

Legal Governance for Open Source Projects

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Governance

A governance model describes

- the roles that project participants can take on and the process for decision making within the project.*
- the ground rules for participation in the project and*
- the processes for communicating and sharing within the project team and community.*

*In other words it is the governance model that prevents an open source project from descending into chaos = **Sustainability***

Key questions for Open Source Communities

- What affects the different governance models for OSC?
- What has to be taken into account for appropriate governance in OSC?
- What do we have to understand in order to be able to decide on an appropriate governance model for an OSC?

Usual factors to understand: determinants

- Types of stakeholders and roles (fixers, developers, subject matter experts, coordinators/managers)
- Types of project (developer software, user applications)
- Types of motivations for the stakeholders/participants (intrinsic, extrinsic)
- Stage of Project development (Introduction, growth, maturity, revival)
- Potential barriers and risks
- Points of conflict (roadmap, infrastructure, membership, goals)

How to determine the Legal Governance Structure (in 9 steps)

1. Intro: Legal Governance Process
2. Objective of legal governance structure (LGS)
 - What must the LGS achieve
 - Purpose benchmark for deciding LGS: does it achieve these objectives?
3. Criteria for selection of legal structure
 - What barriers must the LG overcome
 - Quality benchmarks for deciding LGS: does it comply with these criteria?
4. Levels of governance and roles and processes for the LG (what)
 - Definition of role and responsibilities for LG – áreas of authority
 - What the LGS must do: Is it authorized to take these decisions?
5. Bodies within legal structure (who and how)
 - Division of powers among LG bodies (Assembly, Board, Committees, Work Groups)
 - Who takes the decisions and how: how are responsibilities/checks and balances set?
6. Types of legal entity
7. Management of legal aspects
8. Questions for the Community
9. Terms of Governance: documentation

1. Legal elements to decide upon (legal Governance mechanisms)

- What are the formal components of the legal Governance
 - Roles, rights and obligations
 - Decision making: bodies (who), processes (how), areas (what)
- What will be the best Legal structure
 - Formal entity?
 - Contractual relationship?
 - Nothing?
- Specific focus on legal management decisions
 - IPR
 - Contracts
 - Liability
 - Conflict resolution

2. Objectives of the LGS

- The main functions of the entity, which are core criteria for deciding on the type of legal entity and the division of roles and responsibilities in the constitutional documentation, are:
 - To be the independent “umbrella” for overall governance of the community (independent of the members, and independent of the technical and user committees)
 - To be the umbrella for community activities
 - To separate formal legal management from operative management
 - To be accountable to the community (through an agreed participatory process)
 - To set up the bodies and processes for formal decision takingTo set up the forum and process for the resolution of the highest level of conflicts
 - to minimize the legal liability of developers and code contributors
 - to contract with third parties
 - to channel financing funds
 - to allow the internationalization of the project and community

Discussion Example

- For example, both an Association and a Foundation provide a separate legal identity (persona) e.g. for contracting purposes, and also limited liability for its members (a cooperative may or may not), while imposing duties of diligence and honesty on the management board.
- All forms of entity can establish rules for conflict resolution, and entry/exit from the entity.
- As regards internationalisation, the Spanish “Association” admits foreign members, while the “Patronato” can be from anywhere, the “Protectorado” of a Foundation is a Spanish public entity, something that a foreign public body may find difficult to assume.
- Also, for both entities, the geographic scope must be decided, and if we are talking about nation or international actions, then we are looking at national level associations or foundations, with the Ministry of Education and Culture as sole Protector

3. Criteria for selecting the type of LGS

To overcome barriers and reticence to creating a legal entity, there are usually 4 key characteristics for the legal entity and the legal and organizational governance processes:

- **Participatory:** the proposed legal structure and processes must involve the contribution of the community itself. This is proper of the Metadecidim community
- **Clarity and simplicity:** the proposed legal structure and processes must reduce (legal) technical complexity and provide clear alternatives for community decision making (both in the creation stage and management/operations stage)
- **Lightweight and flexible:** the proposed legal structure and processes must involve the minimum bureaucracy (both in the process and in the results), and be able to be modified to take into account evolution of the community and its environment
- **Transparency:** both the process for developing the legal structure and its implementation and ongoing performance must be transparent at all time to all members of the community.

