MEMORANDUM Privileged and confidential

To: Jacqueline Seignette
Marnix Van den Bergh
Höcker Advocaten

From: Filip Tuytschaever

Re: **Competition law analysis of the proposed RIPE final/8 policies**

Date: 30 September 2009

Dear Mrs Seignette and Mr. Van den Bergh,

With reference to your e-mail of 16 September, we hereby provide you with our competition law analysis of the issues you raise in your e-mail.

This memorandum consists of three parts:

- Part I summarises our understanding of the facts which are relevant to the competition law analysis.

- Part II sets out the legal framework of our analysis and applies this framework to the facts so as to determine the antitrust position of RIPE NCC in the context of the IPv4 shortage and the corresponding final /8 policies. As regards this Part II, we rely in part on the article 82 EC competition law analysis in our memorandum of 29 March 2007 regarding the competition law analysis of the DNSMON service. In addition to article 82 EC, this memorandum also investigates the possible competition law angle of RIPE as an association of undertakings adopting decisions that (may) restrict competition in the sense of article 81 EC.

- Part III summarises our conclusions.

I. FACTS

A. RIPE NCC

1. The worldwide body Internet Assigned Numbers Authority ("**IANA**") allocates "Internet number resources", required for the proper operation of the Internet, to the five Regional Internet Registries ("**RIRs**") for further distribution.

2. RIPE NCC is an independent, not-for-profit membership organisation that acts as the RIR, providing global Internet resources and related services (including the allocation of IPv4 and IPv6 address space), to Local Internet Registries ("**LIRs**") in the RIPE NCC service region, which encompasses Europe, the Middle East and parts of Central Asia.

3. In their turn, LIRs assign blocks of IP addresses to ISPs, customers (End Users) etc. In the case of provider independent (PI) address space, the assignment of address space is done by RIPE NCC through an LIR (or in some cases directly), even though the use of provider dependent (PA) space is always recommended.

4. Membership of RIPE NCC as LIR is open to any organisation, whether it has a legal address in the RIPE NCC service region or not.

5. Whilst RIPE NCC is the primary supplier of IP address space in the European Union ("**EU**"), the other RIRs can technically speaking allocate IP addresses in the EU as well. The regional division of RIRs is indeed recommended solely for reasons of good administration.

6. Finally, the RIPE NCC's activities have not been entrusted upon it by law or government policy and so it does not have a statutory monopoly or government funding.

B. IPV4 SHORTAGE AND SUBSEQUENT EXHAUSTION

1. General

7. Due to the growth of the Internet, we understand that a shortage of IPv4 address space is inevitable and that the complete exhaustion of IPv4 address space is projected in the course of 2012.

8. Migration to IPv6 address space is considered to be the preferred solution to the IPv4 address exhaustion. In this context, the following applies:

- the migration to IPv6 requires investments by the LIRs;
- IPv4 and IPv6 will co-exist for some time; and
- LIRs interested in migrating to IPv6 are likely to require a limited amount of IPv4 address space to do so.

9. IANA will allocate a final single /8 IPv4 address block to each RIR (including to RIPE NCC) for allocation among its LIRs. IANA will do so in accordance with its Global Policy for the Allocation of the Remaining IPv4 Address Space, ratified by ICANN Board on 6 March 2009[1].

10. For purposes of this memorandum, (both new and existing) LIRs are considered to favour obtaining (scarce) remaining IPv4 address space over (abundant) IPv6 address space.

2. Current and future IPv4 address space allocation and assignment policy

11. The **current IPv4 address space allocation and assignment** is laid down in the "IPv4 Address Allocation and Assignment Policies for the RIPE NCC Service Region" (RIPE-471).

12. RIPE-471 has been developed by the RIPE Community. This involved a bottom-up, consensus driven, open policy development process which is consensus-based and occurs at RIPE Meetings (of Working Groups) and RIPE Group mailing lists. All RIPE Meetings and RIPE Working Group mailing lists are open to anyone. As can be read on RIPE NCC's website: "*The policy making process involves all relevant parties. This means that discussions cannot be rushed, and anyone that could be affected by a decision should have a chance to become aware of discussions, review proposals and provide their input*"[2].

