



COMMISSION OF THE EUROPEAN COMMUNITIES

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**COMMUNICATION FROM THE COMMISSION TO THE COUNCIL AND TO THE  
EUROPEAN PARLIAMENT**

**Untying: Enhancing the effectiveness of aid**

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## Untying: Enhancing the effectiveness of aid

### Introduction

1. The debate on untying of aid has long been at the centre of discussions on development policy. In the last few years, a consensus has emerged on the international scene that the practice of tying the granting of aid, directly or indirectly, to the purchase of goods and services procured by means of that aid in the donor country reduces its effectiveness. It is generally recognised that the untying of aid is an important factor in a coherent pro-poor development policy.
2. The untying of aid is an important issue in the debate on the coherence and effectiveness of aid efforts and the credibility of donors. On the one hand untying is perceived to be a strong indication of generosity and solidarity. On the other hand – and perhaps a more pertinent feature – it is seen to enhance the transparency and accountability of aid management and delivery. It could therefore have an important effect in reducing the scope for corruption and mismanagement. It is also seen as an element that fosters participation of developing countries in the management of programs and projects. Far from being a rhetorical concept, the full implementation of the concept of untying of aid - without loopholes and lacunae - could have substantial concrete development impacts in the field. The donor community is therefore called upon to carefully analyse its potential impact. This will require full transparency in application and a prompt response to any request for information.
3. Untying of aid improves aid effectiveness. As only project aid can be tied, untying would also make it easier to move towards sector or budget support by lessening the link in each Donor country between aid and commercial interest, a major cause of inertia. It is also often said that the full application of aid untying would increase the value of Official Development Assistance (ODA) through more cost effective supplies, thereby effectively increasing the amount of financial resources available for development activities. This concept of “increase of ODA through better value for money” is supported by the World Bank's estimate that full untying could lower the transaction cost of aid by up to 25%. The Development Assistance Committee of the OECD (DAC) follows the same line by estimating that this reduction may reach 15% to 30% of the costs<sup>1</sup>.
4. It is, furthermore, also widely argued that tied aid has a negative impact by providing supplies incompatible with those provided by other donors for the same sector in the recipient country. Tied aid may also come from a mix of trade considerations or protectionism, putting it in contradiction with the commonly accepted concept of “ownership“ by the recipient country and leading to an overly donor driven approach.

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<sup>1</sup> OECD Observer, Policy Brief "Untying Aid to the least Developed Countries", July 2001.

5. Despite these widely accepted assumptions concerning positive impacts through cost reduction, we lack complementary information on the other potential positive effects of untying. Those include issues such as the positive impact of untying on country ownership and the impact on the ability of developing country companies to participate and compete effectively in a fully untied market for the procurement of goods and services for development purposes. Additional issues are the effect of full untying - including among all developed and developing countries - on the development of local markets in developing countries; the potential existence of a marginal degree of untying i.e. a certain degree of openness above which there are only marginal gains; the impact of tied aid such as the granting of aid linked to additional policies for which the supplies are exclusively produced in the donor country. We are also not entirely clear about possible effects of untying in terms of balancing the effort amongst donors, of influencing the level of support by public opinion (in particular the taxpayers), and of the evolution of aid flows.
6. The Donor Community is committed to continuing the debate on the impact of untying, as well as on the link between untying and quality, effectiveness and visibility of aid. The OECD has over the years spent considerable time on the subject both in analysis and in its relevant political forum, namely the Development Assistance Committee (OECD/DAC). This work found its first concrete expression in the “Recommendation on Untying ODA to least developed Countries “ adopted by the OECD/DAC in May 2001 after long and difficult negotiations. The Commission regards this recommendation as a good political signal, a first, but insufficient step in the right direction. The recommendation – due to its many conditions, limitations and loopholes – has only a very limited impact on a marginal amount of ODA.
7. The EU included a clear commitment to further discussions on untying of aid in its negotiation platform for the International Conference on Financing for Development (FFD) <sup>2</sup>. In the outcome of FFD the international community committed itself<sup>3</sup> to “Support and enhance recent efforts and initiatives, such as untying of aid..” Untying of aid was thus recognised in Monterrey as one of the possible means to improve the effectiveness of these flows.
8. The European Community itself has a long track record in dealing with the elements of untying, due to the openness of its development programmes to the Member States and to an increasing degree, to beneficiary countries. Such elements of untying were included in its development programmes since the first Yaoundé Convention in 1963<sup>4</sup>. In the mid 90s, as part of its political dialogue with the European Parliament<sup>5</sup>, the European Commission reaffirmed its support for the concept of untying and its potential role in the improvement of development policy<sup>6</sup>. This document intends to consolidate the Commission's approach and to clarify the current state of play regarding the Untying of Community Aid.

