ICANN's Next Top Super Model -- Analysis of public comments on the Community Mechanism as Sole Member from the CCWG's 2nd draft Proposal

From CCWG 2nd Draft Proposal

The CCWG 2nd draft proposal describes the Reference Model, the Sole Member Model (SMM) as the mechanism for exercising the community powers (p.49):

> *305. As the name implies, under the Community Mechanism as Sole Member Model ICANN would remain a California public benefit corporation (also known as a not-for-profit corporation in some jurisdictions), 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.*
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> *306. As required by law, the Sole Member in the Community Mechanism as Sole Member Model would be a legal person created through the ICANN Bylaws as an unincorporated association. The Community Mechanism as Sole Member 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 no assets.*
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> *307. ICANN's SOs and ACs would participate in this Sole Member. Participating in the Sole Member would allow the participating SOs and ACs, as a group, to provide instructions to the Sole Member to use its member powers to exercise the community powers only as directed by the SOs and ACs (for example, to approve change to the Fundamental Bylaws). Participating SOs and ACs would not meet as the Member, and no representatives would cast votes. The directions for voting would come from the SOs and ACs themselves. No SO or AC, or any individual, has to 'join' ICANN or the Sole Member in order to exercise their rights, and no new legal obligations arise for any stakeholder.*
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> *308. It is important that before participating SOs and ACs make decisions regarding how to vote in exercising a community power, they discuss the matter among themselves and with each other. Section 6.3 below sets out the CCWG-Accountability's proposal on how to implement a simple system to do this, based on experience with the work of the CCWG-Accountability itself.*
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> *309. The SOs and ACs that wish to participate by voting 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 through voting initially could opt in later as set out in Section 6.2. New SOs or ACs that are 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.*
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> *310. The SOs and ACs that participate in voting 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 and 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, as explained in the next paragraph). The rules would describe the number of votes each SO and 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. rejecting a Bylaw change will require a minimum of 66% support vs. approving a Fundamental Bylaw change will require a minimum of 75% support). Each SO and AC would be responsible for defining their processes for voting under these rules. The Chair of each SO and AC would be responsible for communicating the votes or decisions of the SO and AC to the ICANN Board. This pass-through of cumulative votes and decisions would become the act of the Sole Member.

311. ICANN Directors would technically be appointed or removed by the Sole Member.

312. The Sole Member would only be capable of acting at the direction of the entities specified in the Bylaws (SOs, ACs, and NomCom) with respect to the appointment of individual Directors. In order to maintain the current arrangements for such appointment, the member rules expressed in ICANN's Bylaws would require the Sole Member to use its power to appoint a director on the instructions of the specific SO, AC, and NomCom responsible for appointing that director as per the current ICANN Bylaws, without requiring a community-wide vote.

313. For Director removal, those directors appointed by an SO or the At-Large community could be removed by that SO or that community only. The Sole Member implements their decision. For directors appointed by NomCom, any SO or AC would be able to petition for removal and a process of SOs and ACs participating in the Community Mechanism as Sole Member would vote on removal as detailed in Section 6.2.

314. Early indications are that the ASO, ccNSO, GNSO and ALAC would be the initial set of voting participants in the Sole Member (with remaining and future SOs and ACs able to opt-in to voting participation). Each of these aforementioned SOs and ACs would have 5 votes on any proposal to instruct the Sole Member (for a total of 20 votes at the start of the system).

315. There is no requirement or expectation than a participating SO or AC cast all its votes identically for a given issue (meaning all 5 in support or all 5 against). Instead, CCWG-Accountability anticipates that the votes each SO and AC casts will be a reflection of the balance of views within that SO or AC (or where possible of that sub-division, where votes have been allocated to sub- divisions). That is, block voting (casting all votes in favor or against the use of a power, even where there are diverse views) is not encouraged.

316. Under these arrangements the decisions and powers of the Community Mechanism as Sole Member could be enforced through the internal Independent Review Panel process with the force of binding arbitration and, if necessary, further backed through judicial proceedings.

317. In circumstances where the Bylaws provide for the resolution of disputes between ICANN and other parties through the IRP, the Community Mechanism as Sole Member will also have the ability to require ICANN to enter into the IRP and abide by its outcome, should it not do so voluntarily. This power to require ICANN to abide by its Bylaws through the use of the IRP would be set forth in the Bylaws, backed, if necessary, due to the Community Mechanism as Sole Member membership status through judicial proceedings.

318. As the Sole Member of ICANN, the Community Mechanism would enjoy all the rights that the law provides to members. The general approach of the CCWG-Accountability is that none of these statutory rights should be easily exercised, other than the power mentioned in the preceding paragraph. As such, the recommendation is that to deploy any of those other statutory rights should require very strong to full consensus of the participating SOs and ACs (that is, a significant supermajority vote); In contrast, the power to require ICANN to enter into an IRP through recourse to judicial proceedings if necessary should be exercisable based on a simple majority vote.

Public Comments (augmented by LA discussions)

- 51 public commenters raised the issue specifically.
- 48% of commenters raised "concerns" with the Model.
- 38% of commenters "agreed" with the Model.
- 19% of commenters "disagreed" with the Model.
- 15% of commenters were "neutral" on the Model.
- 10% of commenters expressed preference for the "designator" Model and 13% prefer "other" Model.
- 19% of commenters expressed need for legal enforceability of community powers.

At least two board members in LA said the board would not support the sole member model proposed by CCWG.