13. In view of the IPv4 address space shortage/exhaustion, several proposals for a **future IPv4 address space allocation and assignment policy** are currently in circulation. The decision-making process for the eventual adoption of these policies is the same as described above. The current proposals to deal with IPv4 shortage/exhaustion, and the allocation of the final /8 IPv4 address block, include the following:

- RIPE Policy Proposal 2008-06: both new LIRs and existing LIRs can receive at their request, once, an amount of address space corresponding to the minimum allocation

[1] http://www.icann.org/en/general/allocation-remaining-ipv4-space.htm.
[2] http://www.ripe.net/ripe/policies/index.html.

size as applicable at the time of request (even if their needs justify a larger allocation block).

- RIPE Policy Proposal 2009-04, which takes into account the developments regarding IP multiplexing and the plan described in RFC5211: the proposal is aimed at reducing the minimum allocations from /21 to /27 (pursuant to the supposed reduced requirements due to IP multiplexing) and at ensuring that each request is justified by requiring the LIRs to actively prepare for IPv6 pursuant to RFC5211. Organisations that do not yet hold any address number resources will be required to request an initial IPv6 allocation or assignment in accordance with relevant policies.

- RIPE Policy Proposal 2009-03, which can be implemented independently and does not exclusively concern the final /8 IPv4 address block. It aims to address the perception of unfairness once the pool has run out by gradually reducing the periods for which address space can be requested (from the needs for a 12 month period to only taking into account the needs for the next three months) and increasing requirements for the utilization rate of the address space.

C. COMPETITION LAW CONCERN

14. The following competition law concern has been expressed in respect of the IPv4 shortage and the various ways in which RIPE currently proposes to deal with that shortage:

> *"[If] a new entrant will not be able to get any IPv4 addresses from the [RIPE] NCC, this might be seen as the established companies (us) trying to prevent new competition. We now have the chance to prevent that situation, and we should make good policies now to prevent that from happening. At least in the first couple of years after IANA runs out of IPv4 addresses.*
>
> *We can't just think about the current LIRs. If we do a bad/anti-competitive/etc job here some governments will have a good excuse to take the IP address allocation right away from the RIPE Community. They might leave us alone, but do we really want to count on that?"*

II. LEGAL FRAMEWORK – ANALYSIS UNDER ARTICLES 81 AND 82 EC

A. GENERAL

15. EU competition law applies to anti-competitive decisions by an association of undertakings (article 81 EC) and to the unilateral conduct of a dominant firm (article 82 EC), capable of appreciably affecting trade between the EU Member States.

16. Given that RIPE NCC (and/or its LIRs) provide their services on an at least EEA-wide scale, it can readily be assumed that the condition of the affectation of inter-state trade is fulfilled. Please note that in the absence thereof, RIPE NCC and/or its LIRs' behaviour would in any case be subject to national competition law (which more or less contains the same substantial provisions as article 81 and 82 EC). For present purposes, we will focus on the latter.

17. The burden of proof of the infringement of EU competition law lies on the party alleging the infringement[3]. In practice, private parties usually rely on a complaint to the EU or the national competition authorities, which have the power to request information from the undertaking or association of undertakings against whom the complaint is introduced.

18. Parties introducing a competition law complaint have a tendency to introduce broad complaints. For that reason, we propose to investigate a possible competition law complaint both under article 81 EC (in **Part II.B**) and under article 82 EC (in **Part II.C**).

19. Whilst the concern expressed above relates first and foremost to unilateral conduct on the market by RIPE NCC (i.e., its unilateral refusal to allocate or assign IPv4 address space), that conduct is the implementation of a policy adopted by the RIPE Community, which could be said to be an association of undertakings in the sense of art. 81(1) EC (it is not because participation is very flexible and because it may involve natural persons in addition to companies, that there can be no association of undertakings). In theory, a party could therefore rely on either provision in a complaint.