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<sup>2</sup> Monterrey, Mexico, 18-22 March 2002

<sup>3</sup> paragraph 43 of the “ Monterrey Consensus “

<sup>4</sup> Convention of Yaoundé I between the EC and its Member States and the Associated African and Malgache Countries, 1963.

<sup>5</sup> Reply to question from EP n°1618/96 - Mr Howitt, OJ 1996, C322/95

<sup>6</sup> The Commission presented in 1991 a first Communication on untying (SEC(91)2273 Final of the 25/11/1991) and debates occurred without concrete results in the Development Councils of the 04/05/1992, 18/11/1992, 25/05/1993 and 28/11/1997.

9. This Communication presents the Commission's approach to untying (*Part I*) and addresses the state of play regarding the untying of Community Aid (*Part II*). It then analyses the issues linked to the untying of the Members States' bilateral aid (*Part III*) and ends with concrete recommendations (*Part IV*).

### ***Part I. A vision of untying***

10. Since the first Lomé Convention<sup>7</sup>, the spirit of Community Aid has been based on partnership, which is centred on the concept of ownership. Partnership and ownership cannot only be treated as statements of mutual respect and recognition. They also carry concrete implications on the concept of untying. The debate on untying cannot only be a debate between donors, solved within donor fora. It implies necessarily a high level of involvement of the recipient countries. Since its foundation, and based on the belief that the quality of the dialogue with partners is the key to successful development policies, Community Aid has put the recipient country firmly at the centre. Therefore, the European Commission has been eager to create a space in the dialogue on untying for the Developing Partner Countries and to introduce an element of decision from their side.
11. The Communication on the European Community's Development Policy<sup>8</sup> refocused Community activities on several priorities amongst which are Regional Integration and Institutional and Capacity Building. Both have been recognised by the International Community as key elements in the fight against poverty and for the sustainability of development in all regions as well as conflict prevention. The European Community's own experience leads it to take an active and leading role in these areas. Therefore, in a coherent approach, the European Commission has been concerned that untying of Community Aid must be used as a tool to cross-fertilise and support the potential of these two elements.
12. One of, if not the main, aim of untying is the improvement of the effectiveness of ODA flows and their impact. The DAC Recommendation on untying recognises, as a principle, the objective of achieving a balance of efforts among the DAC Members. It also acknowledges that achieving a balance in effort sharing is a legitimate and important concern for governments, parliaments and public at large<sup>9</sup>. It is essential that the means employed for untying do not create any distortion of competition between the most advanced donors and those still finding their way. Such a distortion could send a mixed message to the most generous donors and, consequently, create negative consequences for the level of ODA. This places the untying of aid firmly within the debate on financing for development and advocates for the internationally agreed target of 0.7% of GNI.
13. The untying of aid is not an isolated concept. It is part of the ongoing debate on aid effectiveness and the harmonisation of donors' policies and procedures. It should be recalled that the European Council of Barcelona committed the European Union to

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<sup>7</sup> The Convention of Lomé I (1973) between the European Community and the African, Caribbean and Pacific (ACP). It launched five generations of Partnership Agreements between the EC and ACPsovereign states.

<sup>8</sup> Communication from the Commission to the Council and the European Parliament, "The European Community's Development Policy", 26 April 2000, COM (2000) 212 Final

<sup>9</sup> OECD, The DAC Journal Development Co-operation 2001 Report, 2002, Volume 3 n°1, p.43

taking concrete steps in the harmonisation of procedures and co-ordination of policies before 2004<sup>10</sup>.