Raw numbers

Model	Confusion/ Clarification	New Idea	Concerns	Agreement	Disagreement	Neutral	Improvement since 1st	Prefers Designator	Prefers Other	Opt-in/ Opt-out?	Need for legal enforcement / empowerment
Count	4	1	23	18	9	7	7	5	6	6	9
percentage	8.33%	2.08%	47.92%	37.50%	18.75%	14.58%	14.58%	10.42%	12.50%	12.50%	18.75%

Areas of Consensus

- There is support and appreciation for the enforceability of community powers.

- Sole Member Model is an improvement from 1st draft Reference Model: SO/AC Membership Model.

- CWG-Stewardship: "We believe that the powers provided by the CCWG-Accountability draft proposal as described above and the community empowerment mechanism described in the proposal together adequately satisfy these CWG-Stewardship requirements, including by ensuring that the community powers specified in the CWG-Stewardship final transition proposal are legally enforceable."

- Support for principle of community mechanism to enforce community powers.

- There is consensus to be as restrained as possible in the degree of structural or organization changes required in ICANN to create the mechanism for these powers.

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

- There is consensus about the importance of having open community deliberation as part of the exercise of Community powers (the Community Forum).

Areas Needing Clarification/Refinement

- Further detail needed of the process surrounding the Community Forum.

- Indications from commenters that full support and, in some cases determining a position, would not be achievable until further detail and clarification were provided.

- Calls for more simplicity in the Model and its explanation.

- Must be a minimum number of SOs and ACs participating for the Model to work.

Areas of Concern/Divergence

- Lack of consensus on whether the community should take decisions through formal voting or through establishing consensus.

- Lack of consensus on the voting allocations between SOs and ACs. Comments expressed concern for "dilution and authority and influence of SO community". Most commenters on this issue expressed support for voting allocations along the lines of ICANN's existing board structure.

- Lack of consensus on the composition of the community within the Model (e.g. role of Advisory Committees). Comments indicated concern over the possible "duality" of the governmental role in the Model. Several comments expressed concern that providing votes to GAC will fail to meet NTIA requirements.[1]

- Comments expressed concern over the extent of changes required in ICANN's structure with the model.

- Proposal that enforceability for narrowed community powers could be provided for by binding arbitration to enforce fundamental bylaws, instead of the CMSM Model.

Options for CCWG Consideration

The Giant Elephant in the Room:
1. Continue to evolve SMM to address specific points of concern raised in public comment, while maintaining "membership" model.[2]

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[1] GAC Public Comment: "At this point in time, GAC has not determined whether to participate or not in the "Community Mechanism" as a voting entity."

[2] ICANN Board Public Comment: "The ICANN Board does not support this proposal. While the Board is supportive of a change in the balance of power among the community and the Board on operational matters, and agrees with the CCWG-Accountability Proposal elements that enhance those community powers, the Board believes that a Sole Member Model may introduce too much change and may lead to a delay in the IANA Stewardship Transition until that model has been working in practice. […] To support and enforce the new community powers that are proposed within the CCWG-Accountability Proposal, the ICANN Board proposes for consideration an alternative called the Multistakeholder Enforcement Mechanism (MEM) that leverages the ICANN's existing governance structure as well as the existing structure of SOs and ACs within ICANN. The MEM ensures that that the community has access to binding arbitration to enforce the new community powers, without requiring the formation of a member or a community voting mechanism. The binding arbitration will be enforceable under the laws of the State of California, and other courts as appropriate. Please see the MEM summary and FAQ for more details. The Board's approach relies on the broader SO and AC multistakeholder model to reach ultimate decisions to influence operational matters, as opposed to the collection of whatever grouping of SOs or ACs that happen to be part of (or are eligible to be part of) the Sole Member at a particular time. This provides simplicity as well as predictability on the scope of the community that is able to take these decisions at any time."

2. Explore how maximum legal enforcement can be achieved for desired community powers under an empowered designator model for comparison.

3. Sub-Issues within the Models:

1) Single Member and Single Designator Models
   a) Voting or consensus basis;
      i) Move away from "voting" and towards "consensus" for decision-making purposes within the community mechanism.
      ii) Consider community powers only may be exercised by the community as a whole, based on consensus or near consensus of the whole of it.
      iii) Consider option of consensus definition depending on absence of recommendations or advice against when using community powers.
      iv) Consider option of consensus definition depending on absence of recommendations or advice against.
   b) Reconsider role of the ACs in the Model's community forum. Should some ACs be non-voting / decisional and rather, advisory only?
   c) Reconsider voting allocations between SOs-ACs to be more in-line with balance of appointments to ICANN board.
   d) Consideration of advice from those SOs and ACs opting out of the decision-making mechanism;•
   e) Maintaining balance of power to prevent capture of/by those opting-in to the decision-making mechanism;•
   f) Factoring in conflicts of interest and fiduciary or other responsibilities (such as public interest) into the decision-making design;•
   g) Ensuring accountability of the new structure to the broader community and the global public interest.

2) MEM based issues
   a) Decide which powers, if any, can be enforced in a MEM based model, and if they are sufficient to meet community powers and other requirements.
   b) Ascertain whether community can enter binding arbitration without personhood.
   c) Ascertain whether community has standing in court without personhood.
   d) Ascertain whether ICANN can be bound by a binding arbitration if it declines to enter into it or otherwise attempts to frustrate the process.
   e) Ascertain the level of personal or other risk community members must undertake to exercise or enforce any of the community powers.
   f) Ascertain whether the MEM meets CWG-Stewardship, NTIA, and other external requirements.
   g) Ascertain whether the MEM meets all required stress tests.

3) Issues pertinent to either model
   a) decision-making process has to be absolutely capture-proof and require that any exercise of community powers is backed by a consensus or near consensus of the whole community

4) Consider determining a "fixed understanding" of who will vote or otherwise make decisions in the mechanism before decisions are made by CCWG about which Model to finally propose.