[3] Article 2 of Regulation (EC) nr. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (2003) OJ L1/1.

B. ANALYSIS UNDER ARTICLE 81 EC – ANTI-COMPETITIVE DECISIONS BY RIPE AS AN ASSOCIATION OF UNDERTAKINGS

1. General

20. Article 81 EC, which a.o. prohibits anti-competitive decisions by associations of undertakings, reads as follows:

> *The following shall be prohibited as incompatible with the common market: all … decisions by associations of undertakings … which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which …*
>
> *(b) limit or control production, markets, technical development, or investment;*
> *(c) share markets or sources of supply;*
> *(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
> *(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.*
>
> *2. Any agreements or decisions prohibited pursuant to this article shall be automatically void.*
>
> *3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of … any decision or category of decisions by associations of undertakings …which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:*
>
> *(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;*
> *(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.*

21. For present purposes, we assume that the final /8 policies adopted by the RIPE Community and implemented by RIPE NCC have as their effect the restriction of competition, because LIRs, new or existing, may claim that they have no or (in their opinion) insufficient access to IPv4 address space and because this amounts e.g. to a limit or control of markets or technical development (article 81(1)(b)) or a sharing of markets or sources of supply (article 81(1)(c))[4].

[4] Please note that this does not mean that we are of the opinion that the proposed final /8 policies are by definition within the scope of the prohibition of article 81(1) EC but only that we propose to assume a worst case scenario for purposes of this memorandum. In case of a complaint, the application of article 81(1) EC should be analysed carefully.

22. In other words, we assume that the prohibition of article 81(1) EC applies and that it is therefore necessary to rely on article 81(3) EC to obtain an exemption from that prohibition. To this end, the four conditions, two positive and two negative, of article 81(3) EC must be complied with. We believe that this is the case for the currently proposed final /8 policies, each of which is discussed hereafter.

2. Policy Proposal 2008-06 under article 81 EC

23. As regards Policy Proposal 2008-06, any complaint is likely to relate to the fact that all LIRs, regardless of their size and needs, will receive one single allocation of minimum size. This favours smaller LIRs against larger LIRs: smaller LIRs' needs could be covered by a minimum size allocation (thus they could be able to keep developing their businesses), whilst larger LIRs' needs would not be. So smaller LIRs will have a competitive advantage.

24. In view of the scarcity of IPv4 address space, we believe that the discriminatory treatment between smaller and larger LIRs can be justified under article 81(3) EC.

25. Policy Proposal 2008-06 would contribute to optimizing distribution as it would prevent larger LIRs to exhaust very rapidly the IPv4 unallocated pool: as correctly stated in the proposal, it is not intended as a solution to the (short term) growth needs of a few organisations but for assisting with the (medium term) transition from IPv4 to IPv6. The larger distribution of IPv4 address space may very well benefit consumers, as it decreases the risk that one or several LIRs "monopolise" remaining IPv4 address space (which, in its turn, is more likely to lead to price increases). Arguably, the proposal also do not impose restrictions which are not indispensable to the attainment of its objective of optimising the usage of the IPv4 unallocated pool. Finally, it also does not eliminate competition between LIRs in general or even specifically in respect of the IPv4 unallocated pool. On the contrary, it aims at involving as many LIRs as possible. Accordingly, if caught by article 81(1) EC, we find that Policy Proposal 2008-06 could be exempted under article 81(3) EC.

3. Policy Proposal 2009-04 under article 81 EC

26. Policy Proposal 2009-04 does not put a limit on the number of requests for IPv4 address size, nor does it impose a maximum size. Instead, it works on the basis of demonstrated needs of IPv4 address space and combines this with its stated objective to facilitate deployment of IPv6 address space.

27. As regards this objective, it provides that IPv4 address space will be allocated only if it is demonstrated that the requirements of the transition plan to IPv6, as specified in RFC5211, are met. Given that the LIRs that have actually invested in IPv6 infrastructure are currently very little in number, the main concern is that, taking into account that the complete transition to IPv6 will take some years, an LIR, without an IPv6 infrastructure, would introduce a successful complaint against RIPE NCC because it is obstructed from developing its IPv4 services.