## ***Part II: Untying of Community aid***

14. The European Commission indicated at the DAC High Level Meeting in April 2001, inter alia, that “it will implement the spirit and the objectives of the DAC recommendation, while complying with the policies and procedures defined at the Community level and in the partnership agreements”.<sup>11</sup>
15. In February 2002, the Commission, in its Communication to the Council and Parliament, for the preparation of the International Conference on Financing for Development (Monterrey, Mexico, March 2002) committed itself to implementing the DAC recommendation. The Communication further stated that: “the MS should decide to fully untie bilateral aid amongst the 15 Member States and vis-à-vis all their partners in the developing world, while maintaining the existing system of price preference of the EU-ACP framework”.
16. In March 2002, in its conclusions relating to the preparation of the Conference in Monterrey and in order to improve the efficiency of ODA, the European Council (Barcelona Conclusions, paragraph 7, c) decided: “to implement the DAC recommendation on untying of aid to Least Developed Countries and continue discussions in view of further untying”.
17. The commitment was retained in the outcome of the Monterrey Conference and reconfirmed in the plan of implementation adopted at the World Summit on Sustainable Development (Johannesburg, South Africa, August 2002). The Commission reiterated its commitment to the Barcelona Conclusions on the occasion of the DAC Peer Review of Community Aid<sup>12</sup>.

### **State of play on the untying of Community aid**

18. Community aid has been untied to a significant degree for more than 25 years. Calls for tender are open to the fifteen Member States and to all 71<sup>13</sup> ACP countries without distinction between LDCs and other developing countries for projects financed by the EDF, to all Mediterranean partner countries under the MEDA programme and to the beneficiary countries for Asia and Latin America (ALA). This openness of calls for tender had concrete consequences under the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> EDF (1985-2000), as it made it possible for the operators of the ACP countries to gain 23.6% of the contracts, amounting to € 1.415 billion. Moreover, Community aid is progressively directed at balance of payments and budgetary support, which, by definition, is entirely untied.

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<sup>10</sup> European Council Conclusions on the International Conference on Financing for Development, Barcelona, March 14, 2002.

<sup>11</sup> Commission decision [PV(2001)1519] of 11 April 11<sup>th</sup>, 2001

<sup>12</sup> OECD/DAC Peer Review of the EC Aid, Paris, 6 June 2002

<sup>13</sup> There will be 77 ACP countries when the Cotonou Agreement will enter into force.

19. In accordance to its commitments, and along the lines presented above, the Commission has introduced new provisions in favour of further untying in its proposals for the current renewal of the ALA regulation and the Regulation on Communicable Diseases and Reproductive Health<sup>14</sup>. The revision of the EC Financial Regulation<sup>15</sup> has conducted to the introduction of the necessary elements to allow further untying of Community Assistance. Its implementing modalities are still under discussion.

### **The Commission's approach to the DAC Recommendation**

20. While commending the DAC efforts to promote untying and achieving this first step, the Commission recognises the limitations of its Recommendation. By exclusively focussing on Least Developed Countries (LDCs) and excluding Food Aid and its transport, the scope of the Recommendation is clearly limited. According to DAC's own estimates, the amount of untied aid is expected to increase to only 2% of total ODA. The most optimistic estimates predict the untying of three-quarters of ODA to the least Developed Countries (USD 5.5 billion) which would correspond to 10% of the total ODA. Moreover, the logic underlying the Recommendation is regarded as unsatisfactory.
21. The European Commission is particularly concerned with the distinction in terms of untying between Least Developed Countries and other developing countries and its cumulative effect on the already limited scope of the DAC Recommendation. The impact of this limitation is further worsened by the fact that almost one third of the LDCs are in conflict or in post/pre conflict situations where aid delivery is extremely difficult and limited. In fact, if only the DAC recommendation was implemented the distinction established by that recommendation would compel the Community question one of the elements of the EU-ACP partnership, the preferences, which the operators of the ACP countries benefit from in terms of procurement. Such a change would be contrary to the contractual obligations undertaken by the EC and would in addition constitute a step backward from the current situation. Furthermore, this distinction seems to go against the current aims of harmonisation and simplification of procedures.
22. Food Aid is excluded from the scope of the DAC Recommendation, which refers to "discussions and agreements in other international fora governing the provisions of food aid, bearing in mind the objectives and principles of this Recommendation".

