

Articles

International steps to untie aid

The DAC/OECD Recommendation on Untying Official Development Assistance to the Least Developed Countries

Annamaria La Chimia*;

PhD candidate, Public Procurement Research Group, School of Law, University of Nottingham.

Introduction

The practice of tying aid is a major phenomenon in donor-recipient country relationships, a long and established practice put in place by donor countries, and hard to stop notwithstanding the criticism surrounding it.

Tying aid is at the centre of the debate on the role aid plays in economic development. It is one of the most extensively discussed cases of policy incoherence in donor states' development co-operation policies.¹ Leaders of international organisations, NGOs and developing countries agree that talks on enhancing aid effectiveness and strengthening the recipient country's ownership of aid cannot leave out of consideration the question of tackling tied aid.² Tying aid undermines the effectiveness of aid leading to an increase in the aid's costs and the distortion of the nature of the aid itself.

An important international step towards addressing the problem of tied aid is represented by the OECD/DAC Recommendation on untying aid to the least developed countries (hereafter referred to as the Recommendation). Members of the OECD's Development Assistance Committee (DAC)

* I would like to thank Professor Sue Arrowsmith for her valuable comments on a first draft of this article. All mistakes are my own.

¹ Writing document of the Commission service, "Response to the challenges of Globalisation. A study on the International Monetary and Financial System and on Financing for Development" SEC (2002) 185 final, p.70.

² For instance, the President of the World Bank, J.D. Wolfensohn, declared "if we are serious about effectiveness we must call tied aid what it is designed more for domestic constituencies at home than developing countries" reported In The World Bank Group, *From Pledge To Results: World Bank President Calls For Action From G8 Leaders*, available at <http://web.worldbank.org>; In the UNCTAD X Plan of Action developing countries have identified the issue of untying as a key test of the coherence and credibility of donors' policies towards them (see Lammersen, "Development Choices", *the OECD Observer*, 2001, No.228, pp.30-32). See also the numerous papers published by ActionAid below, nn.40 and 98, available at www.actionaid.com.

adopted the Recommendation at the DAC Annual High Level Meeting³ on April 25–26, 2001.⁴ The Recommendation entered into force from January 1, 2002.

This article provides a systematic analysis of the Recommendation's provisions with the aim of ascertaining the range of the agreement and understanding whether the adopted accord is satisfactory. It is divided into three sections. The first section considers the meaning of tied aid and, briefly, the problems that it raises and donors' rationale for tying. The second section considers the role that international institutions can play in addressing tied aid from both the perspectives of enhancing aid effectiveness and opening up the aid procurement market. The third section then provides a detailed analysis of the recent OECD Recommendation.

1. An Overview of Tied Aid

1.1 Meaning of Tied aid

Tied aid is a term used to indicate where Official Development Assistance⁵ (ODA) is provided on condition that use is made of the lender's own resources, *e.g.* a grant or a soft loan for a capital project made on condition that equipment or services is purchased from the donor country only. When the aid is *formally tied* the recipient country, in order to receive the grant or the loan, has no other choice but to fulfil the condition imposed by the donor country, even if it would be more convenient to acquire the goods or the services elsewhere.

The aid is *partially untied* when the recipient is required to effect procurement in specific countries or regions, usually including the donor country itself and substantially all recipient country.⁶ Aid is *untied* when it is not subject to any geographical limitations on procurement.⁷

Another common practice is that of *informally tying* aid. The concept of informal tied aid refers to the situation when powerful governments of donor countries may persuade the governments of the recipient countries to give preference to donor country suppliers,⁸ even if there are no legal binding conditions posed on the beneficiary to do so. "Sometimes donors act in ways that do not guarantee that aid will be spent in the donor country but make that outcome more likely".⁹

The reasons for this latter phenomenon are many, especially when the aid is not matched by a sense

³ OECD, *DAC High Level Meeting (April 2001)* available at <http://www.oecd.org/EN/document/0,,EN-document-68-2-no-20-3170-68,00.html>. The World Bank, IMF and UNDP also participated as permanent observers to the DAC.

⁴ The agreement was reached at a referendum that lasted until May 11. OECD, *DAC High Level Meeting*, available at www.oecd.org/EN/document/0,,EN-document-68-2-no-20-3170-68,00.html

⁵ DAC, *Glossary* available at www1.oecd.org/dac/htm/glossary.htm, defines ODA as "Grants or loans to countries and territories on Part I of the DAC List of Aid Recipients (developing countries) which are undertaken by the official sector; with promotion of economic development and welfare as the main objective; at concessional financial term (if a loan exists having a grant element of at least 25%) technical co-operation is included in aid. Grants loans and credits for military purposes are excluded.

⁶ DAC, *Glossary*, Available at www1.oecd.org/dac/htm/glossary.htm where Partially untied aid is defined as "Official Development Assistance (or Official Aid) for which the associated goods and services must be procured in the donor country or among a restricted group of other countries, which must however include substantially all developing countries"

⁷ *Glossary of Development Terms*. Available at www.glossaryofdevelopmentterms.htm retrieved June 18, 2002; DAC, *Glossary*, defines *Untied Aid* as "Official Development Assistance for which the associated goods and services may be fully and freely procured in substantially all countries".

⁸ Tajoly, "The Impact Of Tied Aid On Trade Flows Between Donor And Recipient Countries", *The Journal Of International Trade & Economic Development*, (1999), Vol.8, n.4 at p.374.

⁹ Office of Technology Assessment US Congress: *Development Assistance, Export Promotion, and Environmental Technology* background paper chapter 3 "how aid can promote exports" available at www.uws.princeton.edu/cgi-bin/byteserv.prl/~ota/disk1/1993/9319/931905.PDF

of ownership of the aid itself. Reasons for informal tying are related to the strong influence that the donor country can exercise when it disburses aid funds and to the situation of necessity which the beneficiary country finds itself in: “tied aid is better than no aid.”¹⁰ *Informal tying* is also favoured by the fact that the disbursement of aid is often mixed with poor procurement practices¹¹: corruption, inexperience, lack of transparency and lack of instruments devolved at ensuring open competition in the procurement process which can lead to or facilitate *de facto* discrimination in favour of the donor country even if this is not a formal policy.¹²

OECD’s statistics show that a significant proportion of donors’ bilateral aid is tied.¹³ Indeed, all donor countries currently provide a high percentage of tied aid.¹⁴

1.2 The costs associated with tied aid

Two main counter effects are associated with tied aid, namely: higher costs paid for the goods and services purchased, and the distortion of the nature of the aid.¹⁵ After years of research, OECD studies have estimated that limiting the purchasing power of the recipient country to goods and services of the donor country can increase the cost of the goods and services to between 15 and 30 per cent more than if they were procured through international competition.¹⁶ The over-pricing is due to the fact that competition for tied aid contracts is usually limited to a few donor firms. As a consequence of the price increase, the beneficiary country will have less value for aid money.

Several other forms of indirect costs must be added to have an overall picture of the costs of tying.¹⁷ For instance, transportation costs may be increased for the recipient country; these could often be avoided if the beneficiary was allowed to procure from neighbouring countries.¹⁸ There may also be increased administrative costs arising from the fact that tied aid discourages donors’ co-ordination in aid activities and provides disincentives to channel aid through multilateral institutions.

¹⁰ Asteris Huliaras, *The Tied Aid Paradox*, available at www.idec.gr/iier/huliarasenv6n3.htm

¹¹ “This kind of informal tying is almost totally ruled out within competitive binding under multilateral aid procurement due to the surveillance of the World Bank and other international bodies” Tajoly, above, n.8, pp.373–388.

¹² For example, a major US firm bid against a major Swedish company for an infrastructure project overseen by Sweden’s national aid agency. Although the bid for the US firm was 10% cheaper and of at least the same quality, the contract was awarded to the more expensive Swedish tender as remarked by treasury secretary Lawrence H. Summers at the 65th anniversary of the export-import bank of the United States, cited in n.47 in Asteris Huliaras, *The Tied Aid Paradox* available at www.idec.gr/iier/huliarasenv6n3.htm.

¹³ Table 23 of the OECD/DAC 2001 Report, n.74 below shows that all donors tie their bilateral aid (DAC’s data do not include Technical co-operation). For instance, Austria ties the 40.8% of its aid, Canada the 75.1%, Greece 76.5%, Italy 61.8%, etc.

¹⁴ According to ActionAid statistics (which include technical co-operation), among EU countries a very big percentage of aid is tied. More than 7 EU Countries tie of more than 50% their aid funds. Greece ties 99% of its aid funds, Austria 75%, Italy 69%, Germany and Spain 68%, Belgium 58%, France 52%, and Portugal 51% see: ActionAid, *Policy and Research: Untying Aid*, available at <http://www.actionaid.org/policyandresearch/aideffectiveness/aideffectiveness.shtml> retrieved February 11, 2003.

¹⁵ Jepma, *Inter-nation Policy Co-ordination and untying of aid*, (Avebury, Brookfield, USA, 1994); Morrissey, White, *How concessional is tied aid*, CREDIT Paper, No 93/13.

¹⁶ OECD, *Policy Brief: Untying Aid to the Least Developed Countries* July 2001, pp.2–3. Available at www.oecd.org/pdf/M00006000/M00006938.pdf retrieved June 16, 2002

¹⁷ Jepma, above, n.15 at p.69.

¹⁸ An example of transportation costs is given by an aid project carried out in Africa in the mid 1990s. Aid totalling 300 million yen was given to Malawi for the purchase of Argentinean maize by two Japanese companies. Only 79 million yen was actually spent on maize, the rest went towards transportation and insurance costs. If Malawi had been left free to buy it from the Southern Africa region, it could have been bought for more than three times as much. This case is reported in L. Hildtch, “Untied Aid Goes Further”, *The International Development Magazine*, (Developments– feature 02/2001) p.1. Available at www.dfid.gov.uk retrieved July 23, 2002.

As far as the distortion effect is concerned, when tied aid is applied the recipient country is not free to use the aid in the way it considers to be the most appropriate. This conflicts with the new emerging concepts of *ownership* and *partnership*.¹⁹ The recipient countries' "ownership" of aid is significantly weakened when the aid is tied. Aid that ignores recipients' needs can be useless, or worse.²⁰ The recipient country is often excluded from the decision-making process for which the aid is granted.²¹ This situation risks leading to the procurement of goods, technologies and advice that do not conform to the priorities and specifications of the recipient country, but instead to those of potent lobbies in the donor country.²²

1.3 Donors' justification for tying aid: an old fashioned rationale?

Donors usually advance economic and political reasons for justifying their implementation of tied aid. From an economic point of view, governments in donor countries advance microeconomic and macroeconomic reasons for justifying the tying of aid.

The microeconomic rationale is that in the short-term, donor exporters can gain from the aid if this is provided under a tied aid basis. Nevertheless, in the long period, tying could result in damaging effects. For instance, the domestic industries initially advantaged by tied aid can risk becoming dependant on exports subsidies and, therefore, more vulnerable if the subsidy is abolished.²³ Moreover, the fact that export orders are guaranteed for some donor firms, will not be automatically transferred in an increase of the overall welfare of the donor's nation.²⁴

Furthermore, when tied aid is granted to help weak industries, the allocation of resources based on international competition is distorted.²⁵ The consequence will be, as for all trade measures availing protectionism, that there will be a loss in terms of world's welfare, because goods and/or services are not produced on the basis of comparative advantage.²⁶

From the donors' macroeconomic perspective, the incentives of tying aid are linked to the need of using aid as an instrument of trade policy: "tying reduces the potential balance of payment deficit",²⁷

¹⁹ The concept of partnership has received great prominence in the 1996 OECD document *Shaping the 21st Century: the Contribution of development Co-operation*; and in the DFID's (1997) White Paper. See also the biennial UNDP Poverty Report, *Overcoming Human Poverty*; and World Bank, *World Development Report 2000/2001. Attacking Poverty*; *UN Report A/CONF.198/11* to cite just a few.