28. Whilst such a complaint can of course not be excluded, we believe that it could be countered successfully. The reasoning used to that end would be different from that used in respect of Policy Proposal 2008-06. For Policy Proposal 2009-04, the discrimination would not be between smaller and larger LIRs, but between LIRs willing or unwilling/interested or uninterested to make the necessary investments to migrate to IPv6 address space. The reasoning would show that there are several factors supporting the fact that it is an exemptible restriction of competition (if any) to ask organisations to demonstrate that they meet the RFC5211 transition plan before they qualify for the allocation/assignment from the IPv4 unallocated pool. Such factors are (i) the scarcity of remaining IPv4 address space for all LIRs; (ii) the possibility of those LIRs that do not wish to invest in IPv6 to request and receive allocations from existing LIRs, also members of RIPE NCC, and/or to optimize the usage of their IPv4 address space; as well as (iii) the fact that migration to IPv6 address space is considered to be the preferred solution to the IPv4 address exhaustion.

29. In view hereof, Policy Proposal 2009-04 would appear to qualify for the conditions of article 81(3) EC: it promotes technological development, which is to the benefit of consumers; it does not impose restrictions which are not indispensable to the attainment of its objective (to stimulate native IPv6 deployment as much as possible, while supporting the need for future networks to communicate with IPv4); and it does not eliminate competition between LIRs in general or specifically in respect of IPv4 address space.

4. Policy Proposal 2009-03 under article 81 EC

30. Policy Proposal 2009-03 can be implemented independently of Policy Proposals 2008-06 and 2009-04. It provides for RIPE NCC to allocate enough address space to LIRs to meet their needs for a period of up to 12 months and to gradually introduce a reduction in the allocation period of address space to LIRs and End Users. In addition, it introduces a utilisation rate (50% of the total space halfway through the assignment period at the time of the assignment). In so doing, it would reduce the period over which the LIRs' needs are recognised roughly in correlation with the expected lifetime of the unallocated pool.

31. Given that Policy Proposal 2009-03 applies across-the-board, in like manner, to all LIRs (and End Users), the policy is unlikely to come within the scope of the prohibition of article 81(1) EC. Even if this were to be the case (quod non), it would qualify for an exemption of article 81(3) EC, as it contributes to improving the distribution of IPv4 address space and to benefiting as much of its consumers as possible; it does not impose any restrictions which are not indispensable to its rationale (addressing any unfairness in the allocation of remaining IPv4 address space) and it does not eliminate competition.

5. The Horizontal Guidelines as an illustration of the European Commission's policy regarding agreements on standards

32. Of course, any present or future final /8 policy will have to fulfil certain conditions for the exemption of article 81(3) EC to apply. We find that these conditions can be illustrated by means of the European Commission's ("**Commission**") *Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements*[5] ("**Horizontal Guidelines**").

33. In the Horizontal Guidelines, the Commission sketches its policy vis-à-vis various categories of horizontal agreements (i.e., between undertakings operating at the same level of trade or distribution, such as the LIRs). Chapter 6 of the Horizontal Guidelines, on "*agreements on standards*", can be used as an illustration, in particular where the Commission discusses the situation where a voluntary standard, set by a group of companies, is or becomes a *de facto* industry standard.

34. In such case, the Horizontal Guidelines read, amongst others:

> *There will clearly be a point at which the specification of a private standard by a group of firms that are jointly dominant is likely to lead to the creation of a de facto industry standard. The main concern will then be to ensure that these standards are as open as possible and applied in a clear non-discriminatory manner. To avoid elimination of competition in the relevant market(s), access to the standard must be possible for third parties on fair, reasonable and non-discriminatory terms* (nr. 174).

