

March 2004

## **ETNO Reflection Document commenting on the possible revision of the Commission Decision on the minimum set of leased lines**

### **Executive Summary**

ETNO finds that the minimum set of leased lines which constitutes one of the Recommendation's relevant markets (and several sub-markets) does not match the overall principle of technology neutrality. Some of the leased lines types (analogue) of the minimum set put an undue burden on operators and may prevent development of markets and technology. Therefore at least types of leased lines linked to a particular type of infrastructure such as analogue leased lines should be removed. In the market place leased lines are replaced by other and more flexible types of transmission capacity services. ETNO therefore sees no justification for amending the minimum set with further types of leased lines.

ETNO welcomes this pertinent consultation on the Decision 2003/548/EC on the minimum set of leased lines. The interwoven set of legislative acts<sup>A</sup> on leased lines represents the most striking example of a non-technology neutral reminiscence from the previous ONP framework.

The minimum set of leased lines as it currently stands is more and more out of step with the development of markets and technology. Therefore a proper revision will no doubt make the market analysis as laid down in the new regulatory framework more efficient.

In this connection we will warn against a delay of this revision because of alleged problems in delivery of leased lines. Such problems may be experienced also due to the fact that the presence of substituting and more relevant solutions is held back by the very specific regulation of leased lines products.

As soon as the Decision will have been revised, we then suggest that this revision also take effect for the other related pieces of legislation.

The starting point for a revision should be the recognition of the following:

- **Standards:** ETNO is in favour of voluntary standards that can assist interoperability of networks and services as long as such standards are developed and applied in accordance with market needs. Standards need to be voluntary in order not to block innovation and creation of more complex services which may have to rely on not yet agreed interfaces.
- **Leased lines market:** The definition of one or more markets for the services which is offered e.g. by leased lines products may not be straightforward in the light of deployment of alternative infrastructure (fibre, FWA), VPN solutions etc.

The market analysis foreseen in the Universal Service Directive's Article 16.3 and the Recommendation which identifies ex-ante the leased lines types in the minimum set (compulsory list<sup>B</sup>) may lead to a situation where a product artificially is kept on that market and is promoted by regulation at the expense of more cost-efficient solutions even if the type under normal market conditions would be phased out.

We will then have a situation where an operator who is regulatory obliged to offer these items will be the primary (only) provider and accordingly will be found to have s.m.p. It will then make it impossible to withdraw regulation even if de facto substituting and competing offerings are available. If a specific product such as a type of leased lines defined by a standard constitutes a separate relevant market where ex-ante regulatory intervention is justified will have to be examined case by case and should not be defined ex-ante by standards.

***Question n°1 – Deletion of certain leased line types from the minimum set***

*Should certain leased line types (e.g. analogue leased lines, 64 kbit/s digital) be taken out from the minimum set of leased?*

Some of the types identified by the Decision and the compulsory list of standards Part A, as requested by the Universal Service Directive's Recital 28, may for all practical purposes be less relevant as the demand is met by other products.

In other words, the demand that nevertheless may be identified exists only because of the regulatory obligation to deliver the services at non-commercial conditions. This may for example be the case for leased lines products such as analogue lines<sup>1</sup>. In this case, not only is the actual degree

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<sup>1</sup> TDC finds that also the leased lines types 2Mb unstructured and 64 Kb can removed from the minimum set as these types may be replaced by e.g. various xDSL based services.

of competition not properly reflected but also markets may be identified with only a very restricted demand. Therefore we advise:

- that the use of mandatory standards as the basis for market analysis is applied very carefully so that actually substituting products such as MPLS, frame relay, are taken into account when assessing these markets
- that the list of mandatory standards is revised so that products<sup>2</sup> such as:

Voice Bandwidth (2 or 4 wire).

are deleted from the minimum set in order to adhere to Article 17.5<sup>c</sup> of the Framework Directive as they in many cases do not represent actual markets and as their presence may unnecessarily oblige a number of companies to uphold costly and commercially irrelevant products.

**Question n°2 – Modification of the leased line types in the current minimum set, or of their technical specifications**

*Should there be any modification of leased line types currently in the minimum set (e.g. technical specifications)?*

n.a.

**Question n°3 – Addition of new leased line types to the minimum set**

*Should certain type of high speed leased lines be added to the minimum set (e.g. higher speed leased lines such as those shown in Annex II)?*

For the reasons mentioned above, namely that identification of relevant markets should build on a market analysis and not on a predefined list of standards, it cannot be recommended to add further types to the minimum set of leased lines. Additionally for retail markets it should be demonstrated that underlying regulation of wholesale products will be insufficient.

For retail demands for higher transmission capacity alternative solutions for transmission capacity are entering the markets as substituting products as well as provision of alternative infrastructure is established for the relevant customer segment (typical major account) in spite of the bias inflicted in the market due to the regulation of the leased lines products.

Clearly some business models may benefit for recourse to a technology dependent regulation but it will not support the policy of the new regulatory framework.

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<sup>2</sup> TDC wants also 2 Mb unstructured and 64 Kb leased lines types to be removed.

A We refer to the Framework Directive Annex 1, the Universal Directive Article 16 and 18 and Annex VII, the list of standards as amended by CoCom, the Recommendation on relevant markets - market 7, and the Decision 2003/548.

B Universal Service Directive, Recital 28: It is considered necessary to ensure the continued application of the existing provisions relating to the minimum set of leased line services in Community telecommunications legislation, in particular in Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines (1), until such time as national regulatory authorities determine... that such provisions are no longer needed because a sufficiently competitive market has developed in their territory. The degree of competition is likely to vary between different markets of leased lines in the minimum set, and in different parts of the territory. In undertaking the market analysis, **national regulatory authorities should make separate assessments for each market of leased lines in the minimum set**, taking into account their geographic dimension. Leased lines services constitute mandatory services to be provided without recourse to any compensation mechanisms (our emphasis)

C 5. Where the Commission considers that standards and/or specifications referred to in paragraph 1 no longer contribute to the provision of harmonised electronic communications services, or that they no longer meet consumers' needs or are hampering technological development, it shall, acting in accordance with the procedure referred to in Article 22(2), remove them from the list of standards and/or specifications referred to in paragraph 1.