Discussion

For example,

- an Association is more flexible and lightweight than a Foundation, and is more participatory in terms of governance, by providing key roles for (formal) members through the Members Meetings.
- However, a Foundation has greater public oversight (through the “Protectorado”, although this oversight is not through the community but through a public administrative body).

4. Areas of decision making

- 3 main levels: LGS involved in Macro and Meso
 - Micro: personal roles , interpersonal relations, development processes,
 - Macro: internal dynamics, intern-institutional, policies and guidelines, community processes, events, leadership and control, conflict resolution
 - Meso: external contacts and contracts
- 4 main areas:
 - Legal management and decision-making
 - Community management
 - Technical
 - Economic

Discussion- Legal competences

- Formal governance
 - Defining decisions making processes of the legal entity (bodies, meetings, board decisions, minutes, etc.)
 - Defining, signing and enforcing Membership Agreement
 - Monitoring and enforcing decisions and decision-making process
 - Publish governance documentation (rules, events, agendas, minutes, decisions)
- IPR
 - Establish the project license and the process for curating this license and IPRs
 - Defending the legal interests of the community, including IPRs
 - Own/hold the trademark in the project as fiduciary for the project members
- Contracting
 - Entering into agreements with third parties (sponsors, PA, etc.)

Discussion – Community competences

- Establish criteria for membership
- Establish the forum and publish the system for community governance (e.g. meritocratic, hierarchical, committee based, etc.)
- Provide the rules for community governance processes, including membership, committees, decisions
- Definition of key decision making processes, supervision and monitoring (and enforcing)
- Establishing Community Board or Committee

Discussion – Technical competences

- Establish the forum and publish the system for technical governance (e.g. meritocratic, hierarchical, committee based, etc.)
- Provide the rules for technical and community governance processes, including membership, committees, decisions
- Establishing Technical Board / Engineering Board or Committee

Discussion - Economic competences

- Formal economic decisions and processes of the legal entity (accounts, reports, etc.)
- Raise and channel public and private funds for development and outreach (community activities)
- Participate as legal entity in funded / subsidized projects to further the technical and community aims of the project
- Pay salaries of key members of the project (CEO/Directors, lead developers, etc.)
- Establishing Eco-Fin Board or Committee

5. Formal Governance Bodies

- LGS defines the bodies that make decisions
- Normal set of bodies (irrespective of entity type)
 - Assembly (of members):
 - the highest level of decision taking is at membership level (e.g. Shareholders meeting for a company, Members meeting for Association, etc.). they usually have the power to review and dismiss the executive management (Board, Junta, etc.),
 - Board:
 - designated or elected group of people responsible for the management and oversight the organization.
 - Committees
 - delegate decisions on technical, community and organisational matters to formal committees set up within the entity or organisation
 - Working Groups
 - informal or ad hoc groups working on specific issues / special interest groups

Debate - Assembly

- Elements

- What type / categories / levels of members are there / should there be?
- Who are original members and what role do they have?
- How are new members admitted and removed (process)
- What rights and obligations do members have

- Example:

- *For example, if the Project is governed by an Association, if a City or Company wants to have influence at this level, it has to join as Member of the Association, and agree to the Membership Agreement and the By-Laws of the Association. These may embed, for example the Social Contract, and require payment of one-off or annual fees.*
- *However not all members of the Project community may want to be bound by these rules, but may still want to participate as a non-Member participant of the community, e.g, as a member of a working group or committee.*
- *For a Foundation, the equivalent role would be the “Protector”, where public administrations may intervene (at very high level), to verify the management by the Board (Patronato).*

Debate - Board

- Elements

- Number of board members
- Term of board members
- Process for election / rotation
- Process for removing
- Quorum, process and majorities for decision taking
- Interrelationship with Members and Community
- Interrelationship with Committees

