BRU2 MINORITY OPINION

BRU2 had a strong minority position that the registry-registrar separation agreement should be 15% across the board, as the maximum for any registrar owning a registry, or registry owning a registrar, regardless of whether the registrar distributes the registry’s TLD.

The minority presented strong concerns over the monitoring and gaming that could easily take place upon the lifting of the minority cross-ownership restrictions (15%). Despite restrictions which might be placed on registrars marketing the domain names in the registry’s TLD, they will be difficult, almost impossible, to enforce. Repeated often within the WG is that it will be very difficult to know who is receiving registry data (which the WG has determined provides a distinct economic advantage to those who have it, and must be shared equally to the registrars, or not at all). While the directly-affiliated registrar may not be able to sell the domain names (thus confusing customers), the potentially large network of affiliated registrars and resellers will be more difficult to monitor, and the registry will have incentive and opportunity to share its data, including premium names, with this network.

In fact, the minority in the BRU2 discussion noted that many in the WG consider that this “not in my TLD” proposal is basically identical to allowing 100% cross-ownership of the registry/registrar combination. Recommendation 19 and the requirement of equal access to all ICANN-accredited registrars will become, essentially, impossible to monitor and maintain.

Accordingly, BRU2 majority and minority spend a great deal of time developing a system for compliance, detection and enforcement to try to prevent the abuses to which BRU2 is subject. It is one which, of necessity, imposes heavily on resources from ICANN and from the registry-registrar cross-owned entity.

BRU2 laid out a thorough list of compliance, detection, and enforcement mechanisms – a list thus far not included in the main body of the BRU2 comment, and one which should be there. Hopefully, the majority comment will add the details developed by BRU2 and listed below:

1. Any significant co-ownership would require “serious disclosure requirements to ICANN” including:

1. Must disclose all shareholders above \_\_\_ % (specific percentage not agreed upon)
2. Must disclose voting powers
3. Must disclose all officers and directors (of both entities)
4. Must disclosure all contracts for material registry services;
5. Must disclose physical infrastructure.
6. Must disclose all key/material subcontracts.

There was a discussion and thought that these disclosures should be public, to allow a public role in the monitoring process (reducing costs for ICANN) and consistent with disclosures in some other industries.

In addition to serious and substantial disclosures, BRU2 laid out other requirements

2. Audits to demonstrate compliance with restrictions.

3. Self-certifications that the requisite disclosures had been done in full, and the restrictions voluntarily and fully complied with.

4. Opportunity for third party complaints/reporting violations.

5. Enforcement:

1. There must be tiered levels of enforcement- dependent on violation/context and harm.
2. Tiered levels of enforcement should be created dependent on the violation and harm.
3. Enforcement must be timely.
4. There must be meaningful penalties and sanctions for violations.
5. Publication of known deficiencies and the enforcement actions which followed.