²⁰ As stated in the biennial UNDP Poverty Report, *Overcoming Human Poverty*, "(National anti-poverty plans) should be nationally owned and determined not donor driven" see UNDP, *Overcoming Human Poverty*. UNDP Poverty Report 2000. (UNDP, New York) (2000). cited in "what is National Ownership?" in *UNDP Royal Ministry of foreign affairs, Norway Chr. Michelsen Institute Comparative Research Programme on Poverty*, (UNDP, New York) (2001) p.9.

²¹ L. Hilditch, "Untied Aid Goes Further", above, n.18.

²² See OECD/DAC, *Reporting Directives for the Creditor Reporting System*, DCD/DAC (2002) 21 where it is stated that "Tied aid tends to favour projects that require capital intensive imports or donor-based expertise over smaller and more poverty-focused programmes", pp.13–14. Too often, for example, poor countries are littered with electrical equipment for villages without electricity, machines for which no spare parts can be found and recycled clothes that destroy local textile markets, see *The Economist*, *Gift With Strings Attached* (London) (June 17, 2000).

²³ Jepma, n.15 above at p.16.

²⁴ In fact it has been sustained that it is only the value added tax? of the selective group of exporters that is increased and not the net effect on national welfare, which instead is negative (See Jepma, n.15 above). The "rent" is captured by the firm alone and is seldom transferred to the recipient (see J.Chinnoch and S. Collins, n.40 below. The Authors go far as in questioning who the real beneficiary of the aid is, whether it is the country receiving the aid or the enterprises based in the donor country).

²⁵ Jepma, n.15 above at p.106.

²⁶ In contradiction with Ricardo's theory and the principle that a system of free trade, by favouring the better off country, will help increase the welfare of the whole world.

²⁷ Morrissey, White, *How concessional is tied aid?*, CREDIT Paper, No 93/13, pp.7–9.

and is also deemed to have positive effects on the donor countries' level of employment. Aid represents an outflow on the current account so that donors concerned with their balance of payment, try to offset the financial outflow represented by the aid and seek to match inflows by increasing exports and stepping up trade flow with the beneficiary country.²⁸

However, economists, disproving the economic rationale behind tied aid, have reached the conclusion that "it is very unlikely that aid tying produces significant macroeconomic benefits for domestic employment or balance of payment aggregates in the donor country".²⁹

From the political side, politicians advance two main arguments in favour of tied aid. First of all they argue that tying aid emphasises the link between the donor and the recipient country. Much bilateral aid is in fact granted to those countries connected to the donor by historical and cultural links, such as former colonies. Tying can render these links more evident³⁰ and help to communicate donors' cultural and ethical values, a sign of its willingness to co-operate closely with the people in developing countries.

The second important political argument is associated with the costs of granting aid. Tying can reduce these costs by helping national exporters.³¹ Furthermore, it is argued that, especially in a period of tight budget control, tying prevents the risk of lowering the total amount of aid given. External aid that is perceived to be less costly can be more politically acceptable. The use made of taxpayers' money to finance external assistance can thus be justified. In other words, benefiting domestic companies through public procurement is a way to "buy political support" for development policy at home.³²

Political support is surely gained from those specific and organised interest groups within the business lobby but it is questionable that it will be gained also by the public at large. Indeed, a poll in Canada has shown that the general public would support sound development aid policies rather than aid schemes aimed at subsidising national export firms.³³

2. Addressing the problem at institutional level

2.1 The role of international institutions

That the case for tying is more political than economic is also shown by the fact that tying aid is often related to defensive concerns. Donors do not want their industries to be disadvantaged in foreign markets for aid granted from other donors to their national firms' competitors. Donors also maintain that if they take the lead by unilaterally reducing the amount of tying, their domestic industries would suffer in two respects: first their protection would disappear, and second foreign competitors would achieve a better relative position.³⁴

Donors are locked in the so-called "prisoner's dilemma", a dilemma that can be resolved only if all countries untie together. Hence, multilateral institutions such as the World Bank, the United Nations

²⁸ OECD *Policy Brief*, n.16 above.

²⁹ Jepma, n.15 above; See also Morrissey, n.27 above; Tajoly, n.24 above; Lammersen, n.2 above; Huliaras, n.10 above. There are several factors explaining the failure of tied aid as an instrument of trade policy for donor countries namely: fungibility; retaliation by other donors; information problems; the globalisation of the business community (as highlighted by Jepma and Tajoly).

³⁰ OECD, *Policy Brief*, n.16 above.

³¹ This policy argument is particularly advanced by the Danish Government that with its 1% of GDP devolved in aid, it is one of the major donor countries.

³² Writing Document of the Commission Service, SEC (2002) final, n.1 above at p.71.

³³ Decima Research Limited, 1985, p.64 reported in Jepma, n.15 above at p.28. The study there reportedly demonstrates that any attempt to use aid as a way of enhancing trade would be considered exploitive and immoral.

³⁴ See Jepma, n.15 above at p.16.

and the OECD have a fundamental role to play to co-ordinate international policies and “to put all countries on an equal footing”.³⁵ As Jepma has sustained, “tying has become a problem of international policy decision making and of finding the proper juridical bases, rules and procedures”.³⁶ From this perspective, the Recommendation can represent a turning point towards multilaterally untying and promoting better co-ordination in donors’ development aid policies.

2.2 Enhancing aid effectiveness

Aid resources have been recognised to play a vital role in tackling poverty.³⁷ The need is felt not only to increase the aid budget level but also, and above all, to enhance aid effectiveness and to optimise the effects of the existing aid resources.³⁸ Thus, the practice of tying aid, given its effects of undermining the effectiveness of aid and leading to misallocation of resources, is out of line with the new thinking of development co-operation.³⁹

Moreover, tying aid also causes fragmentation and poor co-ordination in donors’ development policies.⁴⁰ The lack of donors’ aid policies co-ordination creates many problems that results in heavy administrative costs borne by recipient countries. For instance, a multiplicity of procurement rules are often applied, a consequence of the fact that tied aid is frequently implemented by imposing donors’ procurement rules.⁴¹

Thus, it is not surprising that tied aid is at the centre of the debate on the role aid plays in economic development. The most critical commentators have described tied aid as a costly way of subsidising jobs and enterprises in the donor country,⁴² emphasising the fact that tied aid is a form of aid that creates short-term commercial gains for rich country suppliers, but reduces the value and distorts the use of the aid in the recipient country.

³⁵ *ibid.*

³⁶ *ibid.*

³⁷ At the first Conference on financing for development held in Monterrey from March 18–22, 2002, it has been highly praised that ODA plays an important part as a complement to other sources of financing for development. See UN, *Report of the International Conference on Financing for Development*, Monterrey, Mexico, A/CONF.198/11, p.9; web information on International Conference on Financing for Development, available at www.un.org/esa/ffd/ retrieved on 27/01/2003. See in particular the Monterrey Consensus and the statement to the plenaries of the heads of States.

³⁸ OECD/DAC, *Development Co-Operation Review: European Community* (2002) (OECD, Paris). In this periodic review of DAC Members’ performances the DAC has recently assessed the European development policies. Here the DAC has welcomed the increase of EC ODA, (according to the preliminary figures for 2001 they have increased of 21.1% in real terms) however, the development committee has called for the improvement of the developmental impact of the EC’s sectoral allocations within the primary aim of poverty reduction. In the report, the DAC called also for aid untying to enhance aid effectiveness.

³⁹ Aid is considered to be the largest source of external financing and is critical to the achievement of the development targets of the Millennium Declaration, see UN, *Report*, n.37 above.

⁴⁰ J. Chinnoch, S. Collison: *Purchasing power Aid untying, Targeted Procurement and Poverty Reduction*, ActionAid September 1999, p.6. Available at www.euforic.org/by_theme/731.htm retrieved on June 16, 2002 p.3. Aid granted from different donors to the same sector often results in incompatible equipment which require complex spare parts and training arrangements. For instance, a survey in Kenya found more than 16 different kinds of water pump in use, each funded by a different donor country. This latter example is reported in N. Baird, “Tied to the Hand that Feeds: For years the West thought it was good for business. Now many countries want to end the practice of forcing poor nations to buy goods from donor countries in return for aid”, (1996) *New Scientist*, Issue 2051, p.12.

⁴¹ As shown in a study conducted for the OECD as part of the pilot review of the international aid system in Mali, a number of failings in terms of aid effectiveness and Mali’s ownership of aid were caused by the multitude of public procurement procedures applied. See Study report for the OECD Development Assistance Committee, *The Mali Donors’ Public Procurement Procedures: Towards Harmonisation With The National Law*, July 2000, Report Summary, p.2. Available at www.oecd.org/pdf/M00038000/M00038097.pdf.

⁴² J. Chinnoch, S. Collison, n.40 above.

The Recommendation represents a step towards the enhancement of aid effectiveness and fostering co-ordination of aid policies among DAC Members. As it is said in Title I of the Recommendation itself, effectiveness of aid and co-ordination of donors aid policies are the Recommendation's openly declared aims.⁴³

2.3 Fostering trade liberalisation in the aid procurement market

The Recommendation represents also an important step towards fostering trade liberalisation in the international procurement market. Indeed, tying aid is an untouched form of protectionism granted through development aid policies. Tied aid offers a contradictory picture of the international community: on one side ready to sponsor free competition as the best way for the allocation of resources, on the other implementing tied aid and contradicting in practice what they preach.

Tied aid is accepted by the international community despite the predominance of the ideas in favour of free trade as a means to increase the welfare of the whole world⁴⁴ and despite the numerous international and regional agreements aimed at the liberalisation of the market.⁴⁵ This is particularly surprising for the European Union, where almost all the sectors of the economy have long since been liberalised and great efforts have been made for achieving free competition, including in the public procurement market.⁴⁶

Up to now development aid policies have been left immune from any scrutiny of compatibility with free trade rules. It is arguable that the practice of tying aid is incompatible with regional and international agreements agreed for fostering market liberalisation. Those donors that are most in favour of untying aid might be willing, in future, to challenge the practice of tying aid by using existing international legal instruments. As far as the international legal panorama is concerned, it could be briefly said that the legitimacy of the practice of tying aid could be questioned, for instance, under the WTO/GATT Agreement. It is well known that the GATT is an international agreement aimed at achieving international economic liberalisation. However, no cases against tied aid projects have been raised up to now. The fact that the compatibility of tied aid with GATT's rules has never been questioned, might be due to the fact that tied aid is perceived as being exclusively related to government procurement. Given the fact that government procurement is explicitly excluded from the range of the GATT Agreement, (see Art.III(8) of GATT), interpreters might be easily lead to the conclusion that tied aid is also excluded from the range of the GATT agreement,⁴⁷ but this conclusion

⁴³ Together with strengthening partnership with recipient countries and enhancing the receiving countries' ownership of aid, partnership and ownership, as seen above (para.1.2), are weakened by tied aid practices (these objectives are stated in the first part of the Recommendation Paragraph 1, Title I "objectives and principles").

⁴⁴ The comparative advantage of Ricardo's theory is lost if governments afford protection to national industries.

⁴⁵ It needs to be said that the very brief account here made of the legal problems that tied aid can raise does not claim to be exhaustive and has the sole aim of pointing out the incoherence of the donors community and highlighting that the Recommendation can represent an important step towards fostering trade liberalisation in the international procurement market. In other works by this author, the legal analysis of the EC Treaty; the GATT, and the GPA will be objects of full and detailed analysis.

