MEMORANDUM Privileged and confidential

To: Athina Fragkouli
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From: Filip Tuytschaever

Re: Need-based requirement for IPv4 in the RIPE NCC service area

Date: 7 June 2013

1. In September 2009, when requested to analyse the EU competition law impact of the final /8 RIPE policy proposals, we concluded[1] that the proposals are in line with competition law rules, i.e. article 101 TFEU (on the prohibition on anti-competitive agreements) and article 102 TFEU (on the prohibition to abuse a dominant position):

(i) The policies comply with the conditions of article 101(3) of the Treaty on the Functioning of the European Union ('**TFEU**'), so that they can be exempted from the prohibition on anti-competitive agreements of article 101(1) TFEU should the policies be considered as agreements between undertakings, or as decisions of an association of undertakings, in the sense of that provision.

(ii) The policies provide the RIPE NCC with an objective justification for its behaviour in respect of the allocation of public IPv4 address space should that behaviour be challenged on the basis of article 102 TFEU for alleged abuse of dominance.

2. One of the main reasons for our favourable competition law assessment under articles 101 and 102 TFEU was that the allocation of public IPv4 address space occurred on the basis of the proof of objective 'need' rather than on the basis of purely economic considerations.

3. The need-based requirement does not only apply to the allocation of public IPv4 address space, but also to subsequent transfers of such space between operators. Such transfers involve the prior authorization by the RIPE NCC and continue to take place at the present day, after the depletion of the public IPv4 address space.

[1] Available here https://www.ripe.net/ripe/mail/archives/address-policy-wg/attachments/20091006/c9513ab7/attachment.pdf and shared in the address policy wg mailing list on 6 October 2009 http://www.ripe.net/ripe/mail/archives/address-policy-wg/2009-October/004743.html

4. A policy change is now proposed so as to remove said need-based requirement.

5. From a competition law perspective, and in particular from the perspective of the exposure of the RIPE NCC and the LIRs to competition law claims after the abolition of the need-based requirement, our comments are as follows.

6. Competition law claims by whom and against whom? The depletion of the public IPv4 address space of the RIPE NCC implies that the focus of any competition law claims, whether they come from a private company or from the public sector, is likely to shift from the RIPE NCC to the LIRs. However, the involvement of the RIPE NCC cannot be excluded as a matter of fact. A claimant may want to include the RIPE NCC if only in order to make more publicity for its complaint.

7. What competition law claim? A claim based on competition law against one or several LIRs (and/or the RIPE NCC) would suggest discriminatory or exclusionary behaviour (refusal to supply) by LIRs and/or the RIPE NCC. If a complaint were to be introduced against a private company, the most likely basis for such complaint would be stockpiling and accompanying unfair pricing ('excessive pricing') for IPv4 address space. We would like to point out that such claims could also be filed even if the need-based requirement for IPv4 allocation remains in the RIPE policy. However the existence of the need-based requirement could make a difference as explained under point 9.

8. Forum for a competition law claim? A competition law claim could take the form of a national court case (for example in the form of a damages claim) or the form of a complaint before a national competition authority or the European Commission.

9. Assessment

- As regards competition law claims against a single organisation for abusing a dominant position: Our understanding is that the likelihood of such claims is small because stockpiling by a single organisation is unlikely even in the absence of a need-based requirement for IPv4 allocation. If so, that would imply that the success of a private claim before a national court or before a competition authority for alleged abuse of dominant position is also small, for the simple reason that it would be difficult, if not impossible, to prove that a company alleged of stockpiling has a dominant position.

  A dominant position in the sense of article 102 TFEU (or a corresponding provision of national competition law) requires a considerable market (>40%) share on the relevant market. In addition to a dominant position, a claimant would also have to prove the

existence of unfair (excessive) pricing. That is notoriously difficult and seldom successful, as the claimant must show that it concerns a price which is excessive 'because it has no reasonable relation to the economic value of the product supplied' (Court of Justice of the EU, case 27/76, *United Brands v. Commission*, nr. 250).

- As regards competition law claims against several organisations (LIRs and/or the RIPE NCC), which are more relevant from an institutional perspective, for abusing their joint dominant position or for having concluded an anticompetitive agreement: Experience shows that such claims are more likely, in an initial stage, to take the form of a competition law complaint with a competition authority rather than that of a court case.

- The abolition of the need-based requirement for IPv4 allocation could make a difference in the context of such complaint or court case. Experience shows that contracts and policies (such as the RIPE policies) based on a sound competition law analysis play a double role. Not only do they have a deterrent effect on potential claimants (preventive role), in case a claim is nevertheless introduced, they are often crucial in countering such claims (defensive role).

- It is fair to argue that the need-based requirement for IPv4 allocation has been instrumental in shielding the RIPE NCC and the LIRs from competition law claims during the period of allocation and up to this moment. After depletion, the need-based requirement continues to be relevant particularly should there be a risk of stockpiling. Abolishing the need-based requirement could create an exposure of the LIRs (and/or the RIPE NCC) to claims based on anticompetitive agreements and/or abuse of dominance (such as discriminatory treatment/refusal to supply). The less the likelihood of a stockpiling, the less the need to maintain the need-based requirement from a legal perspective.

- Please note that a middle way could be for the LIRs to commit to adopt their own need-based requirement. The RIPE NCC would then no longer vet transfers of IPv4 space. Those would take place on the basis of a commitment by each LIR to act along certain pre-agreed lines.

- Finally, from a policy rather than from a legal perspective, account must be taken of the fact that the removal of the need-based requirement may send out a wrong signal at a stage of transition to IPv6. That could be an incentive for governmental actors wanting to step in. Once again, that policy consideration is more important depending on the likelihood that the removal of the need-based requirement may attract claims, including corresponding negative press coverage.