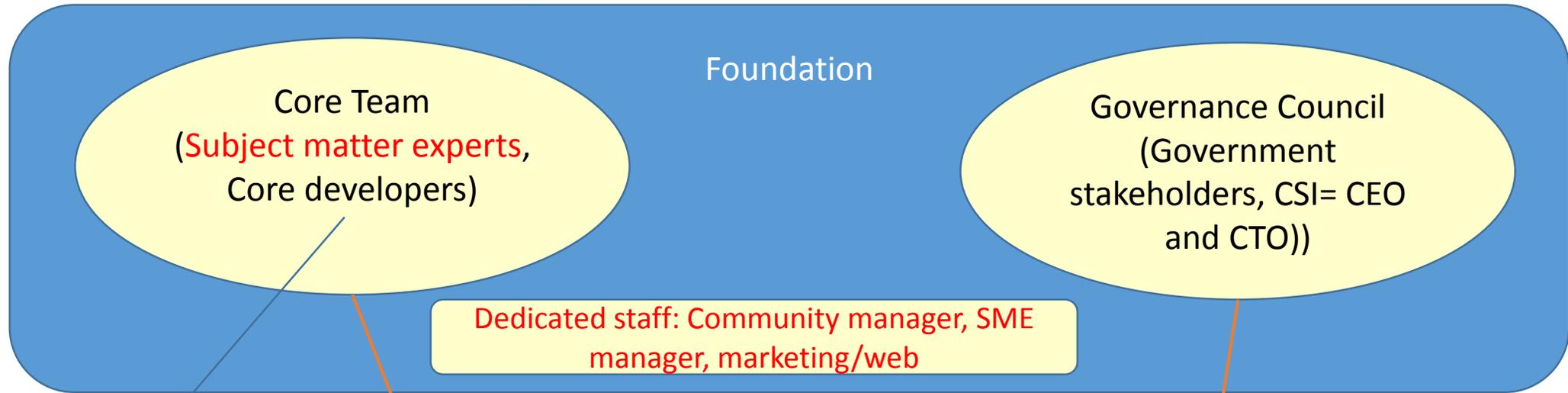
- Example

- *In many larger Projects, the members could elect an Executive Board (or committee, “ExCom”), rotating, with community oversight*
- *For the project decision-making process, the community needs to have essential information about the board, and decide on elements including its size, the term, who can be part of the board, how they make decisions and how they are elected/removed from their seats.*

Debate: Committees

- Decisions to take
 - Which committees
 - Assuming Technical, Community, EcoFin
 - Membership of the Committees
 - Roles and responsibilities of Committees
 - Oversight of committees
- For example, in many projects, the following “committees” are already running
 - Product / Technology Core
 - Other committees could be:
 - community management,
 - Membership,
 - Ecofin

Tisano (health application)



public officials from state level and local- local

knowledge of the business, background, practices and processes, use case, user testing and acceptance of the code, customer discovery
1-2 / week (tel conf)