⁴⁶ Indeed, tying aid is implemented also by EU Member States when they grant bilateral aid (Projects financed by Member States on an exclusively bilateral basis are often restricted to the procurement of goods and services from the donor country only, isolating the EU Member States' market from any other EU and non-EU country. When instead projects are financed with EU funds by EU Institutions, the beneficiary country will have to purchase goods and services from EU suppliers only). The compatibility of tied aid with EU law will be the subject of broad and comprehensive discussions in other chapters of the author's theses.

⁴⁷ It is beyond the scope of this article to analyse this issue in detail.

may be open to question.⁴⁸ The Agreement on Agriculture (URAA) explicitly bans the possibility of using tied aid as a means of subsidising exports. However, as will be seen below (para.3.2.1), this clause is mainly disregarded by donor States. The expiry of the “peace clause”⁴⁹ might lead to the eventuality of donors challenging tied food aid projects.

For the present, however, the main efforts to address the tied issue have come through the OECD Recommendation. Although the Recommendation is not a legally binding instrument (see below, para.3.3) its “soft law” nature could still help the aim of enhancing international trade liberalisation. By changing the mentality in respect of foreign aid policies, it might foster further discussions on untying aid and even change the way in which existing international agreements are currently interpreted.

3. The OECD/DAC Recommendation

3.1. Historical background

A first attempt to untie bilateral aid was made in early 1969 when Sweden launched an initiative to seek multilateral agreement on progressive untying. The year after, at the High Level Meeting in Japan, consultations between donors were started. On that occasion, to come to an agreement was proved impossible notwithstanding a vast majority of DAC members declared themselves for the first time, “prepared to adhere to an agreement to untie their financial development loans”.⁵⁰ The negotiations’ failure was due to the reticence of some members, who were not “in a position to commit themselves on the principles or the urgency of such a scheme”.⁵¹

A second attempt to multilateral untying was made in 1974. Although a Memorandum of Understanding on untying development loans in favour of procurement in developing countries was subscribed between 10 donor countries,⁵² it never became operational because of the oil price shock that constrained donors’ aid budgets.⁵³

The late 1970s and 1980s are years characterised by a conspicuous amount of aid giving.⁵⁴ However, the granting of aid became very much linked with the opportunity given to donors’ enterprises for gaining export markets. Untying initiatives were abandoned. Tied aid became an

⁴⁸ The possibility to apply the plurilateral Agreement on Government Procurement Agreement (GPA) to tied aid seems to be also excluded, because tied aid to developing countries is explicitly excluded from the range of this Agreement by a note to Art.1.1 of the GPA. For further discussion, see Arrowsmith, *Government Procurement in the WTO*, (Kluwer Law International 2003) pp.150–153.

⁴⁹ Until the end of 2003, Art.13 of the URAA (the so-called “peace clause”) protects domestic support measures (including measures classified in the green and blue boxes) as well as export subsidies from certain WTO dispute settlement actions. See EU Commission, *Glossary*, available at <http://europa.eu.int/comm/agriculture/external/wto/backgrou/gloss.pdf>.

⁵⁰ In particular supportive members were Germany, the Netherlands and Norway. See Helmut Fuhrer, *The Story of Official Development Assistance*, (OECD Publication) (Paris, 1996), p.22.

⁵¹ Communiqué of the DAC HLM in Tokyo, reported in DAC, *DAC in Dates: prepared for the 40th anniversary of the development assistance group/ development assistance committee*; OECD, *Policy Brief, Untying Aid to LDCs*, 2001 OECD Observer, p.4. These other members included notably France, Italy and Canada, on this point see Helmut Fuhrer, n.50 above.

⁵² Helmut Fuhrer, n.50 above at p.26.

⁵³ OECD Policy Brief, n.16 above at p.4.

⁵⁴ Japan launched a plan to double his ODA, from \$1.4 billion in 1977 to \$2.8 billion in 1980. In 1981 at the UN Conference on LDCs in Paris, the UN adopted the new targets for LDCs in the 1980s introducing also a new sub-target of 0.15% of GNP for aid to LDCs. In Helmut Fuhrer, n.50 above, pp.31and 35.

instrument of export promotion for capital goods, albeit at high concessionality levels.⁵⁵ For instance, in those years, Italy strongly, and successfully, used its mixed credits programme to support her construction industry. Italy's share in international construction rose from 6 per cent in 1980 to 10 per cent in 1985 and, during the second half of the 1980s, it occupied a third position in the related world construction market, (after the US and Japan).⁵⁶ Not surprisingly, the year 1986 is the "year of Italy",⁵⁷ (as it became one of the most generous donors with a 58 per cent increase of its ODA).

In 1991, pursuing United States' concerns about the use of concessional tied aid to gain commercial advantage, formal operating guidelines were agreed in Helsinki, by OECD Members (formally entered into effect in March 1992) to regulate the use of tied export credits. They incorporate the aid-relevant aspects of the 1978 Arrangement on Guidelines for Officially Supported Export Credits,⁵⁸ and some additional provisions on the use of development assistance, they are often referred to as the "Helsinki Arrangement".⁵⁹ The 1992 Helsinki tied aid disciplines were conceived as a means of reducing trade distortion with tied concessional loans to projects, which would have been financially viable projects, and could otherwise have been financed through traditional commercial channels.⁶⁰

The Helsinki Arrangement applies to export credits and its main characteristics are the ban of tied or partially untied aid credits in upper and middle income countries and the ban of the use of tied and partially untied aid credits in all countries (except LDCs) for projects which are "commercially viable".⁶¹ These rules aim at limiting the use of concessional financing for projects that should be able to support commercial financing (those which are commercially viable). These rules also redirect tied aid away from richer countries, which should be able to attract commercial credits, towards developing countries that are less well off. When a project is "commercially non-viable" it is still up to the aid agencies to ensure that the projects financed are of good aid quality and developmentally sound.⁶²

Projects with a value less than \$2 million, grants and very soft credits are excluded from its coverage.⁶³ The Arrangement also does not apply to tied and partially untied aid credits directed to the poorest countries.⁶⁴ The exception is due to the fact that the poorest LDCs may have difficulty in gaining access to commercial financing no matter how attractive a project may be.⁶⁵ Furthermore, it

⁵⁵ Lammersen, "The Helsinki arrangement: its impact on the provision of tied aid", *International Journal of Finance and Economics*, 6 (2001) pp.69–79.

⁵⁶ Jepma, n.15 above.

⁵⁷ Helmut Fuhrer, n.50 above at p.45.

⁵⁸ The Arrangement came into being in April 1978, and it is a Gentlemen's agreement. For a complete explanation see OECD, *Arrangement on Guidelines for Officially Supported Export Credits ex ante guidance gained under the "Helsinki" tied aid disciplines, revised 2003*, TD/PG (2003) 13, at p.2 it is stated that "The main purpose of the Arrangement is to provide the institutional framework for an orderly export credit market and thus to prevent an export credit race in which exporting countries compete on the basis of who grants the most favourable financing terms rather than on the basis of the price and quality of the product".

⁵⁹ Helmut Fuhrer, n.50 above at p.57; Lammersen, n.55 above at pp.69–79.

⁶⁰ Lammersen, n.55 above at pp.69–79.

⁶¹ Helmut Fuhrer, n.50 above at p.57. Participants also agreed on operational guidelines that encompass two key tests to determine commercially non-viable": a) financial viability, i.e. does the project lack capacity to generate cash flow sufficient to cover the projects' costs and b) availability of finance, whether it is unlikely that the project can be financed on market terms, in Lammersen, n.55 above.

⁶² Jepma, n.15 above at p.140.

⁶³ Very soft credits are those with concessionality level of 80% or higher. See Jepma, n.15 above at p.142.

⁶⁴ Those with a concessionality level of 80% or above.

⁶⁵ OECD, *Arrangement on Guidelines for Officially Supported Export Credits ex ante guidance gained under the "Helsinki" tied aid disciplines, revised 2003*, TD/PG (2003) 13, at p.2.

was agreed that the use of tied aid in these countries requires at least a 50 per cent concessionality level.⁶⁶

Any OECD Member country, which is contemplating a tied aid loan to an eligible country,⁶⁷

Iraq is among the eligible countries. has the obligation to notify the project to all the participants. Then the notification is followed by a consultation process, whereby participants could request the proponent to provide additional project information or clarification.

The role of the consultation process is to monitor adherence to the Helsinki Arrangement and adjudicate on any unresolved challenges raised by participants by means of a face-to-face consultation.⁶⁸ The consultation group weighs the arguments for and against the commercial viability of the project. It also helped in developing a body of experience used to provide *ex ante* guidance on the critical boundary between financial viability and non-viability.⁶⁹

In addition to setting out rules for tied aid,⁷⁰ the Arrangement provides a framework for official export credits. It sets limits on the terms and conditions (minimum cash payment, maximum repayment term and minimum interests rates where officially financing support is involved) for export credits.⁷¹

The Agreement can be judged a success in achieving the target of reducing trade distortion with concessional loans.⁷² However, “the question of value for aid money in mixed credit schemes remained unanswered. The aid value of a mixed concessional tied aid loan would increase if the grant component was used as a stand-alone untied grant.”⁷³

It was only after setting the 1992 discipline for guiding the use of tied aid, that the attention of DAC returned to explore ways to liberalise aid procurement regimes.⁷⁴ However, it was not before 1998, following a detailed investigation of options and targets for a possible initiative, that the DAC was

⁶⁶ DAC, *Glossary* available at www1.oecd.org/dac/htm/glossary.htm, defines the Concessionality Level as “A measure of the “softness” of a credit reflecting the benefit to the borrower compared to a loan at market rate. (cf. Grant Element). Technically, it is calculated as the difference between the nominal value of a Tied Aid Credit (q.v.) and the present value of the debt service as of the date of disbursement, calculated at a discount rate applicable to the currency of the transaction and expressed as a percentage of the nominal value”.

⁶⁷ A list of eligible countries is contained in OECD, *Country Classification for export credits and tied aid explanatory notes*, available at [www1.oecd.org/ech/docs/countryclassification\(2001\)en.pdf](http://www1.oecd.org/ech/docs/countryclassification(2001)en.pdf) i.e.

⁶⁸ Lammersen, n.55 above at p.71.

⁶⁹ At the end of March 1999 the financial viability of 119 projects had been appraised, see Lammersen, n.55 above at p.75. If the project is determined to be commercially viable by the consultations group, then it is expected that the notifying country would drop its offer of concessional finance to the recipient country.

⁷⁰ For instance, in respect of large projects, those with a value more than SDR 50 million, financed by tied aid, the DAC agreed that the offers of aid for these projects should be subject to International Competitive Bidding (ICB) procedures, contracts be awarded to the lowest evaluated bidder concerning both price and technical factors, before taking into account the financing terms. Poorest countries can take account of the latter provided the contract is awarded to the supplier which ranked second or third.

⁷¹ See OECD, *Arrangement on Guidelines for Officially Supported Export Credits ex ante guidance gained under the “Helsinki” tied aid disciplines, revised 2003*, TD/PG (2003) 13, at p.3.

⁷² Lammersen, n.55 above at p.77.

⁷³ Lammersen, n.55 above at p.78. Some other objections have been advanced to the discipline. Firstly, it has been argued that the idea of aid being available only for commercially non-viable projects conflicted with the accepted DAC guidelines of project appraisal, wherein the economic feasibility of a project is one of the criteria; secondly it was pointed out that there could be incompatibility with projects that are considered high priority from a development point of view and for which donors would allocate ODA but that are at the same time commercially viable. The willingness of the donor to finance such a project with the help of ODA could be based on the inability of the recipient to finance the projects: in these cases the approach could prevent the project from being financed at all. See Jepma, n.15 above at p.141.