[5] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2001:003:0002:0030:EN:PDF

> *All competitors in the market(s) affected by the standard should have the possibility of being involved in discussions. Therefore, participation in standard setting should be open to all, unless the parties demonstrate important inefficiencies in such participation or unless recognised procedures are foreseen for the collective representation of interests, as in formal standards bodies* (nr. 172).

35. It follows from this that the main concerns of the Commission for *de facto* industry standards (the final /8 policies could be read as such) are as follows:

(i) they should be adopted by means of a procedure open to all (which is the case for the decision-making process of the RIPE Community);
(ii) they should be as open as possible and third parties (new LIRs) should have fair, reasonable and non-discriminatory access (which seems to be the case for the policy proposals which we have seen); and
(iii) they should be applied in a clear non-discriminatory manner.

In our opinion, the proposed final /8 policies comply with these conditions, also with the condition of non-discrimination, which is addressed in more detail the following Part II.C.

C. ANALYSIS UNDER ARTICLE 82 EC – ABUSE OF DOMINANT POSITION BY RIPE NCC

1. General

36. The final /8 policy, if and when adopted by the RIPE Community, shall be implemented by RIPE NCC. It is inherent in that implementation that RIPE NCC will sooner or later have to refuse, in whole or in part, IPv4 address space to existing or new LIRs. Such refusal could be at the basis of a complaint for alleged exclusionary abuse (e.g., new LIRs could complain that their market entry is made more difficult). By extension, there is a broader concern relating to the discrimination of LIRs in respect of the allocation of the IPv4 unallocated pool.

37. Article 82 EC, which prohibits the abuse of a dominant position, reads amongst others as follows:

> *Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.*
>
> *Such abuse may, in particular, consist in:*

> *(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;*
> *(b) limiting production, markets or technical development to the prejudice of consumers;*
> *(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage …*

38. Hence, a breach of article 82 EC will occur if five cumulative conditions are fulfilled:

1. there must be an undertaking;
2. that undertaking must hold a dominant position on a relevant market;
3. the dominant position must be held in a substantial part of the common market (i.e., the EU or one or several Member States);
4. there must be an abuse; and
5. that abuse must affect trade between Member States.

2. Dominant position in the sense of article 82 EC

39. For present purposes, we assume that all conditions, save (d) (the abuse, which we analyse below), are fulfilled:

- Undertaking: An undertaking is defined very broadly in competition law as any natural or legal person engaged in an "*economic activity*". An economic activity has been defined as any activity which involves offering goods or services on the market or, if this is not the case, any activity that could in principle be carried out by a private entity for profit.[6] If so, the (natural or legal) person offering the good or service is "*an undertaking*". Against this background, RIPE NCC as RIR is an undertaking in the sense of EU competition law as it offers IP address space to LIRs and End Users.

- Dominant position on a relevant market in the EU or a substantial part thereof: A relevant market is a combination of a product and a geographic market[7]. A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use. A relevant geographic market comprises the area in which the undertakings concerned are involved in the supply

---

6 Case C-67/96, *Albany International BV v. Stichting Bedrijfspensionfonds Textielindustrie* (1999) ECR I-5751, nr. 311.

7 Commission notice on the definition of the relevant market for the purposes of Community competition law (1997) OJ C 372/5–13.

and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas. In the present case, the market for the allocation and assignment of IP addresses would appear to be the relevant product market. The relevant geographic market is most likely at least EEA-wide (and probably worldwide, as companies in the EU may perhaps try to obtain IPv4 address space with another RIR than RIPE NCC). For present purposes, we assume a worst case scenario, where RIPE NCC, as the only RIR for Europe, the Middle East and parts of Central Asia, has a 100% market share for the allocation/assignment of IPv4/IPv6 address space and hence a dominant position in the EU.

- Affectation of trade between the Member States: As stated above (nr. 16), given that RIPE NCC and/or its LIRs provide their services on an at least EEA-wide scale, it can readily be assumed that the condition of the affectation of inter-state trade is fulfilled.