Corporate Contributor License Agreement

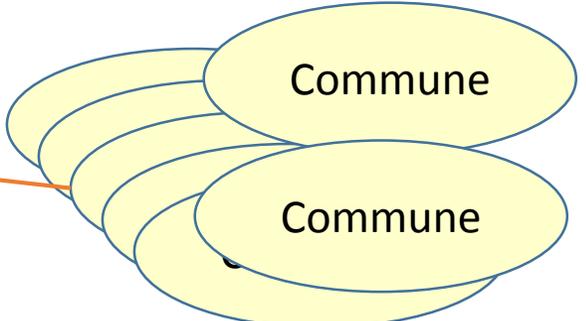
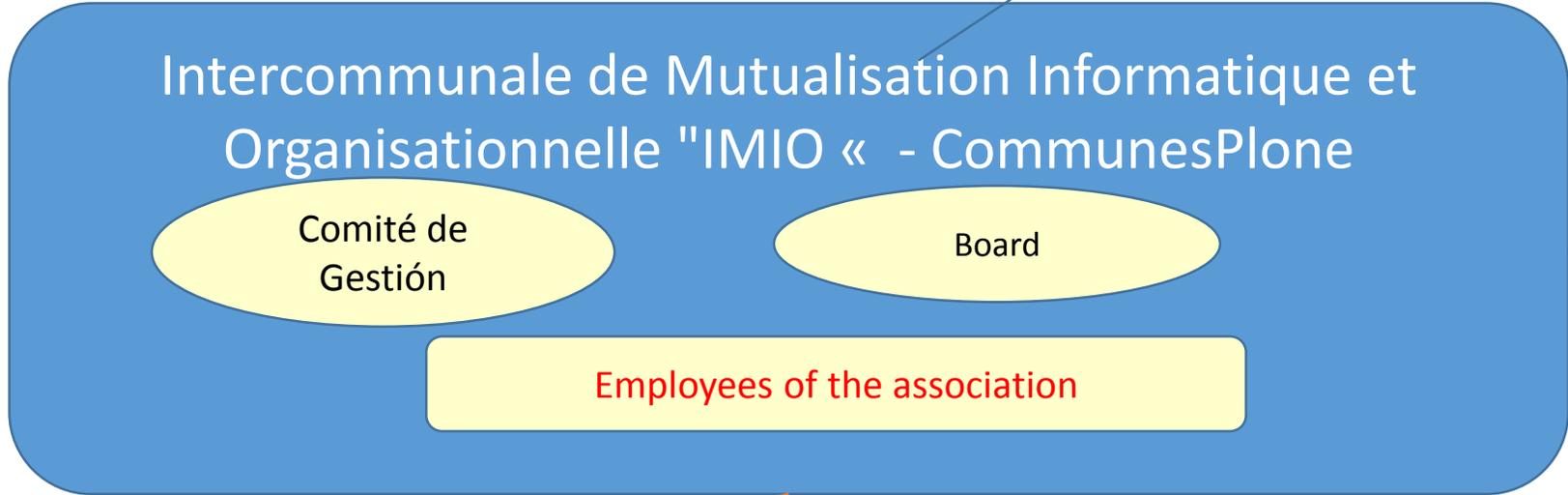
broader issues, market impacts, "big picture", reviews project progress, burn rate .
insight or guidance on other events
1 / quarter

Membership Agreement + Statements of Work

*Business applications require a non-technical resource to drive the development.
Need to harvest the knowledge of subject matter experts, to create and support the community and have a third party to bring the SME team together becomes critical*

PloneGov

association intercommunale
Société coopérative à responsabilité limitée



bylaws and Governance structures of the projects



GPL

No legal structure until 2012

Meetings and Events

- What (formal and informal) inter-relational processes should be set up for the project?
 - at a formal level (structure) - Entity meetings (e.g. Board, committees)
 - at an informal level (operations) (e.g. working groups)
 - At community level: (see below)
 - for each, what are the processes, the membership/attendance, the rules of engagement, the decision making rules
- How are the project community meetings to be organized
 - Who determines the process for organizing the meetings?
 - Who can attend?
 - Who sets the agenda?
 - How do decisions get taken?

6. Types of Legal entities for LGS

- Series of options for entities in each country.
 - Need to consider international aspects
- Informal legal structures
 - No structure (discarded by the community)
 - Contractual relationship (consortium style)
- Formal legal entities in Spain, as an example
 - Fundación
 - Asociación
 - Consorcio
 - Cooperative

Fundación

- A Spanish Foundation is constituted by private or public person or persons with the main object to manage an asset or “patrimonio”.
 - It is managed by a Patronato, who can delegate powers to commissions or comités, with general oversight of a Spanish public body – which, if the scope of action of the Foundation is national, is the Ministry of Education and Culture.
 - It can contract and act in commerce, but it must always act in the interest of its mission.
 - It must have a starting asset of 30.000 euros, which can be contributed in kind.
 - Within this framework, internal regulations approved by the Patronato can govern internal management and all operative processes .
- In the case of Decidim, the asset would be the code and the IPR of Decidim, which has a value above 30K euros. The management board would be the Patronato, or a Delegated commission set up by the Patronato. In the second case, all or nominated members of the community could be members of the Patronato, rather like the members of an Association (see below).

Asociación

Associations are groupings of private or public persons to carry out an activity (as opposed to manage an asset, though there are overlaps, of course). They are the ordinary instrument of "associative" (participatory) life.

- General assembly (or all members) can decide on many issues, and has oversight over the management board (who has delegated powers).
- It can contract and act in commerce, but it must always act in the interest of its misión
- An association has no starting "capital" or asset however as it will have running costs, members usually pay a one-off or annual fee for membership, which can be contributed in kind.
- Within this framework you can set up internal regulations. It is easy to enter and exit as member.
- It is less expensive to run than a Foundaiton, more open to commercial entities (partners) for their participation in project management.
- They can admit members from any country or type, depending on the statutes.
- For Decidim, all members of the community can become members (of different categories and voting rights, if need be). These members then elect and supervise the Board, which can delegate functions to a User, Technical and Community Committees or Commissions. The rules of the association can set the requirements to be a member, and the members have rights and obligations under the membership contract (e.g. Decidim Social Contract).