⁷⁴ OECD, *The DAC Journal of Development Co-operation 2001 Report*, Vol.3, No.1, (2002 edition) (OECD Publication; Paris), p.42.

invested with a mandate to work on a Recommendation to untie aid to least developed countries.⁷⁵ In 2001 the Recommendation on untying ODA to least developed countries was adopted and has been in force since January 1, 2002.

3.2 The Recommendation: analysis of the text

3.2.1 Coverage: limits, exclusions and derogations

Since January 1, 2002, DAC Members have pledged to untie Official Development Assistance (ODA)⁷⁶ directed to Least Developed Countries. Donors have engaged to restrain their use of ODA as a means of fostering export promotion and supporting domestic enterprises. However, donors' commitments to untie ODA are not full and unconditional. The coverage of the Recommendation suffers numerous limitations, exclusions and derogations that significantly limit the range of the Agreement.

Limitations: Least Developed Countries

First of all, as mentioned above, the Recommendation's ambit of application is limited to ODA to Least Developed Countries.⁷⁷ The preference for limiting the Recommendation to the Least Developed Countries was already expressed in the 1998 DAC mandate. Two main reasons lie behind this choice: the first, which is also openly declared in para.3 of the Recommendation, is linked to the fact that LDCs have more difficulties in achieving the millennium development goals and cannot bear the burdens of tied aid. The second is related to the fact that developed countries' industries have less interest in least developed countries.⁷⁸

Limiting the Recommendation to LDCs significantly reduces the impact that it has on total OECD bilateral aid. In fact only 12 per cent of total OECD bilateral aid will be covered by the Recommendation.⁷⁹ Moreover, excluding all developing countries that are not classified as LDCs, leaves unsolved the question of enhancing ODA effectiveness for all those countries that, as well as LDCs, are in need of effective help.

For instance, ODA granted to Iraq may well be tied, because Iraq is eligible for receiving tied aid.⁸⁰ However, it will fall outside the Recommendation's coverage due to the fact that Iraq is not a LDC.

⁷⁵ OECD Policy Brief, n.16 above at p.4.

⁷⁶ Official development assistance is defined in DAC, Statistical Reporting Directives, DC/DAC/(200)10, as "those flows to countries on Part I of the DAC List and to multilateral institutions for flows to Part I aid recipients which are: provided by official agencies, including state and local governments, or by their executive agencies; and transaction of which: is administered with the promotion of the economic development and welfare of developing countries as its main objective; and is concessional in character and conveys a grant element of at least 25% (see footnote 6) (calculated at a rate of discount of 10%). In paragraph 25 of the Recommendation it is expressly stated that this directive is to be used for definitions of ODA categories addressed in the Recommendation.

⁷⁷ Annex II of the Recommendation lists the countries that are to be considered Least Developed. However, the list is based on the UN classification and thus can be modified periodically.

⁷⁸ OECD, *The DAC Journal of Development Co-operation 2001 Report*, n.74 above at p.42.

⁷⁹ DFID, Briefing, *Untying aid*, September 2001 available at www.dfid.gov.uk retrieved 9/8/2003.

⁸⁰ Iraq is a country eligible for receiving tied aid, See n.67 above for the list of countries eligible for receiving aid and classified as LMIC included in Part I of the DAC list, (qualification essential for AID to be classifiable as ODA, see n.76 above for a definition of ODA) for classification of Iraq as LMIC see OECD in Washington, *Recent Trends In Foreign Aid*, available at www.oecdwash.org/NEWS/LOCAL/oecdwash-oct-nov2002.pdf, where, in the sample list of aid recipient (extracted by the DAC Journal: Development Co-operation Report 2001, OECD, Paris 2002), it is stated that Iraq is a LMIC.

Indeed, the US development agency USAID is currently limiting to US suppliers and goods the participation in the awarding of contracts of the many post war reconstruction projects that it is administering.⁸¹ Projects are needed, after the devastating 2003 war, for the reconstruction of the whole country. They embrace numerous fields such as agriculture, oil tracks and infrastructures.⁸²

In a USAID Fact Sheet of April 11, 2003, and circulated by the US Embassy in Rome, it is openly stated (see point 4 of the document) that “the prime contracts will be awarded to US firms. . . (omissis). Existing US foreign assistance law establishes a preference for US firms”.⁸³

Foreign firms will only be eligible to compete as sub-contractors.⁸⁴ Numerous contracts have already been awarded, and the US Embassy has circulated, for the interest of information of all potential subcontractors, a list of US prime contractors with USAID.⁸⁵

The possibility to participate as subcontractors has also been given to Iraqi industries. However, difficulties have already been encountered by Iraqi industries in being able to compete and be awarded significant contracts due to their difficulties in meeting the quality of standards and security necessary to comply with US Law. For instance, for these reasons the Betchell, (a US construction industry and awardee of a contract worth \$680 million), had to take a step back and reduced the proportion of the subcontracts to award to Iraqi industries to 40 per cent, although initially it was willing to award them 90 per cent of the subcontracts.⁸⁶

⁸¹ Projects are needed in the field of agriculture, oil tracks and infrastructures, the US President’s budget request to the Congress was of \$1.7 billion for reconstruction and \$543 million for humanitarian relief. See www.ice.it/estero2/baghdad/h_ricostruzione.htm.

⁸² The US President’s budget request to the Congress was of \$1.7 billion for reconstruction and \$543 million for humanitarian relief. See www.ice.it/estero2/baghdad/h_ricostruzione.htm.

⁸³ As stated in a document by USAD on April 11, 2003, Washington DC 20523 and circulated by the American Embassy in Rome, (who also provides a list of prime contractors who have been already awarded some reconstruction contracts) “the prime contracts will be awarded to US firms through the competitive procurement process. Existing US foreign assistance law establishes a preference for US firms.”. available at www.ice.it.

⁸⁴ USAD, April 11, 2003 Washington, DC 20523 see above “a great number of countries can be eligible to compete for sub-contractors. Companies located in non-restricted countries (those not on the terrorist list) can compete, just as U.S. companies can compete, to be considered as sub-contractors” the document is available at www.ice.it The preference to US suppliers has always been justified, and is also here justified, with the fact that USAID administrates US taxpayers’ money. However, it remains to be seen whether, for projects that have been limited to US suppliers, Iraq’s oil revenues will also be used, if this would be the case, the preference for US suppliers and/or goods will appear probably less sustainable rational. A UN Resolution 1483, adopted by the Security Council on 22 May, 2003, and that recognises US and UK as the occupying Authorities, also allows them to administrate Iraqi’s oil revenues. Indeed, the mentioned Resolution provides for the establishment of a Development Fund for Iraq, (point 12 of the Resolution). All proceeds from the sale of petroleum, petroleum products and natural gas from Iraq shall be deposited in this Development Fund, (point 20 of the Resolution). The resources of the Fund shall be *disbursed at the discretion of the occupying Authority*, in consultation with the Iraqi interim administrator, (point 13) for the purposes listed in point 14 of the Resolution. These purposes include, among others, “economic reconstruction and repair of Iraq’s infrastructure”. Although, the Resolution specifically requires that the Fund “shall be used in a transparent manner” (point 14), nothing is said about the eventuality of using the Funds’ money to finance reconstruction projects that have been limited to US (or UK) contractors so, in the absence of any rule, this eventuality is not to be excluded.

⁸⁵ The document is dated August 12, 2003. It is available also in the ICE website under *Iraq: la Ricostruzione* www.ice.it/estero2/baghdad/aziende.htm. In the ICE website it is also to be found in the document of the American Embassy.

⁸⁶ ICE, Rome 25/6/2003, *Iraq: Si Riduce La Quota Di Subappalti Per Le Aziende Irachene*. Available at www.ice.it. The preference to US suppliers has always been justified, and is also here justified, with the fact that USAID administrates US taxpayers’ money. However, it remains to be seen whether, for projects that have been limited to US suppliers, Iraq’s oil revenues will also be used, if this would be the case, the preference for US suppliers and/or goods will appear less sustainable.

Limitations: Thresholds

Another restriction of the Recommendation's coverage is represented by the threshold clause contained in para.8. It is there stated that the Recommendation "does not apply to *activities* with a value of less than SDR⁸⁷ 700,000, (or SDR 130,000 in the case of investment-related technical co-operation)" (emphasis added).

Having threshold limitations is in line with the 1998 mandate and its preference for "manageable thresholds".⁸⁸ Thresholds are provided with a clear and comprehensive attempt of avoiding unnecessary administrative burdens. Indeed, when ODA has a very small value the costs of liberalising and untying would not outweigh its benefits.

Having *de minimum* thresholds is a common practice among international and regional procurement agreements.⁸⁹ However, in these cases, the risk is that easy loopholes to the obligations endorsed can be found by simply splitting up contracts. This inconvenience is usually avoided through the application of transparency rules that allow estimating the contractual value through the aggregation of all contracts within a given period of time, in the same sector and from the same procurement agency and, if the sum is above the threshold, to compel the procurement agency to meet the terms of the agreement.⁹⁰

The Recommendation is not immune from the risk that donors might try to offset the commitment to untie by simply circumventing the threshold provision.

Besides, the risk of circumventing the threshold provision is enhanced by the lack of clarity of the wording of para.8. The language used there is very elusive. The paragraph introduces the concept of "*activities*" without defining it. It is not clear whether the concept of "*activities*" can coincide with that of "ODA offers" constantly used in the Recommendation. The paragraph does not mention either how to estimate the value of "an activity", nor even if it is possible, for threshold purposes, to aggregate all the "*activities*" within a period of time.

For instance, donors could exclude the application of the Recommendation by simply splitting up ODA offers directed to a recipient country, if each offer represents a separate "activity", this could still be tied.

It could also be considered whether "*activities*" refers to the procurement process. It could happen that more than one procurement process is needed even for the same ODA offer and, if each/or some of them are below the threshold, they would not have to be awarded in accordance with the principles of the Recommendation and could still be tied.

Another weakness of the Recommendation's threshold provision can be found in respect of the transparency provisions. Although the Recommendation provides for strong transparency mechanisms when ODA offers are untied, such as *ex ante* notification and exchange of information among DAC Members, these transparency requirements are not necessary when ODA offers are

⁸⁷ SDR is valued on a special unit basket of key international currencies and serves as the unit of account of the IMF and a number of other International Organisations. By April 2003 the value of 1 SDR was US dollar 0.577; Euro 0.426; pound sterling 0.0984. Reported in IMF, *Special Drawing Rights*, Factsheet April 2003, available at www.imf.org/external/np/exr/facts/sdr.htm.

⁸⁸ Point 2 of *Aid Procurement liberalisation: 1998 DAC HLM Mandate*. Annex III of the DAC Recommendation on Untying Aid to LDCs.

⁸⁹ For instance this is also the practise used by the GPA or the EC Public Procurement Directives. See as an example Art.5 of the EC Directive 93/36 as modified by directive 97/57.

⁹⁰ See Art.5, paras 3 and 6 of EC Directive 93/36.

below the threshold. “Activities” below the threshold would only be subject to the *ex post* control of the peer and annual reviews.

However, adherence to the spirit of the Recommendation requires donor countries to behave according to *bona fide*. Behaviours like the kind described above would still be reproved when monitoring donors at the time of the peer and/or annual reviews.

Even if it could well happen that additional amount of ODA are given, or that the procurement process needs to be split up when ODA granted to a recipient will fulfil different needs, donors should be guided by sound development needs.

Categories of ODA

The Recommendation acknowledges in para.7, that untying “is a complex process” and “different approaches are required for different categories of ODA”. The paragraph then goes on by stating that the Recommendation only applies for the categories of ODA listed in para.7(i). These are: balance of payments and structural adjustment support; debt forgiveness; sector and multisector programme assistance; investment project aid; import and commodity support; commercial services contract and ODA to NGOs for procurement related activities.⁹¹

In para.7(ii) and (iii) the areas of exclusion (or partial exclusion) from the Recommendation’s coverage are listed. These embrace two important sectors: technical co-operation (with the specifications that are presented below) and food aid.

