

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 address the CWG-Stewardship dependencies
- 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 (CWG – Stewardship dependency)
 - 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 abilitythe procedure to triggerimplement a separation ofprocess relating to PTI (CWG-Stewardship dependency)
- ~~To address the CWG-Stewardship dependencies~~

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The first CCWG-Accountability draft proposal presented as a reference model for the community mechanism ~~as~~ an SO/AC Membership Model.¹ However, there were significant

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.

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:

- ~~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 (except for enforceability) and would allow opt-in re legal status.~~
- ~~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 (except for enforceability) and would allow opt-in re legal status.~~
- ~~The “Community Mechanism as Sole Member Model (CMSM)” as Model is 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~~ CMSM Model ~~(CMSM)~~ given the understanding that:

- It provides the required legal enforceability that the Empowered SO/AC Designator Model ~~and Empowered SO/AC Membership Model~~ could not.
- It removes the problematic requirement for some SOs/ACs that they become legal persons, ~~whether~~ to participate ~~as a member~~ in the Empowered SO/AC Membership Model or to enforce rights in both the Empowered SO/AC Membership Model and Empowered SO/AC Designator Model.
- It avoids the problem of differential rights with respect to statutory rights of ~~Members~~ SOs/ACs that become members compared to SOs/ACs that were not members associated with the Empowered SO/AC Membership Model.
- ~~By allowing action only upon support of the community through the Community Mechanism, 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~~ ICANN and bring derivative suits.

The subsections below explain the ~~Sole Member~~ CMSM Model ~~however.~~ (As with any model, it is ~~important to note anticipated~~ that ~~the CMSM is currently based on the initial work there~~ may be a level of external legal counsel on this topic and detail that work is ongoing to fully

~~develop all aspects must be resolved in the drafting of this model-appropriate Bylaws, which Bylaws will be subject to further review and approval by the ICANN community.)~~

5A.1 The Community Mechanism: as Sole Member (CMSM) Model

As the name implies, under the Community Mechanism as Sole Member (CMSM) Model (CMSM) ICANN would have ICANN become remain 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-), but its internal governance structure would be transformed from a structure having no members, to a structure having a single member. This change will not require any re-incorporation or affect ICANN's status as a nonprofit or tax-exempt organization, and can be simply implemented through Bylaw amendments approved by the ICANN Board.

As required by law, ~~the memberSole Member in this modelthe CMSM Model would have to be a legal person and it is expected that it would be created through the ICANN Bylaws as an Unincorporated Association (UA) given this type of legal person has few requirements for operating (e.g. no need for unincorporated association. The CMSM Model would rely on direct participation by SOs and ACs in this sole member for exercise of community powers but would not require any of them to have legal personhood. The Sole Member would have no officers or directors) and is simple to create no assets.~~

~~Only ICANNICANN's SOs and ACs couldwould~~ participate in this Sole Member. Participating in the Sole Member would allow the participating SOs/ACs, as a group, to provide instructions to the Sole Member to use its member powers (such to exercise the community powers only as approving directed by the SOs and ACs (for example, to approve a change to the ICANN Bylaws). The SOs and ACs that wish to participate in the Sole 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 Sole Member at any time but this would require the current participants to approve this and the ICANN Bylaws to be amended to reflect their participation.

The SOs/ACs that participate in the Sole 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 Sole 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 of individual directors—see, as explained in the 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 Sole Member to exercise a power. Each power could have a different minimum number of votes required to instruct the Sole 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. The chair of each SO/AC would be responsible for communicating the votes or decisions of the SO/AC to the ICANN Board. This pass-through of cumulative votes and decisions would become the act of the Sole Member.

~~As a membership organization~~ ICANN directors ~~have to~~ would technically be appointed or removed by the Sole Member ~~but the Sole Member would only be capable of acting at the direction of the entities specified in the Bylaws (SOs/ACs/NomCom) with respect to the appointment and removal of individual directors~~. In order to maintain the current arrangements for the appointment of directors, which is a requirement pursuant to the ICANN Bylaws, the Member rules expressed in ICANN's Bylaws would require the Sole 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~~ community-wide 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 which requires a vote (for a total of 20 votes). There is no requirement or expectation that a participating SO/AC cast all its votes identically for a given issue (meaning all 5 in support or all 5 against).

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

DRAFTING NOTE – ~~The issue of what statutory rights and obligations are applicable to the Member and the impact of these remain to be clarified and agreed to.~~

Comment [1]: Seems inconsistent with visual summary slide 11 which indicates that a vote of the member would be required.

5A.2 Influence in the Community Mechanism

Drafting note: WP1 will be completing the details on voting thresholds.

5A.3. Governance models and community powers

Please refer to Appendix G produced by legal counsel.