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<sup>14</sup> In its proposal for a new ALA Regulation, COM (2002) 340 final, the Commission has already inserted a provision on the untying of aid as regards all Member States, the candidate countries and, for cooperation in their respective regions, the Asian and Latin American developing countries, as well as further untying, on a case-by-case basis, for developed countries (cf. Article 9). While already in line with the Commission's earlier approach to untying, this proposal could be further strengthened, in light of this Communication and any additional elements related to untying that will result from the debate on this in the Council. Discussion of Article 9 of the Commission's ALA proposal should meanwhile be put on hold in Council. This will avoid any delays in the adoption of the regulations due to the debate on untying. Similar course of action will be pursued for the adoption of any other legal basis that could shortly come into discussion

<sup>15</sup> The new Financial Regulation has been adopted in the Regulation of the Council n°1605/2002 of 25/06/2002 (OJEC L 248 of 16/09/2002). It will enter into force on the 01/01/2003.

The Food Aid Convention<sup>16</sup>, which might be the appropriate forum for discussion and agreement, has not yet taken the required concrete steps towards untying<sup>17</sup>. The European Commission reaffirms the extreme importance of food aid for countries and populations that suffer under food emergencies. Food aid should only be provided if it is the most effective and appropriate means of assistance based on an evaluation of the needs and as much as possible respecting local nutritional habits. It is important to consider the different types of food aid and purposes, and to distinguish between food aid and food security objectives and to recognise their potential impact on vulnerable countries capacity, local agricultural development, regional and local markets. The European Commission is advocating a complete untying of food aid and food aid transport and proposes to introduce these elements in the future re-negotiations of the Food Aid Convention.

23. The Commission in its declaration attached to the DAC Recommendation (see Annex II) has clearly expressed its commitment to reaching the goals contained in the Recommendation without necessarily committing itself to this limited scope. In fact, Community Aid is already untied to a high degree, which goes further than the impact of the DAC Recommendation. Community aid has already reached a high level of untying as it is already completely untied to the 15 Member States, and partially untied to the Candidate Countries, the Members of the European Economic Agreement, and to most developing countries.

### **Implementation of the Commission's approach**

24. In order to further untie Community aid, the policies and procedures defined at Community level and the partnership agreements<sup>18</sup> require changes to the legal bases of a whole set of financial instruments of Community aid. It may, inter alia, imply changes to the EDF Financial Regulation, Annex IV of the Cotonou Agreement, geographical financial instruments (CARDS, MEDA, TACIS and ALA regulations) as well as other development related financial instruments. The list of relevant texts to be changed is attached in Annex III.
25. These changes require the consultation and agreement of the Council and the European Parliament and in some cases the Partner Countries. These amendments will have to be applied to each instrument. They also depend on the time schedule inscribed in each instrument. The case of the EDF depends on the entry into force of the Cotonou Agreement and will imply a new negotiation with the ACP countries leading to their approval. Due to the above-mentioned procedures and constraints there are two methods for the Commission to introduce these changes. The first one is the revision of each instrument, one by one, in a step-by-step approach based on the insertion of common concepts. The second one is the establishment of an Horizontal Regulation that will apply to all instruments and that could be completed in specific and requested case by a limited revision of some instruments.

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<sup>16</sup> The Food Aid Convention, in its Article IX(e)(i) requires "that 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.

<sup>17</sup> The Present Food Aid Convention from 1999 was extended until June 2003 and only refers to the issue of tied food aid in relation to commercial exports.

<sup>18</sup> As stated in the Commission's declaration attached to the DAC Recommendation.