3. Abuse in the sense of article 82 EC

40. A complainant would not only have to prove that RIPE NCC holds a dominant position in the sense of Article 82 EC, but also that there is an abuse. Indeed, holding a dominant position as such is not prohibited under competition law, only its abuse is.

41. For the competition law analysis of exclusionary abuses (the likely basis for an article 82 EC complaint), the Commission's recent 2009 *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*[8] ("**Guidance on abusive exclusionary conduct**") is relevant.

42. As a starting point, it must be recalled that any (partial or total) refusal to supply from the side of a dominant undertaking will only be considered an abuse in exceptional circumstances. In its Guidance on abuse exclusionary conduct (nr. 74), the Commission indeed recalls that freedom of trade is the rule, and any obligation to do so the exception:

> *generally speaking, any undertaking, whether dominant or not, should have the right to choose its trading partners and to dispose freely of its property … intervention on competition law grounds requires careful consideration where the application of art. 82 EC Treaty would lead to imposing an obligation to supply on the dominant firm.*

[8] http://ec.europa.eu/competition/antitrust/art82/guidance_en.pdf.

43. EU competition law deals with two categories of situations in which a refusal to supply can nevertheless constitute an abuse of dominant position. These two categories are refusal to deal with competitors ("**primary line abuse**") and refusal to deal with customers ("**secondary line abuse**").

44. Secondary line abuse is generally less of a competition law problem than primary line abuse: the Commission's enforcement priorities indeed focus on ensuring that undertakings which hold a dominant position do not exclude their competitors by other means than competing on the merits of their products and services (Guidance on abusive exclusionary conduct, nr. 6 and 19). If a dominant firm is not itself present on the downstream market as a competitor, and its behaviour is therefore by definition not aimed at eliminating competitors, the refusal to deal shall indeed only be able to favour certain customers of the dominant firm and not the dominant firm's own business.

45. It could be argued RIPE NCC "competes" with the LIRs when it comes to PI address space: an End User has the possibility to request PI resources either directly from the RIPE NCC or via an LIR. In this market, however, RIPE NCC has no dominant position (it only has one or two out of hundreds End Users as customers). Additionally, RIPE NCC does not aim to reserve some address space for its PI direct assignments and the current IPv4 address space allocation (RIPE-471) provides that the use of PA address space should always be recommended. Accordingly, a primary line abuse from the side of RIPE NCC is excluded.

46. Given RIPE NCC's position as sole RIR in the EU, only secondary line abuse appears relevant. For there to be an abusive refusal to deal, an LIR would therefore have to prove that it is a victim of an abusive discrimination between itself and other LIRs. Confronted with such a claim, the Commission would take into account that a dissimilar treatment of certain customers is not *per se* prohibited: also a dominant firm may continue to organize its commercial dealings with customers in a way which is demonstrably commercially sensible. There will only be abusive discrimination in the sense of article 82(c) EC in the absence of objective justification for the refusal to deal.

47. Ultimately, in an article 82 EC context, the question will therefore be whether or not RIPE NCC has an objective justification for an alleged exclusionary/discriminatory abuse in respect of the usage of the IPv4 unallocated pool. Put differently, an objective justification under article 82 EC functions as an article 81(3) EC exemption under article 81 EC. Above (nr. 18-23) we concluded that the proposed final /8 policies fulfilled the conditions of article 81(3) EC. In like manner, we find that they rely on a relevant objective justification.

48. A shortage of supply is indeed generally recognized as an objective justification for a dominant company to discriminate between its customers. In such cases, which applies to IPv4 address space, a dominant firm may e.g. prioritize long-standing customers over new or occasional customers[9] and the Commission will limit its investigation to verifying that there is a genuine shortage and that the reduction in quantities supplied is not merely a pretext for a downright abusive refusal to supply[10].

49. The IPv4 address space shortage/exhaustion is a fact, not a subjective appreciation by RIPE NCC. The proposed final /8 policies are an attempt at organizing broad access to the remaining IPv4 address space and any discrimination which they involve must be seen against this background. Whilst there may indeed be discrimination, we find (at least based on the proposed final /8 policies which you sent us) that such discrimination is not abusive in the sense of article 82(c) EC.