Consortium

- A consortium is a formal or contractual entity, with or without legal identity, set up for a specific purpose or project, e.g. to manage a service, to carry out a mission (R+D consortiums), to realise a project.
 - This is a very common structure for Public Administrations.
 - There are private consortia (of type "research projects"), public consortium (for the management of a municipal service, Localret, etc.) and mixed consortiums.
 - They are very flexible, easy to implement (municipal declaration, or private/public agreement), it sets up its own rules for management (assemblies, boards, comités, etc.) with its own code of conduct, voting, etc.
 - Liability among members is regulated by the consortium contract, and members can enter / exit in accordance with the Consortium's bylaws.
 - However, they are not necessarily made for the long terms (though nothing stops them existing for many years).
- For Decidim, this is probably the most flexible option, as all the bodies, structures, rules and regulations can be embedded in the Consortium Agreement or below that in internal regulations. It is also flexible in terms of evolution over time (internally) or transformation into another type of entity (externally).

Cooperative

- A cooperative is an enterprise formed by people (physical or legal) who join voluntarily to meet economic, social and cultural needs and aspirations in common through a jointly owned and democratically managed entity (cooperative enterprise).
 - It is constituted with a minimum of two partners (with limited liability) who must carry out the cooperative activity that corresponds according to the cooperative class (there are a number of types of cooperative, including a “cooperativa de servicios” which tends to be more general).
 - Cooperatives may also be defined “Colaborators” (as opposed to members), who contribute economically but do not work or participate with the Cooperative, but help achieve its objectives.
 - Cooperatives are managed by a “Consejo Rector” (Board) that accounts to the Assembly (of members),
 - can delegate tasks to “Secciones” (specific areas of work) and comités and commissions
- What is really interesting in cooperatives is that they share the philosophy of Decidim:
 - Participative
 - Democratic
 - Cooperation
 - Social responsibility and community interest
- Will the “local” nature of a cooperative be stimulating for international participation?
 - However, under the umbrella of the International Cooperative Alliance (<https://ica.coop/es/node/3297>), each country could create its own cooperative, which can then federate in an “(international federation of cooperatives”

7. Legal management

- Main areas to be managed by the LGS
 - IPR management and licensing
 - Contracting with third parties
 - Liabilities
 - Formal conflict resolution

7. Legal management: IPR management

- Copyrights in the code
 - Initial ownership of rights
 - Contribution policy
 - Assignment of rights (CLA)
 - Contributor License (CLA)
 - Project license (DCO)
- Copyrights in materials, web, texts, designs,
 - Idem
- What license? Or “licensing” (various licenses?)
- IPR Compliance – verifying license terms and compatibility
- Importance: owner decides on license, license change, license alternatives, legal defense... and assumes responsibility for infringements

7. Legal management: trademark

- Registration process (cost)
 - Per territory, products and services
- Exclusive use of the mark for the owner
 - Use in commerce
- Licensed use
 - For community users
 - For comercial purposes
- Questions:
 - What trademark, what territory, what logo?
 - Who is the owner
 - What licensed rights should be granted to the community



8. Conclusions; questions / processes for the community

- If you are formalising your community... How to get there?
- Rule: must be done with the community
- Suggestion : organise the issues in three main areas, to *“facilitate the organization of the discussions and the easy engagement of community members, who can participate in those elements where they feel more interested”* ...
 1. Legal entity questions and role
 2. Management bodies and committees, etc
 3. Decision-making processes

9. Terms of Governance: documentation

- Formal structure documentation
 - Foundational document (statutes, by laws, etc.)
 - Internal regulations
 - Embedding the social contract
- Internal Governance documents
 - Governance rules
 - Membership criteria
 - Bodies and decision making proceses (rules of process for each body)
 - IPR
 - IPR and Contribution policy
 - Trademark policy

Thank You!!

(And End of Backstage conference)

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