26. In line with the arguments presented above and in the first part of this Communication, the European Commission has opted for the first method and will introduce the following elements of untying into the legal bases of all development related financial instruments:

*Horizontal (thematic) budget-lines*

- Untying towards all Developing Countries,
- Untying towards all Developed Countries under the condition of reciprocity by the third country and the agreement by the recipient country.

*Geographical budget-lines*

- Untying towards Developing Countries on a regional basis,
- Untying towards all Developed Countries under the condition of reciprocity by the third country and the agreement by the recipient country.
- Possibility of further untying on a case by case basis<sup>19</sup>,
  - considering specific geographical circumstances,
  - taking into account specific thematic circumstances.

27. In this regard, the candidate countries and the countries of the European Economic Area (EEA)<sup>20</sup> are assimilated to the EU Member States<sup>21</sup>.

28. The issue of untying of Community Aid is also relevant in the context of the efforts to create a more stable and effective partnership with the United Nations and other international organisations. Specific circumstances as referred to above could also be seen to exist in the context of joint management of programs and projects in the sense of Art. 53.1 c) of the new Financial regulation as well as in the yet to be established strategic partnerships with selected United Nations Agencies, Funds and Programs. This would equally require changes to the legal bases to be introduced at the occasion of the revision of the relevant legal texts.

29. The approach proposed by the Commission goes far beyond the scope of the current DAC Recommendation and will lead to an almost complete untying of Community Aid. The whole of EC Aid would be untied immediately towards 16 out of 23 of the DAC Members, 32 developed countries and 151 developing countries as a group for the thematic budget lines and on a regional basis for the regional instruments. In addition the whole of EC aid would be untied to all other third countries under the condition of reciprocity and the agreement of recipient country. The requested agreement from the recipient country is fully in line with the internationally agreed principles of ownership. The requested reciprocity follows from the DAC Recommendation itself, its universalism for the Donor community and its agreed

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<sup>19</sup> The specific circumstances of issues, which are to be addressed, may justify such an extension, if through such an extension the EC can increase cost-effectiveness of its actions.

<sup>20</sup> Norway, Iceland and Liechtenstein. Agreement on the European Economic Area, Oporto 2 May 1992

<sup>21</sup> The assimilation refers to “access to public procurement procedures in the Community”

principle in favour of a balanced share of effort. It is also coherent with the multilateral disciplines at World Trade Organisation (WTO) level.

### ***Part III: Situation of EU bilateral aid***

30. Community aid is one complementary component of the development effort of the EU alongside bilateral aid from the Member States. That bilateral aid effort is based on a separate set of rules and procedures adapted to the specificity of development assistance. It must however respect the EC Treaty and applicable Community Law. Both the EC Treaty on free movement of goods and services and the EU Public Procurement Rules prohibit any criteria that discriminate in favour of national enterprises and against operators established in other EU countries. Tied bilateral aid may be in breach of EC competition law and Internal Market rules and infringe on the non-discrimination principle inscribed in Article 12 of the EC Treaty. Following complaints, the Commission is therefore investigating the regime applied to development aid by Member States and has recently launched infringement proceedings against certain Member States in particular under the Public Procurement Directives. The following elements attempt to outline the different legal issues, arising from the practice of aid tying by Member States. It needs to be clearly understood that all these references refer to the untying of aid among EU MS.

#### **Application of Community rules on State aid**

31. In order to constitute State aid within the meaning of Article 87(1) of the Treaty, a measure must be attributable to a Member State, and involve the use of State resources in a selective manner, which confers an advantage on certain undertakings resulting in a distortion of competition and an effect on trade between Member States. Provided that it meets all these conditions, tied aid would constitute State aid, and would therefore need to be notified to the Commission in accordance with Article 88(3). In assessing such aid, the Commission would have regard, in particular, to the OECD arrangement on guidelines for officially supported export credits.

#### **Tied Aid may affect internal trade**

32. The Treaty rules, in particular Articles 28 to 30 and 49<sup>22</sup>, are applicable to the public procurement launched by the competent authorities of the Member States on their territory or in a recipient third country. The Commission believes that, if Member States impose a clause of national origin, this would prevent EU operators from other Member States from participating in the procurement and would therefore affect the internal trade<sup>23</sup> even if the good or service was provided to a third country. Tied aid which, restricted the procurement practices in relation to goods and services, could thus infringe Articles 28 and 49 and may not be covered by any derogation.

