the consequences of capture for the sole membership model would be lowered because there needs to be a collaborative approach by the groups in the single membership associated with voting thresholds for those powers to be exercised.

The process of exercising votes, and the facilitator of the discussion of exercising the community power will be overseen by an ICANN Community Assembly (ICA). Each SO/AC appoints one or more members to the ICA, each with a mandate to exercise some or all of the SO/AC votes. The maximum number of ICA members per SO/AC is eight.

a. It is not expected that the ICA will meet unless there is an issue raised by SO/ACs that requires consideration of whether to exercise a community power.

b. The ICA will be self-organized and appoints its own Chair who shall have the authority to conduct meetings.

c. The ICA would be the forum to garner support from other SO/ACs and from the further community

d. Any votes taken to exercise community powers would need to be fully transparent and public, and the vote exercised by a representative of part of the community would need to be traceable to a decision of those who are bring represented.

e. Any SO/AC that decides to not participate in exercising community powers in general or in a particular case will be deemed to have abstained on all votes allocated to that SO/AC.

f. Abstentions shall not count as NO votes but reduce the overall number of ballots to be considered.

g. For each power, there will be a critical number of YES votes which will be required to exercise the power.

h. SO/ACs that chose to opt out of voting in general or on a particular issue are nevertheless welcome to participate in ICA discussions and/or provide any advice that they deem appropriate.

i. Should an issue arise between ICANN meetings, it is possible that a face-to-face meeting might be required. Although the likelihood of this happening is small, ICANN should annually budget for one such meeting.

Unresolved Issue

This issue was brought up by several people at the Buenos Aires CCWG meeting. This issue is whether the special treatment accorded GAC advice (Article XI, Section 2.1j-k - https://www.icann.org/resources/pages/governance/bylaws-en/#XI-2.1j, after factoring in ATRT2 Recommendation 9.1 the Board must discuss its refusal to follow advice with the GAC and attempt to find common ground) should be allowed to co-exist with the GAC participating in the Community Council.[4] Alternatively, if not, the Bylaw provision would have to be deleted if the GAC were allowed to participate in the community powers. The sub-group was divided on this issue.

One suggestion was that if the GAC participates in the Community Council, it should not then be able to give formal advice to the Board contrary to a decision of the Community Council. It was pointed out that such GAC advice could have pre-dated the Community Council decision.

5A.3. Governance models and community powers

Please refer to Appendix G produced by legal counsel.

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[4] ATRT Recommendation 9.1: ICANN Bylaws Article XI should be amended to include the following language to mandate Board Response to Advisory Committee Formal Advice: *The ICANN Board will respond in a timely manner to formal advice from all Advisory Committees, explaining what action it took and the rationale for doing so.*

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