50. Based on the case-law cited above even a privileged access of existing LIRs to remaining IPv4 address space (privileged compared to the access by new LIRs) would not necessarily be an abusive discrimination. Dominant companies are entitled to favour their existing customers over new ones. In like manner, (larger) LIRs may continue to receive more IPv4 address space compared to (smaller) LIRs, as long as this occurs on the basis of objectively justifiable criteria (size is an objective criterion; existing or new membership as well), which are publicly available and are applied in uniform manner.

51. Practically speaking, however, it would appear that a final /8 policy which favours access to the IPv4 unallocated pool by as many market participants as possible (hence: limit the size of the IPv4 address blocks which are allocated) will be more successful in achieving RIPE's intention to avoid complaints, including competition law complaints.

III. CONCLUSIONS

- A competition law complaint against RIPE NCC's final /8 policies could take two forms: either it could be a complaint against RIPE ("the RIPE Community") or RIPE NCC as an association of undertakings entering into anti-competitive agreements which are prohibited under article 81 EC and/or it could be a complaint against RIPE NCC as sole RIR in the EU allegedly abusing its dominant position under article 82 EC because it

[9] Case 77/77, *BP v. Commission* (1978) ECR 1513, nr. 20 and 32.
[10] *Napier Brown/British Sugar* (1988) OJ L 284/41, nr. 23.

refuses to supply (all or part) of (limited) IPv4 address space requested by existing or new LIRs.

- From a practical point of view, any complaint is likely to be aimed against RIPE NCC. Technically speaking, a complaint could also be introduced against RIPE in the form of the Chair or the Address Policy Working Group Chair. Our experience nevertheless teaches us that such a complaint against a natural person is less likely than a complaint against RIPE NCC, a legal person. If it will occur, it will most likely be in addition to a complaint against RIPE NCC.

- As regards article 81 EC, we have assumed a worst case scenario, namely that the final /8 policies adopted by the RIPE Community and implemented by RIPE NCC may have anti-competitive effects, are within the scope of the prohibition of article 81(1) EC and therefore must receive an exemption under article 81(3) EC.

- If challenged, we find that the proposed final /8 policies are likely to comply with the conditions of article 81(3) EC: they contribute to optimizing distribution and/or to promoting technical progress; in so doing, they benefit consumers; they do not appear to impose restrictions which are not indispensable to the attainment of their objective of optimising the usage of the IPv4 unallocated pool; and they do not eliminate competition in respect of the IPv4 unallocated pool.

- For future reference, in order to benefit from the exemption of article 81(3) EC, any final /8 policy adopted by the RIPE Community and implemented by RIPE NCC should:

  (i) continue to be adopted by means of the bottom-up, consensus driven open policy development process of the RIPE Community;
  (ii) be as open as possible (i.e., involve as many LIRs as possible, which is the case for the currently proposed policies); and
  (iii) be applied in a clear non-discriminatory manner, and third parties (new LIRs) should have fair, reasonable and non-discriminatory access.

- As regards 82 EC, we have assumed that RIPE NCC has a dominant position and that it must be analysed whether its refusal to supply, or its discriminatory supply, is an abusive exclusionary abuse under article 82 EC. Given that the IPv4 shortage/exhaustion is a fact, and not a subjective appreciation by RIPE NCC, we find that RIPE NCC has an objective justification for discriminating between existing and new customers and/or between existing customers, as long as that discrimination occurs on the basis of

objectively defined criteria which serve the purpose of the usage optimization of the IPv4 unallocated pool and the migration to IPv6.

- The implementation of the final /8 policies by RIPE NCC should strictly apply the objective criteria laid down in those policies.

- A final /8 policy favouring access to the IPv4 unallocated pool by many participants (hence: limiting the size of the IPv4 address blocks which are allocated) will be more successful in achieving RIPE's objective to avoid complaints, including competition law complaints.

*

* *