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<sup>22</sup> Ex Articles 30 to 36 and 59 EC Treaty

<sup>23</sup> Court's case law acknowledged that distortion of trade between the EU and third country may also affect internal trade.

## Application of the Public Procurement Directives

33. Unless a procurement is covered by the Directives' specific exemption clause for international agreements (cf. Below) EU Public Procurement Directives apply to procurement undertaken by a contracting authority<sup>24</sup> of a Member State whether or not financed by bilateral development aid, where the estimated value of the contract is equal to or above the relevant thresholds. Contracts falling into this category must be awarded in accordance with the procurement procedures in the Directives and they may not be awarded excluding operators established in other EU Member States, EEA countries and Europe Agreement countries.
34. When the authority of a third country tenders the contract, the Directives do not apply, unless the third country authority acts on behalf of and for the account of a contracting authority of a Member State. In the Commission's view, in the latter case, Embassies or national bodies located in the recipient country would be covered by the Directives. Failure to apply the procedures of the Directives would thus constitute an infringement of EC law actionable by the Commission and by economic operators subject to EC law having or having had an interest in obtaining a particular public supply, service or works contract and who has been or risks being harmed by an alleged infringement and by economic operators from EEA countries and Europe Agreement's countries.

## Exemption clause for international agreements

35. The Directives contain a derogation clause exempting procurement for the supply of goods, supply of services, and supply of works awarded "*in pursuance of an international agreement between a Member State and one or more non-member countries*". However, these exceptions only apply to agreements concluded "*in conformity with the Treaty*"<sup>25</sup>. As argued above, clauses discriminating against suppliers from other EU countries would not fulfil this condition. Moreover, in those cases where this international exemption would apply, this would still impose an obligation on the Member State to notify the agreement to the Commission<sup>26</sup>.

## Exemption in the Government Procurement Agreement

36. Both GATT and GATS Agreements contain clauses excluding Government Procurement from their main provisions. At WTO level, tied aid is currently excluded from the scope of the Government Procurement Agreement (GPA)<sup>27</sup>

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<sup>24</sup> Contracting authority within the meaning of the Public Procurement Directives are "the State, regional or local authorities, associations formed by one or more of such authorities or bodies governed by public law", where "bodies governed by public law" are defined as "any body" established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and having legal personality, and financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law; or subject to management supervision of those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by bodies governed by public law".

<sup>25</sup> Article 4(a) of Directive 93/36/EEC of 14 June 1993, Article 5(a) of Directive 92/50/ECC, Article 5(a) of Directive 93/37/EEC

<sup>26</sup> Reply to EP question n° 3104/95 OJ C45/1, 1998

<sup>27</sup> Agreement on Government Procurement (GPA), OJ L 336/273, 1994. The parties to the agreement are: the EC and the 15 Member States, Canada, Hong Kong, China, Israel, Japan, Rep of Korea, Liechtenstein, the Netherlands (for Aruba), Norway, Singapore, Switzerland and the USA.

concluded in the context of the Uruguay Round<sup>28</sup>. The acceptance of these principles does not however, preclude that tying of aid could infringe EC internal market rules.

### **Impact of the decentralisation**

37. When a procurement financed by a Member State is undertaken under the sole responsibility of an authority of the third country recipient, which does not act on behalf of and for the account of a contracting authority of a Member States, neither the Public Procurement Directives nor the Treaty applies. It could furthermore happen de facto that<sup>29</sup>, in the absence of obligation, that no untying is applied.