Exclusions: Technical Co-operation

Para.7(ii) is dedicated to one of the most important categories of ODA, namely Technical Co-operation.

A conspicuous amount of aid is given under the form of Technical Co-operation.⁹² Thus, having it tied or untied will significantly influence the impact that the Recommendation will have. Moreover, it can also result in sizeable differences to the extent to which DAC Members’ ODA is presently untied.⁹³

A brief illustration of data will make the significance of the problem clearer. In the year 2000 France gave \$2,829 million in bilateral ODA, of which \$1,283 million was given under the form of Technical Co-operation.⁹⁴ In the same year, The Netherlands gave \$2,243 million in bilateral ODA of which only \$579 million was in the form of Technical Co-operation.⁹⁵

With the clear intent of avoiding that the impact of the Recommendation would be too limited if Technical Co-operation were totally excluded from its coverage, the Recommendation’s drafters

⁹¹ As far as this latter category of ODA is concerned, para.27 in Annex I of the Recommendation specifies that “Grants for the core support of development NGOs or their programmes are excluded”.

⁹² \$12.767 million was the total amount of aid given in the form of TC by DAC Members. As reported in DAC table N10, published in the DAC Annual report, see n.78 above at p.210.

⁹³ The problem that the coverage of the Recommendation can result in sizeable differences between Member States is acknowledged by paragraph 6 of the Recommendation.

⁹⁴ These data are extracted from the OECD/DAC *Journal Of Development Co-Operation 2001 Report* n.74 above, at Table 13 “Comparison Of Flows By Type In 2000” pp.214–215. The table does not distinguish between categories of countries so it can be assumed that it refers to the total amount of ODA given to all the countries referred to in Part I of the DAC list of developing countries.

⁹⁵ *ibid.*, For instance, in the year 2000 Italy gave bilateral ODA for \$377 million of which only \$27 million came in the form of Technical co-operation, but Italy gives the majority of its aid in the form of contributions to multilateral organisations. The above table shows that it gives \$999 million (This form of aid is usually untied).

have limited this exclusion to the category of Technical Co-operation classifiable as Free-Standing Technical Co-operation.

Indeed, Technical Co-operation is not *tout court* excluded from the Recommendation's coverage, a distinction is made between two categories of Technical Co-operation, namely Investment-Related (IRTC) and Free-Standing Technical Co-operation (FSTC). Only Investment-Related Technical Co-operation is subjected to the discipline of the Recommendation (even with the limitations that will be analysed below) whereas Free-Standing Technical Co-operation is allowed explicit and total exclusion from the Recommendation's coverage (last sentence of para.7(ii)).

In the DAC Statistical Reporting Directives, DC/DAC/(200)10, (expressly recalled in para.25 of the Recommendation for the definitions of the ODA categories addressed in it), Free-Standing Technical Co-operation is defined as comprising "activities financed by a donor country whose primary purpose is to augment the level of knowledge, skills, technical know-how or productive aptitudes of the population of developing countries, *i.e.* increasing their stock of human intellectual capital, or their capacity for more effective use of their existing factor endowment". Investment-Related Technical Co-operation is defined instead as "the financing of services by a donor country with the primary purpose of contributing to the design and/or implementation of a project or programme aiming to increase the physical capital stock of the recipient country. These services include consulting services, technical support, the provision of know-how linked to the execution of an investment project, and the contribution of the donor's own personnel to the actual implementation of the project (managers, technicians, skilled labour, etc.)".

Unfortunately, data distinguishing between these two forms of Technical Co-operation is not made in the DAC's Tables published in the 2001 Annual report,⁹⁶ therefore what the significance of the distinction is in numerical terms, cannot be compared.

It is surprising that careful commentators of the Recommendation do not make any reference to the distinction made in the Recommendation between the two forms of Technical Co-operation⁹⁷ and still regard Technical Co-operation as totally excluded from the Recommendation's coverage. They also consider this exclusion to be a major weakness of the Recommendation.⁹⁸ It would be interesting to know whether their attitude is due to the fact that they perceive this distinction to be too elusive to be actually implemented, or if instead this is due to a perception of lack of donors' will to implement it.⁹⁹

The need to avoid the distinction made between the two forms of Technical Co-operation remains a general statement of principle that seems to be acknowledged first of all by the Recommendation itself. It is in fact stated in para.25 of Annex I that "further work will be undertaken *as a matter of priority to operationalise* the definitions of Investment-Related Technical Co-operation (including its component activities) and food aid *to ensure an effective implementation of the Recommendation* (emphasis added)".

Although it is still too early to know what direction DAC's works will take (and should take) to "operationalise" the definition of IRTC, it is foreseeable that the challenge of drawing a definition of IRTC will be to combine the need for drawing a clear line between the two forms of Technical Co-operation. In order to avoid that fate, donors willing to circumvent the Recommendation's provisions

⁹⁶ See OECD, *The DAC Journal of Development Co-operation 2001 Report*, n.74 above.

⁹⁷ For instance in ActionAid's (and ActionAid Alliance) papers it is never mentioned.

⁹⁸ ActionAid Alliance, *Towards Effective Partnership: Untie Aid*, available at www.actionaid.org/resources/pdfs/tiedaid.pdf.

⁹⁹ This Author believes that it is reasonable to assume that their criticism of the Recommendation is not simply lacunose in this respect, but that this attitude is due to the fact that they consider this distinction not to be effective enough.

could speculate on where the boundaries between the two forms of Technical Co-operation lie, with the need for reflecting the reality of Technical Co-operation aid projects that could well consist of a hybrid between the two. It will be important, for achieving greater untying, that the definition of IRTC will not be too restrictive.

A factor that also constitutes a difficulty in the implementation of such a distinction can be found in the fact that donors are not used to distinguish between these two forms of Technical Co-operation. Indeed, they do not even report separate data for the two different forms of Technical Co-operation (at least this is what can be assumed by the fact that the DAC latest Report only gives information on Technical Co-operation as a general category), and having to fill this gap in donors' data reporting system might also cause delays in the implementation of the Recommendation.

The effective functioning of OECD data reporting system plays an important role in ensuring that donors respect the intention of the Recommendation's drafters of avoiding that Technical Co-operation is *tout court* excluded by the Recommendation's coverage. Pressure needs to be put on donors to provide complete data on Technical Co-operation. Lack of data on IRTC denies the Recommendation its important monitoring system (see below, para.3.2.3).

As far as the analysis of the substance of para.7(ii) is concerned, the language of para.7(ii) can raise some doubts in interpretation. The paragraph acknowledges also for Investment-Related Technical Co-operation the possibility that donor states may be willing to maintain a "basic sense of national involvement". This wording seems to suggest that IRTC is not to be treated like the other categories of ODA listed in para.7(i). However, nothing is said about which different treatment (if there is any) has to be granted to it.

The different treatment could not result in the possibility to waive the commitment to untie, because such possibility is openly reserved only to Free-Standing Technical Co-operation (last sentence of para.7(ii)). This provision cannot be read as allowing donors to waive their commitments to untie simply appealing to the "sense of national ownership". In fact, if this would be the case, donors' discretion would be full and unconditional (as it is for free standing Technical Co-operation) because no specifications are provided on the hypothesis on which donors could rely on, and there would be no scope for operationalise the definition of IRTC, "as a matter of priority", as stated in para.25.

To ascertain which kind of different treatment has been reserved to IRTC, para.7(ii) needs to be read together with para.8. In this way it will be possible to identify the meaning of "basic sense of national ownership" with the different, and higher, threshold applied to Investment-Related Technical Co-operation compared to that applied for the categories of ODA in para.7(i).

Exclusions—food aid

In respect of food aid, the Recommendation recognises that "DAC Members' policies may be guided by the discussions and agreements in other international fora governing the provision of food aid, bearing in mind the objectives and principles of this Recommendation" (para.7(iii)). Food aid was not specifically excluded from the 1998 High Level Mandate. Thus, it seems reasonable to wonder whether the final decision of excluding this category of ODA from the Recommendation's coverage represents a step back from DAC Members' initial purposes.

A brief introduction of the international panorama surrounding food aid is first necessary in order to ascertain, given the silence of the Recommendation, *which are* the possible "international fora" and *when* these "discussions" will be undertaken. Only after these preliminary remarks, it will be possible

to investigate the substance of the Recommendation's provision. The attention will be in particular concentrated on the second part of the Recommendation's provision and on the implication that its wording "bearing in mind the Recommendation objectives" will have for DAC Members when discussing in "other international fora". A final conclusion will be drawn on whether agreeing with the Recommendation's choice of delegating other international fora for the discussions on untying food aid.

It needs to be stated in advance that the international panorama surrounding food aid is here recalled with the sole scope of ascertaining whether the exclusion of food aid from the Recommendation's coverage is appropriate. The analysis here cannot but be restricted to the discussions concerning food aid only relatable to the Recommendation's targets,¹ even if it is here acknowledged that food aid debates embrace a broader range.²

At the international level important discussions on food aid are taking place in the WTO within the framework of the negotiations for reforming agricultural trade.³

According to the Doha development agenda, all the WTO negotiations will have to be finished by January 1, 2005. Another important appointment for the agenda of the negotiations in agriculture is September 2003 when, at the Fifth Ministerial Conference, to be held in Mexico, countries are expected to submit comprehensive draft commitments.⁴ Given the importance of the outcome of these negotiations, the 1999 Food Aid Convention has been prorogued until the year 2005.

Food aid is a very contentious issue within the WTO, it is addressed within one of the three pillars, namely the export-competition pillar, upon which agricultural trade liberalisation was built in the Uruguay round Agreement on Agriculture (URAA).⁵

Donors are asked to meet the needs of the countries that most necessitate food aid by providing adequate quantity (in terms of amount given but also of "reliability" of aid given, *i.e.* avoiding the usual trends of increasing donations in times of surplus and decreasing them in times of shortage, when prices are high and developing countries are most in need) and quality of food (without causing distortion to nutritional habits of the recipients' population of aid provided).

The main concerns related to food aid are linked with the fear that food aid is abused as a mechanism to circumvent export subsidy commitments and to reduce surplus stocks at times when world prices are low.⁶ Such a use of food aid distorts the terms of trade among world food producers,

¹ For further and comprehensive discussions it is deferred to the extensive work of Philip C. Abbot and Linda M. Young, *Export Competition Issues in the Doha Round* available at <http://www2.montana.edu/lmyoung/pdf-files/Abbott%20and%20Young.pdf>.

² Broadly speaking, negotiations are taking place on detailing the conditions and situations under which emergency, project and programme food aid should be granted; enhancing the level of food aid granted, paying particular attention to additionality and reliability of food aid; reaching the target of ensuring that food aid is provided only through grants rather than also with loans.

³ Negotiations are being conducted under Art.20 of the Uruguay Round Agreement on Agriculture (URAA). See www.wto.org. These are built around three pillars, Market Access, Domestic Support And Export Competition. Food aid is only one of the four categories dealt with in the export competition pillar. As already said above, it is not possible here to take into consideration negotiations taking place under the other pillars.

⁴ Even the deadline for the renegotiations of the food aid convention has been postponed to the year 2005, most probably to make it coincide with the virtual date of the ending of all negotiations within the WTO.

⁵ Agricultural trade liberalisation is built in the Uruguay Round Agreement on Agriculture (URAA) upon three pillars; these are Market Access, domestic support and export competition. The export competition pillar addresses not only issues related to Direct export subsidies, but also problems related with officially supported export credits, exporting state trading enterprises and food aid, under which implicit support subsidies may arise, See Abbott and Young, n.1 (2nd ser.) above.