### ***Part IV: Recommendations***

38. The information on the impact of full and unrestricted untying among all donors on the effectiveness of aid, the allocation of resources and the structures and actors of development is insufficient. The Commission suggests initiating comprehensive work on this at European level.
39. The information on the relationship between untying of aid and moves towards decentralisation, the harmonisation of procedures and the role of the recipient country is insufficient. The Commission proposes to initiate concrete initiatives with the Member State and in the context of partnership.
40. The Commission will propose to integrate the approach on untying of Community aid presented in this document into all relevant legal bases of development related financial instruments of the Community.
41. The rules of the Internal Market and the Directives on Public Procurement apply to part of the Member States Development aid. The Commission invites all EU actors to comply with those rules.
42. Regarding contracts awarded by authority of the recipient country, where these do not act on behalf of and for the account of a contracting authority of a Member State, the Commission proposes an undertaking by Member States to untie aid and systematically to insert a contractual clause in the instruments by which aid is granted, obliging the authorities of the recipient country concerned to apply award procedures based on the principles underlying the Public Procurement Directives, namely the principles of equal treatment, transparency, mutual recognition and proportionality.

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<sup>28</sup> The notes to Article 1 (1) of the GPA make clear that procurement made in connection with tied aid to developing countries is not covered by the agreement: "*Having regard to general policy considerations relating to tied aid, including the objective of developing countries with respect to the untying of such aid, this agreement does not apply to procurement made in furtherance of tied aid to developing countries so long as it is practised by Parties*". In the annexes describing the obligations of each party – the European Community annex to the GPA<sup>28</sup> stated that "*the agreement shall not apply to contracts awarded under: (...) an international agreement and intended for the joint implementation or exploitation of a project by the signatory States*"

<sup>29</sup> DAC Members have subscribed in the DAC Recommendations on Untying ODA to the Least Developed Countries, May 2001, under Appendix 1 "Operational Procedures and Understandings" to implement their commitment de jure but also de facto.

43. The Commission recommends that ongoing efforts concerning the untying of aid among all donors undertaken at the OECD/DAC should be continued and extended in view of a complete untying including inter alia food aid and food aid transport, based in particular on the principle of full reciprocity among donors.

## ANNEX I

### **Coverage of the DAC Recommendation on Untying ODA to Least developed Countries (May 2001)**

The OECD/DAC recommendation of May 2001 proposes the untying – as of 1 January 2002 – of loans or grants to Least Developed Countries (49 countries) in the following areas only:

- balance of payments and structural adjustment support;
- debt forgiveness;
- sector and multi-sector programme assistance;
- investment project aid;
- import and commodity support;
- commercial services contracts, and
- ODA to NGO's for procurement related activities.

Free-standing technical co-operation and food aid are excluded.

The recommendation does not apply to activities with a value of less than SDR 700,000 (SDR 130,000 in case of investment-related technical assistance).

## ANNEX II

### **Commission's declaration attached to the DAC Recommendation on Untying ODA to Least developed Countries (25 April 2001)**

The declaration states that:

The Commission will propose to the MS to further untie Community aid, on a regional basis, to Asian and Latin American countries without distinction between least developed and others;

On a case by case basis, the Commission intends to open to all countries, developed or developing, its procurement of services and pharmaceutical products essential in the fight against HIV/AIDS, tuberculosis and malaria.

The Commission declaration is based on the Commission decision [PV(2001)1519] of 11 April 2001 which approves option 2 of the document [SEC(2001)623/3], where the Commission is requested to:

- congratulate the DAC for its efforts;
- recognise the limitation of the DAC recommendation;
- indicate that it will implement the spirit and the objectives of the DAC recommendation, while complying with the policies and procedures defined at the Community level and in the partnership agreements;
- announce that it will propose to extend rules on regional untying applicable to ACP and MEDA countries to other regions in development. Community aid would be untied between the 15 MS and the developing countries of each one of the major regional groupings (Asia, Latin America, the Mediterranean and ACP) under our regional agreements and co-operation programmes, without distinction between LDCs and other developing countries, and for all forms of aid;
- utilise the possibility of opening up procurement to all developing countries, based on the existing rules of the Community and on a case-by-case basis for medicines and essential services in the fight against HIV/AIDS, tuberculosis and malaria;
- explore (for regional untying for ALA and medicines) the possibility of a further opening, towards other OECD members.