⁶ See Food Aid Convention Art.IX. In the URAA food aid was included in Art.10.4 and drew on protocols and commitments that previously were implemented in other international agreements. See Abbott and Young, n.1 (2nd ser.) above.

and risks serious harm to producers in the receiving country, (up to the extent of causing the collapse of their own food production).

To tackle the problem of using food aid as a means of promoting exports Art.10.4(a) of the URAA requires donors to ensure that “the provision of international food aid is not tied, directly or indirectly to commercial export of agricultural products to recipient countries”. It recalls Art.IX(e)(i) of the 1999 Food Aid Convention (FAC). However, the language of the latter is stricter and more detailed, for instance it makes explicit reference to formal and informal tied aid.⁷

Notwithstanding the obligation endorsed under both the URAA and the FAC, donors’ practices still lag behind and food aid is used to improve the access of donors’ commercial companies to certain national markets.⁸ Indeed, numerous studies denounce donors’ practice of tying food aid.⁹

The web of tying food aid is very intricate, even more than that of other categories of ODA. Donors’ reticence of untying food aid are connected not only with the implementation of tied aid by other donors, but are also made in retaliation for the implementation of other agriculture subsidies, such as direct subsidies.¹⁰

For instance, the Committee of Review of Australian Overseas aid programme although acknowledging the danger associated with Australian practice of tying food aid, it recommends that Australian food aid should be untied only in respect of developing countries but should not be sourced from those European or Northern American countries which retain either implicit or explicit price support mechanisms for their grain exports.¹¹

So far negotiations within the four categories of the export competition pillar seem to be closely interrelated, the final solution adopted within food aid will certainly depend also on the agreements reached within the other categories of the export competition pillar, namely: direct export subsidy, export credits and state enterprises.

The need to render operative and explicit the commitment to untie is shown in the second Chairman’s Paper, delivered on March 18, 2003,¹² containing proposals for the replacement of para.4 of Art.10 of the Agreement on Agriculture. The proposal adds strengthened terms of untied

⁷ Art.IX (e)(i) of the Food Aid Convention states that Members shall ensure that “the provision of food aid is not tied directly or indirectly, formally or informally, explicitly or implicitly to commercial exports of agricultural products or other goods and services to recipient countries”.

⁸ This is particularly the case of the US, the major food aid donor. See Clark, *Food Aid In The WTO Agricultural Trade Policy*, January 2002, available at www.foodgrainsbank.ca/downloads/fatp.pdf the reason adduced by this author to explain donors’ behaviours is that “although this is specifically proscribed by Art.10(4) of the Agriculture Agreement, such allegations are extremely difficult to prove given the proprietary nature of any resulting commercial transactions.

⁹ See for instance: NGIN, *Stop Putting A GM Gun To The Head Of Hungry Zambias*, available at www.ausaid.gov.au/publications/pdf/simons/chp16.pdf where it is denounced that “US food aid is tied. . .(omissis) and in breach of the food aid convention . . .the US is refusing southern African governments loans that are not tied to the purchase of GM contaminated grain from the US”. Available at <http://members.tripod.com/~ngin/231002c.htm>; see also AUSAID, *Food Aid And Food Security* available at www.ausaid.gov.au/publications/pdf/simons/chp16.pdf where it criticised the Australian government practice of accommodating commercial pressures to purchase food aid in Australia. It is there explicitly said that “AUSAID appears in practice to tie nearly all its bilateral food aid purchases to Australian supply”.

¹⁰ Well known is the *querelle* between US and EU because of the latter making an extensive use of direct subsidies, whereas the former is blamed of using food aid and export credits as instruments of trade promotion. The EU is seeking for a reform of food aid that will ensure food aid is provided to “well defined vulnerable groups and in response to well recognised emergencies”. Moreover, the EU also advocates, with the support of developing countries, that food aid is given only in the forms of grant.

¹¹ Report of the Committee of Review, chapter 16 “food aid and food security”, in Report of the Committee of Review, *One Clear Objective Poverty Reduction Through Sustainable Development: The Australian Overseas Aid Program*, April 1997, pp.255–257 Available at <http://www.ausaid.gov.au/publications/pdf/simons/all.pdf>.

¹² Attachment 6 of Annex 5, “draft for further consideration of a possible replacement of paragraph 4 of article 10 of the Agreement on Agriculture”.

commitments with the aim of rendering more difficult to circumvent the obligation of not using food aid as an export subsidy.

The proposal recalls literally at point 4(b)(iv), Art.IX(e) of the 1999 Food Aid Convention and it adds, in para.4(b)(ii), that “food aid for other purposes, including under programmes and projects to enhance nutritional standards amongst vulnerable groups in least-developed and net-food importing developing countries, is provided exclusively in the form of untied financial grants to be used to purchase food for or by the recipient country. . .(omissis)”.¹³ The proposal, at point 4(f), makes it also clearer that food aid transactions that are not in conformity with these provisions and “which cannot be accommodated within limits of a member’s export subsidy reduction commitments shall be deemed for the purpose of Art.10.1 of this agreement to constitute non-commercial transactions which circumvent that Member’s export subsidy commitment”.

Turning now to the analysis of the substance of para.7(iii) of the Recommendation, it could be asked whether the Recommendation’s provision goes beyond a *simpliciter* exclusion of food aid from its coverage. It is submitted that an affirmative answer to this question would not be coherent with the spirit of the Recommendation, the HLM mandate and with a systematic interpretation of the Recommendation’s provisions.

A systematic interpretation of the Recommendation requires para.7(iii) be read together with the collateral provision contained in the Recommendation, in particular it can be pointed out that para.5 requires to “study the possibilities of extending untied aid”.

For these reasons the suggested interpretation of the norm is that signatory parties are not only delegating their competencies on food aid to other international fora, but they are committing themselves to undertake discussions and concrete efforts on untying food aid in those fora. If these efforts are not made, DAC Members should be regarded as not fulfilling the Recommendation obligations.

A final observation needs to be made. When the Recommendation states that donors shall “bear in mind the objectives and principles of the Recommendation”, it not only refers to the commitment to untie, but to all the principles there promoted. A look at the proposals submitted in the WTO negotiations seems to confirm the importance that these principles can play.

So that DAC Members should not hinder developing countries’ long standing demands for an increase in the level of food aid and the enhancement of its “reliability”, *i.e.* ensuring that food aid will not decline in times of shortage, this would in fact not be consonant with the principle of promoting and sustaining “adequate level of ODA, in terms of quality, volume and direction” (as stated in para.2 of the Recommendation).

Another principle of the Recommendation can also be very relevant in the food aid negotiations. This is the principle of promoting local and regional procurement in partner countries, (para.4 of the Recommendation). It coincides with the claim of organisation involved in food aid donation, such as the UN World Food Programme, that donor countries should make more use, for delivering food aid, of local and triangular purchases.¹⁴ For instance in the year 2002, of the 2.9 million tons of food aid

¹³ Exceptions are provided when food aid can be provided in kind within the framework of programmes and projects operated by UN agencies or by humanitarian organisations.

¹⁴ As defined in INTERFAIS, WFP, *2002 Food Aid Flows The Food Aid Monitor May 2003*, p.VII, “Local purchases account for the food aid procured in a country and used as food aid in the same country, whereas triangular transactions are the food aid purchases or exchanges in one country for use as food aid in another developing country”.

delivered bilaterally, only less than 5 per cent had been procured through triangular or local purchases.¹⁵

It can be concluded by saying that, if food aid is not considered as being simply excluded from the Recommendation's coverage, the choice of the drafter to leave the discussion on untying this category of ODA in other international fora can be justified by the fact that it was aimed at avoiding slowing down of DAC's work by donors' discussions in this delicate area or contrast with the provisions that may be adopted in other fora.

Moreover, negotiations within the WTO are showing that food aid discussions are closely connected with the solutions that will be reached in the other categories of the export competition pillar. Thus it seems appropriate to leave to the WTO also the matter of untying. It needs also to be said that the WTO is a forum where developing countries will have the chance of addressing their concerns. For instance, when the OECD was delegated with the task of resolving the issue of export credits in agriculture, some developing countries have objected to being excluded from those negotiations.¹⁶

Derogation

Before concluding this section, another provision of the Recommendation needs to be analysed is the derogation clause provided in para.19. This derogation concerns individual ODA offers. The paragraph states that "DAC Members may, *in exceptional circumstances*, take measures inconsistent with the terms of this Recommendation, in situations where they believe it to *be justified on the basis of overriding, non trade related, development interests*. . . (emphasis added)".

Two conditions need to be satisfied to apply the derogation: an *exceptional* situation and a justification that is "overriding, non-trade related, development interests". However, no definitions are provided for the terms *exceptional situation* and *overriding, non-trade related, development interests*.

An exceptional situation could be defined in negative terms as one that is not connected to structural or permanent phenomena. For instance, a war, like the one in 2001/2002 in Afghanistan (a LDC), could well be considered as an exceptional situation, so that, any post-war reconstruction program in Afghanistan could fall within Art.19 and be exempted by the Recommendation if the second condition is also met.

However, problems might arise when trying to ascertain what an "overriding, non trade related, development interest" is. The norm is constructed as an open-draft derogation and it does not offer an explicative list of justifying policies or events. From one side, an open-draft derogation, in not limiting its application to listed policies, avoids the risk of being too narrow and easily becoming out of date. Everything that is related to development, but not to trade, can be covered by it. However, on the other hand, this could give rise to easy speculations of the norm leading to a too extensive use of it. Moreover, when inserting this provision in the tied/untied aid contest it seems to be hard to find a "non-trade related" justification for limiting the procurement process to donors' exporters. (Are not tied aid conditions inserted to favour economic, and so "trade related", interests of donors' exporters?).

In addition, one could have doubts on whose "overriding, non-trade related, development interest" the norm is protecting. If these interests are the recipient countries' and not the donors' it

¹⁵ INTERFAIS, WFP, *2002 Food Aid Flows The Food Aid Monitor May 2003*, p.22.

¹⁶ Abbot and Young, n.1 (2nd ser.) above at p.1.

might be even harder to identify them (how could a developing country's development interest be favoured by granting procurement preferences to donor's exporters?).

The second part of para.19 lays down the transparency requirements that donor States' are asked to comply with for applying the derogation. Donors have to justify in a "letter to the Secretary-General of the OECD and to the DAC chair" their implementation of the derogation. They do not need to follow any consultation process with other DAC Members or to wait for advice and/or check on the fulfilment of the derogation's requirements before being able to use the derogation. Although follow up review procedures are provided as safeguard measures for avoiding misuses of para.19. However, nothing is said on whether, in case of a misleading application of the derogation, a mechanism to refrain donors from its implementation (and to untie) will be started or not.

Emergency aid

It seems opportune to discuss in this paragraph whether emergency aid should receive a different treatment compared to that of other categories of ODA, and/or if it should be considered not to be covered by the Recommendation at all. Members' views on this issue are different and no formal decisions have been taken. Obviously granting a special treatment to emergency aid could result in significant waives to the Recommendation's coverage.

The Recommendation does not provide for a special treatment, to be granted to emergency aid and no specific reference to it is made.¹⁷ Thus, if emergency ODA follows within one of the categories listed in para.7(1), if it is not given in the form of food aid or free-standing TC, and if a derogation (as specified in para.19, and as analysed above) is not applicable, it should be considered covered by the Recommendation's coverage.¹⁸

At the meeting of the working Party on Financial Aspects of Development Assistance held in Paris on March 13–14, DAC Members discussed how emergency aid should be regarded in respect of the Recommendation. The DCD Secretariat advanced some proposals on how to address this issue in a pragmatic way.¹⁹

In the preliminary guidance it is suggested that speed of delivery is essential in "Emergency"²⁰ situations and that "the procedures of the Recommendation (*ex ante* notification, competitive procurement regimes) should not get in the way of this and can be waived when emergency aid is at stake".²¹

However, it is worth highlighting that the secretariat is only proposing to waive the transparency and procedural requirements set in the Recommendation for untied aid offers and it is not claiming for the waiver of the untie commitment itself. For transparency purposes and for possible future review of

¹⁷ In the discussion prior to the adoption of the Recommendation the issue of emergency aid had been raised, members' views differed as to whether emergency aid should be formally covered or excluded by the Recommendation., no formal decision was taken. Reported in Document number: CD/DAC/FA/M(2002)1/PROV Annex 1, p.7.

¹⁸ Obviously if the activities are also below the thresholds provisions.

¹⁹ Document number: DCD/DAC/FA/M(2002)1/PROV Annex 1, p.7.

²⁰ DCD/DAC(2000)10, para.1.14: "an emergency is an urgent situation created by abnormal event which a government cannot meet out of its own resources and which results in human sufferings and/or loss of crops and livestock. Such an emergency can result from i) sudden natural or man-made disasters, including war or sever civil unrest; or ii) food scarcity conditions arising from crop failure owing to drought, pests and diseases".

²¹ Development co-operation Directorate Development Assistance Committee, document number DCD/DAC/FA/M(2002)1/PROV Annex 1, 19 April, 2002.

this issue, the secretariat also recommends that ODA disbursement should be reported to the secretariat “after the fact” (this report shall include aid offers plus contract award).²²

Closure principles

Notwithstanding the limits and exclusions highlighted above, donor countries are free to untie their ODA “to a greater extent” than that set out in the Recommendation and, if they have already done so, are invited to continue to untie their ODA in areas not covered in the Recommendation (para.5).

3.2.2 Implementation: Donor States’ Obligations: untying de jure and de facto

Untying ODA “to the greatest extent possible”, (para.2 of the Recommendation) is the main commitment endorsed by DAC Members. Untying implies that loans or grants will be freely and fully available “. . .to finance procurement from substantially all aid recipient countries and from OECD countries”.²³ DAC Members are asked to “take any steps necessary to ensure that ODA, untied in accordance with this recommendation is both *de jure* and *de facto* untied²⁴” (Annex I, para.23).

A number of other obligations have been set as its corollary, to help in completing and strengthening the untying initiative. Untying is regarded as a means to an end, an instrument to achieve the objectives and principles laid down in the first part of the Recommendation (see para.1). In order to achieve the Recommendation’s objectives, other commitments, parallel and complementary to the untying ones, have been endorsed.

For the sake of clarity, this paragraph will start with the analysis of the initiatives undertaken to foster “de facto” untying and the related transparency rules. Not surprisingly transparency rules are intrinsically connected with a de facto implementation of the Recommendation. Only the transparency rules strictly linked with donors’ role, i.e. that impose obligations to donor States, will be analysed here whereas, those transparency rules connected to the DAC’s monitoring role will be considered in the next paragraph.

The analysis will be then continued with the study of donors’ commitments parallel to the untied initiative.

De facto untying and the transparency obligations

To achieve a *de facto* implementation of the Recommendation and ensure that the aid procurement market is open to international competition, the Recommendation has provided a series of transparency rules and operational procedures aimed at eliminating obstacles to foreign suppliers’ fair participation to the bidding process and targeted at enhancing collaboration among DAC Members.

The transparency rules are laid down in part *d*) of the Recommendation, paras 16–18, and in Annex I, paras 29–37. The first set of rules lay down general transparency principles whereas the rules contained in Annex I are “operational procedures and understanding”,²⁵ *i.e.* concrete obligations to

²² DCD/DAC/FA/M(2002)1/PROVAnnex 1 p.7.

²³ Annex I, para.23 of the Recommendation.

²⁴ Annex I “Operational Procedure and Understanding” forms an integral part of the Recommendation on Untying ODA to LDCs as stated in para.22 of the Recommendation.

²⁵ Para.22 of the Recommendation.

avoid the former from remaining abstract if general principles are left to the arbitrary discretion of each state.

Donors are asked to comply with several requirements. As a first step, they are required to notify *ex ante* the untied aid offers (para.16). These rules have the scope of ensuring the widest-spread of possible suppliers is informed in time for the bidding opportunities.²⁶ What kind of information the notification should include, when and where these notifications need to be made is further specified in the norms contained in Annex I (it is worth remembering, Annex I is an integral part of the Recommendation).²⁷

At the notification stage, donors need to disclose the name of the notifying member, agency and contact point; name of the recipient country; the project description; the project value; the bidding period; the procurement regime; the agency responsible of the procurement process (para.30). At the meeting of the working Party on Financial Aspects of Development Assistance, it was subsequently specified that donors, at the time of the *ex ante* notification, need to make publicly available the Aid Offer, “not its component procurement opportunities”.²⁸ Nevertheless, donors have to present as much information as possible on the component procurement opportunities likely to be associated with that offer.²⁹ Interested suppliers can also seek further information via the contact information of the procurement agent.

Notifications need to be made to the Secretariat no less than 30 calendar days prior to the opening of the bidding period (para.31) and need to be advertised on the DAC’s Internet Bulletin Board³⁰ (para.33). Donors have to comply with the *ex ante* notification procedures even if the procurement process is carried out by partner countries.³¹

Meeting Paris 13/14 March, 2002 Document number DCD/DAC/FA/M(2002)1/PROV. Where it is also recommended that in the above circumstances DAC Members will have to find way to comply with their obligation without imposing undue burdens on partner countries.

The procurement process needs to allow a “*sufficient time to all suppliers* to prepare and submit bids (emphasis added)”, (para.32). A *sufficient time* is normally regarded to be of no less than 45 calendar days or 90 days for large projects (those with a value of, or exceeding, SDR 50,000).³² The Recommendation clearly takes into account the fact that foreign bidders would be disadvantaged in respect of national suppliers if too short a time is granted for the bidding process.

Corollary commitments: completing de facto untying

Other obligations complete, as a direct corollary, the untying obligation. These include the obligation not to diminish the level of ODA (point 2, para.2), if it was already done so, continuing to untie in sectors not included in the Recommendation, and studying the possibility of extending untied aid in such areas”(para.5).

The sense of these obligations is self-explicative and does not need too many comments. The

²⁶ As it will be analysed below, see para.3.2.3, these rules have also the scope of enhancing DAC’s monitoring role.

²⁷ See para.22 of the Recommendation.

²⁸ At the meeting of the Working Party On Financial Aspects Of Development Assistance held in Paris in April 2002, Document number DCD/DAC/FA/M(2002)1/PROV Annex 1, p.8.

²⁹ *ibid.*

³⁰ In addition DAC Members may, if they wish, use their own facilities to publicise aid offers contained in notifications (Annex I, para.33).

³¹ See Working Party on Financial Aspects of Development Assistance *Summary Record Of The 137th*

³² Para.32 of the Recommendation.

Recommendation's objectives would be jeopardised if as a result of the untying obligation, DAC Members constrain ODA flows to LDCs. It would also be against the spirit of the Recommendation if donors decide to restrict the ambit of untied aid that they used to grant only to align their behaviours to those of other donors and/or to the Recommendation's coverage.

However, both commitments are difficult to prove. A change in ODA flows could easily be justified as a change in development policies, escaping in this way the suspicion of being implemented only to circumventing the untie obligation. In this context the role exercised by the DAC and by the peer donors is fundamental. The level and direction of ODA flows over the years need to be carefully compared and, when suspicious changes of their direction have occurred, pressure needs to be put on the suspected donors in order to receive clear explanations of why these changes have occurred.

A final comment needs to be made for the commitment to further extend untying. This is a necessary norm of closure. It recognises the limits of the Recommendation itself and the need of not stopping DAC's work for untying. It represents the legitimating base for any other DAC's work on untying.

Other commitments:

Effort sharing and co-ordination

Parallel to the above, more specific untying obligations are other Recommendation's provisions targeted at enhancing the impact of the Recommendation and at fulfilling its objectives.

Recognising that the impact that the Recommendation has on each country could be very different, donors' have endeavoured to promote "more balanced effort-sharing among members" (para.6). This commitment is very important for the success of the implementation of the Recommendation.

Indeed, "variations in the structures and geographical orientations of Members' aid programmes, together with the coverage provisions in this Recommendation, can result in sizeable differences in the extent to which DAC Members' ODA to LDCs is presently untied".

An example of how "sizeable" the differences can be among DAC Members in "the extent to which their ODA to LDCs is presently untied", has been already made in the previous paragraph, (see above paragraph. . .where data on the total amount of aid granted bilaterally by donors have been compared with data on ODA granted in the field of TC).

A more balanced effort sharing will also be in line with another goal of the Recommendation: promoting co-ordination among donors.

Co-ordination and collaboration among donors are very important for DAC Members as demonstrated also by other provisions in the Recommendation. For instance co-ordination between donors' policies is enhanced also by the transparency rules laid down in paras 17 and 34 of the Recommendation. These rules are set to facilitate the exchange of information among donors on untied aid offers covered by the Recommendation and allow signatory states to know how each other party implements the Recommendation.

Donors are asked to provide prompt and full responses on untied offers when requests for further information are put forward by other Member States (para.17). Para.34 of Annex I of the Recommendation, individuates a *prompt response* as one given by using electronic means within 14 calendar days. The response is *full* when it provides "all information relevant to the request, including

information concerning donor financing of the services related to the design and implementation of the notified project”.³³

Procurement procedures

In para.4 of the Recommendation, under the title “objectives and principles”, DAC Members recognise that, it is *intrinsic to the untying initiative*, that they achieve the aim of reinforcing “partner country responsibility for procurement”. (para.4).

This issue of reinforcing recipient countries’ responsibilities for the procurement process is receiving a strong echo not only within the OECD/DAC forum, but also within other international institutions such as the World Bank and the UN. This is due to the fact that the current practice of donors imposing their procurement rules has been demonstrated to be unsuccessful and harmful for the recipient country.

The problems that can be raised by the application of different donors’ procurement rules are twofold. First of all, they create administrative complexities for procurement officials. Secondly, they can constitute obstacles to international trade, *i.e.* national over foreign suppliers will be advantaged because they are more familiar with the donors’ rules.

Indeed, the Recommendation tries to avoid the highlighted risk. It gives a first answer to these problems by requiring donors to apply, in the procurement process, the DAC ‘s Good Procurement Practices (Pt II, letter c, paras 14–15). However, it is recognised that further works need to be undertaken to solve the problems created by the lack of co-ordination in donors’ aid procurement procedures.

The DAC has also the specific task of reviewing, in its Annual Report, DAC Member and partner countries’ procurement practices for untied aid offers and assessing progress towards strengthening partner countries’ local procurement capacities (para.20). DAC Members are currently considering further initiatives on procurement reforms. Work in this respect is being undertaken jointly by the OECD, the World Bank and the UN.³⁴

The Recommendation also engages DAC Members and partner countries to adhere to the principles of “effectiveness, accountability, probity and transparency” when undertaking any initiative aimed at reinforcing partner country responsibility for procurement and at reforming their aid procurement systems (para.4). To this end, donors must endorse, in partnership with partner countries, relevant commitments and guidance to fight corruption and bribery in procurement³⁵ (para.15).

3.2.3 Monitoring

Pt II(f) of the Recommendation reserves to the DAC the role of *monitoring and evaluating* “all aspects” of the Recommendation. The monitoring and evaluation provisions are aimed at reviewing the implementation and assessing the impact of the Recommendation. These rules also have the parallel

³³ This norm has to be read also in conjunction with para.35 of the Recommendation, for hypothesis where it is not possible to reply with a letter.

³⁴ For instance the tree institutions gathered in February 2003 in Paris for the forum “mainstreaming procurement in developing countries”.