### ANNEX III

#### **Indicative list of the relevant regulations to be amended**

- 1 Council Regulation (EC) n° 1292/96 of 27 June 1996 concerning the policy and the management of the food aid and of the supporting specific actions to food security
- 2 Council Regulation (EC) n° 1257/96 of 20 June 1996 concerning the humanitarian aid
- 3 Council Regulation (EC) n° 1659/98 of 17 July 1998 relating to decentralised cooperation
- 4 Council Regulation (EC) n° 1658/98 of 17 July 1998 relating to co-financing with the non governmental organisations of development (NGO) European of actions in the fields interesting the developing countries
- 5 Regulation (EC) n° 2494/2000 of the European Parliament and of the Council at its meeting on 7 November 2000 pertaining to measures aiming to promote the conservation and the durable management of the tropical forests and of the other forests in the developing countries
- 6 Regulation (EC) n° 2493/2000 of the European Parliament and of the Council at its meeting on 7 November 2000 pertaining to measures aiming to promote the full integration of the environmental dimension in the development process of the developing countries
- 7 Council Regulation (EC) n° 2836/98 of 22 December 1998 relating to the integration of the questions of equality of the sexes in development co-operation
- 8 Council Regulation (EC) n° 2046/97 of 13 October 1997 relating to North-South cooperation as regards fight against drugs and drug-addiction
- 9 Council Regulation (EC) n° 1484/97 of 22 July 1997 concerning aid for the demographic policies and programs in the developing countries
- 10 Council Regulation (EC) n° 550/97 of 24 March 1997 relating to the actions in the field of the HIV/AIDS in the developing countries
- 11 Council Regulation (EEC) n° 443/92, of 25 February 1992, relating to financial and technical aid and to economic cooperation with the developing countries of Latin America and of Asia
- 12 Council Regulation (EC) n° 2258/96 of 22 November 1996 pertaining to rehabilitation and rebuilding actions for the developing countries
- 13 Council Regulation (EC) n° 1725/2001 of 23 July 2001 concerning the fight against the anti-personnel land mines in the third countries other than the developing countries
- 14 Regulation (EC) n° 1724/2001 of the European Parliament and of the Council at its meeting on 23 July 2001 concerning the fight against the anti-personnel land mines in the developing countries

- 15 Council Regulation (EC) n° 381/2001 of 26 February 2001 creating a fast reaction mechanism
- 16 Council Regulation (EC) n° 976/1999, of 29 April 1999, fixing the requirements for the implementation of the Community projects, other than those of development co-operation, which, within the framework of the Community cooperation policy, contribute to the general objective of development and of the consolidation of democracy and the rule of law as well as with that of the respect of human rights and of fundamental freedoms in the third countries
- 17 Council Regulation (EC) n° 975/1999, of 29 April 1999, fixing the requirements for the implementation of the actions of development co-operation which contribute to the general objective of development and of the consolidation of democracy and the rule of law as well as with that of the respect of human rights and of fundamental freedoms
- 18 Council Regulation (EEC) n° 3906/89, of 18 December 1989, relating to economic aid for the Republic of Hungary and the people's Republic in Poland (PHARE)
- 19 Regulation (EC, EURATOM) n° 99/2000 of the Council at its meeting on 29 December 1999 (TACIS)
- 20 Council Regulation (EC) n° 1267/1999 of 21 June 1999 (ISPA)
- 21 Council Regulation (EC) n° 1268/1999 of 21 June 1999 (SAPARD)
- 22 Council Regulation (EC) n° 2666/2000 of 5 December 2000 (CARDS)
- 23 Council Regulation (EC) n° 1488/96 of 23 July 1996 (MEDA)
- 24 Council regulation (EEC) n° 443/92 at its meeting on 25 February 1992 (ALA)
- 25 Cotonou Partnership Agreement n°483/2000 of 23 June 2000 (ACP STATES/EDF)
- 26 Council Regulation (EC) n° 2500/2001 of 17 December 2001 (pre-accession of Turkey)
- 27 Council Regulation (EC) n°555/2000 of 13 March 2000 (Cyprus and Malta pre-accession)