³⁵ Para.15 of the Recommendation requires to apply the 1996 DAC Recommendation on Anti-corruption and the 1997 OECD Convention on bribery of foreign public officials.

function of incentive Member States' fulfilment of the obligations endorsed with the Recommendation.

They are instructed to ensure that the objectives and principles laid down in Pt I of the Recommendation³⁶ are fulfilled by DAC Members. To fulfil this objective, the DAC will direct its monitoring and assessing role to the control of the level of untied aid offers, the "volume quantity and direction" of ODA flows, the extent to which effort-sharing among members is promoted and how capacity building in developing countries is enhanced.

DAC Members, by communicating in a timely manner a set of indispensable information to the DAC will facilitate its monitoring task. The transparency rules laid down in paras 16, 18 and 37 are of great relevance for monitoring purposes. Through the *ex ante* notifications, the DAC will be aware of untied aid offers and, in this way, will control the level of untied ODA flows (it will be remembered that the *ex ante* notification serves the scope of letting all possible suppliers know of untied aid offers).³⁷ Donors have to inform the DAC also of the name of the bidder that has been awarded the contract pertaining to the untied offers covered by the Recommendation (para.18).³⁸ This latter obligation is to be regarded as a transparency norm of closure and it will allow the DAC to evaluate the real impact of the Recommendation and to ascertain whether it is *de facto* implemented.

As already explained at para...a point of criticism is the lack of mechanisms for efficiently monitoring tied offers that are excluded from the coverage of the Recommendation, *i.e.* those below the threshold or not included in the area listed in para.7(l).

Also very important for monitoring purposes are the provisions in paras 9–13. They offer two mechanisms, the reference indicator matrix and the member performance profiles, for the evaluation of "promoting a more balanced effort sharing among Members".³⁹ The two mechanisms will be object of DAC's analysis both in the Annual Report (see para.13) and in the peer review (see para.12). In case of unsatisfactory results, the DAC may recommend donors to undertake further actions.

Three mechanisms are individuated through which the DAC will accomplish its monitoring role: the Annual Reports (to be renewed in time for the DAC annual high level meeting),⁴⁰ the Peer Reviews of individual DAC Members, and a "comprehensive evaluation" to be carried out by the High Level Meeting in 2009.

The Annual Report covers "all the aspects of the Recommendation as well as the experience of delivering its objectives" (para.20). The Recommendation specifically states that with this annual instrument, the DAC will 1) assess the impact of the Recommendation on ODA flows⁴¹; 2) set out Members' policies in respect of investment-related technical co-operation and food aid; 3) monitor effort-sharing in accordance with the mechanism set out in paras 9–13⁴²; 4) review DAC members procurement practices and assess progress towards strengthening local procurement capacities and improving the access of partner countries' enterprises to aid funded procurement.⁴³ In the Annual

³⁶ See Pt I of the Recommendation, paras 1–6. All the monitoring point in para.20 reflects the objectives of paras 1–6.

³⁷ So not only Member States or private parties as analysed in the precedent paragraph.

³⁸ Para.18 of the Recommendation.

³⁹ Para.9 of the Recommendation.

⁴⁰ Para.20 of the Recommendation

⁴¹ An essential objective of the Recommendation and commitment for Member States is to ensure that ODA will not decline over time as a result of the implementation of this Recommendation.

⁴² In case of unsatisfying results, it has the power to recommend further actions

⁴³ Reinforcing capacity building is an essential objective of this Recommendation, and enhancing the effectiveness of procurement rules and practices is individuated as a mean to this end.

Report the DAC will also address individual concern of Member States, and provides input for the peer reviews of individual DAC Member's development co-operation programmes.

Para.20 includes also the peer review of DAC Member's development co-operation programmes between the mechanism for evaluating and monitoring the Recommendation. The peer review is a systematic examination and assessment of the performance of a State by other States, (when it involves an international organisation like the OECD, also together with the Secretariat of the organisation).⁴⁴ The examination is conducted every 3–4 years, on a non-adversarial basis and it relies on mutual trusts among states. Peer review tends to create, through the reciprocal evaluation process, a system of mutual accountability. Peer reviews are Probably politically more effective than the Annual report, because they address only one country.

The 2009 evaluation will probably take into account the results reached with both the Annual Reports and the Peer Reviews however, at present, it is still too early to know how effective this will be and how it will actually be structured.

3.3 The Recommendation's Shadows: Effectiveness and Enforcement

Effectiveness

The Recommendation has received a strong echo among the international community. For instance, the Recommendation is expressly recalled in the UN Programme of Actions for the Least developed Countries, and in the Brussels Declaration, both unanimously adopted by the UN Assembly at the closing plenary meeting of the Third United Nations Conference on the Least Developed countries, held in Brussels from May 14–20, 2001.⁴⁵

In principle, DAC Members seem to be willing to implement the Recommendation in their development laws and practices, nevertheless they seem to be still reluctant in putting into practice the Recommendation's untying provisions. Especially as concerns the transparency rules and instruments.

So that, even setting aside any specific example on a single Member States (on which we will come back in the appropriate chapters dedicated to the case studies),⁴⁶ the Author has noticed, while looking at the DAC Untied Aid Bulletin Board on which untied aid offers need to be advertised ex para.33 of the Recommendation, that very few donors (and offers) are actually using it and complying with the Recommendation's obligations.

On the period between September 4, 2002 and April 25, 2003, only 11 out of the 23 DAC Members have actually advertised untied ODA offers on the Bulletin.⁴⁷ Of these 11 countries, only very few offers are advertised. Countries like the US or Canada have advertised only one offer. This, especially for a State like the US that gives approximately \$2000 million in ODA to LDCs,⁴⁸ is unfortunately surprising.

⁴⁴ F.Pagani, *Peer Review: A Tool For Co-Operation And Change. An Analysis Of The OECD Working Method*. OECD, General Secretariat Directorate for Legal Affairs, September 11, 2002, unclassified document, number SG/LEG (2002)1.

⁴⁵ UN A/56/297 Third United Nations Conference on the Least Developed Countries www.un.org retrieved on 27/01/2003. See in particular Point A 14 for the Brussels Declaration and Point B 49 commitment 7 of the plan of actions.

⁴⁶ This Author will focus her future work on the study of the implementation of tied aid by the Italian and the UK Governments.

⁴⁷ The Untied Bulletin Board was retrieved in May 2003, all the Untied ODA offers from January 2002 have been checked. The bulletin is available at www.oecd.org.

⁴⁸ It gave exactly, in the year 2000, \$1942 million. The reader is warned that the data here analysed referred to the year 2000. As for in the DAC table in the OECD *Annual Report*. See n.74 above but it seems here reasonable to assume that these have not declined (remember commitment endorsed in para.5 of the Recommendation, of not declining the level of ODA as a consequence of the implementation of the Recommendation).

A study conducted on four DAC Members, namely France, Italy, Spain and the US, by the NGO's ActionAid Alliance,⁴⁹ confirms that limited results have been achieved in the implementation of the Recommendation. Of the four countries there analysed, only France seems to have reformed its aid procurement system to adhere to the Recommendation, whereas the other donors still lag behind.⁵⁰ As shown in the NGO's study, French reforms seem to have already enabled the participation of foreign suppliers in the competition for French aid funded procurement contracts (though the report does not specify whether any contract has been actually awarded to foreign suppliers).⁵¹

Enforcement

The Recommendation is not a legally binding instrument and the commitments endorsed by DAC Members have not the character of legal obligations consequently, the instruments provided by the Recommendation to compel signatory parties to fulfil the endorsed obligations do not have judicial nature (it will be remembered that these are the Annual Report and Peer Review, see above paragraph). They depend on political pressure and work as a sort of "soft enforcement system" resulting in non-coercive final reports and recommendation rather than coercive measures such as sanctions.⁵²

It goes outside the scope of this work to assess in detail the suitability of soft law instruments as enforcement mechanisms or to enter into a discussion on the role that private parties could have in enforcing an international instrument such as the Recommendation, only a general comment will be offered.

As regards soft law compliance instruments, they are considered to be effective in some respect. For instance, the effectiveness of peer reviews relies on the influence and persuasion exercised by the peers during the process, this effect is known as "peer pressure".⁵³ Peer pressure "is a means of soft persuasion which can become an important driving force to stimulate the state to change, achieve goals and meet standards".⁵⁴

As far as the role of private parties is concerned, it can be only said that at least unless the Recommendation is not incorporated into a legally binding inter-governmental mechanism or otherwise inserted into national law, in the way consonant to the different constitutional procedures of each of the Member States, and it does not become enforceable law according to their legal systems, judicial enforceable mechanism will not be provided and private parties will play no role. Indeed, the effectiveness of the Recommendation will strongly depend on the willingness of donor states to accomplish with its provisions.

However, as far as the EU Member States are concerned, they represent a different case. The

⁴⁹ ActionAid Alliance, *Towards Effective Partnership: Untie Aid*, available at www.actionaid.org/resources/pdfs/tiedaid.pdf, retrieved on 20/8/2003.

⁵⁰ For instance it is there denounced that US does not even report data on tied aid.

⁵¹ ActionAid alliance report only says that "the DAC notification has already enabled companies from third countries to respond to calls for tenders for French aid" nothing is said about the awarding of the contract. As we will see in the chapter dedicated to the UK, the untying reforms there taking place have already resulted in aid funded contracts being awarded to foreign companies.

⁵² F.Pagani, n.44 (2nd ser.) above, in the referred article the author explains the functions of the OECD's peer reviews. His conclusions can be here adopted as Peer Reviews will be also used to assess DAC Members' compliance with the Recommendation (see para.20 of the Recommendation).

⁵³ F.Pagani, n.43 (2nd ser.) above at p.5.

⁵⁴ F.Pagani, n.44 (2nd ser.) above at p.6.

obligations of the Recommendation have been endorsed at the EU level and, as we will analyse in the second part of this chapter, this makes a great difference.

Conclusions

The Recommendation is expected to cover three quarters of all bilateral ODA to LDCs worth some USD 5.5 billion⁵⁵ and is a major achievement. It represents, first of all, a change in donors' perception of foreign assistance—a recognition that untied aid is needed to enhance aid effectiveness. Nevertheless, despite the talk of a historical step towards untying, when comparing the impact of the Recommendation with the total of ODA flows, it is regrettable that it only covers 12 per cent of total OECD bilateral aid. This limited impact is due to the numerous limitations exclusions and derogation that have been analysed in the previous paragraphs.

These exclusions have been the subject of much criticism by NGOs and members of developing countries, which regard them as major weakness of the Recommendation.⁵⁶ Thus, the Recommendation, although an important starting point, should not end the work and commitment of donor countries: untying aid must go further.⁵⁷

However, before addressing the issue of extending the coverage of the Recommendation and further untying, it should be ensured that the commitments endorsed with the Recommendation will be actually implemented and fulfilled by DAC Members. To this end, and given the non-binding nature of the Recommendation, the role of the DAC, and of those donors more favourable towards the untying cause, will be fundamental in ensuring that a strong political weight is given to the mechanisms there provided for monitoring donors' implementation of the Recommendation, namely the Annual and Peer review. For instance, in order to ensure that these mechanisms work, data on the status of donors' implementation of the Recommendation and on the tying status of aid need to be transparent and easily accessible to the donor community, to practitioners, to the recipient countries and to the public at large.

⁵⁵ OECD, *The DAC Journal. 2001 Report*, n.74 above at p.42.

⁵⁶ ActionAid, *Our Efforts To Untie Aid/DAC Agreement in ActionAid, Policy And Research* web section, available at <http://www.actionaid.org/policyandresearch/aideffectiveness/efforts.shtml#>

⁵⁷ Writing Document of the Commission Service, SEC (2002) final, n.32 above at p.71.