

Tied aid and EU competition policy

An ActionAid briefing

In September 1999, ActionAid together with 40 other European NGOs (list in annex) submitted a legal complaint to the European Commission on the grounds that aid tying - the practice of tying aid to goods and services procured in the donor country - breaches EU competition and internal market rules. This complaint was subsequently supported by the Liaison Committee of NGOs which represents the interests of more than 900 development and environmental NGOs throughout the EU. This briefing deals exclusively with the competition elements of the case.

Tied aid accounts for more than half of the 13 billion euros in aid given by Member States every year. It leads to poor value for money because the costs of goods and services procured can be between 15-30% higher than on the open market by the absence of competitive bidding processes.

Table showing the amount of Member State aid that is tied

Country	%of tied bilateral aid commitments (1998)	% of total aid programme tied to technical cooperation	% of bilateral aid spent on technical co-operation
Austria	31.4	27	42.1
Belgium	30	32.8	54
Denmark	18.6	6.6	11.1
Finland	21.4	17.2	32.5
France	21.4	36.2	49.7
Germany	13.5	26.4	56.9
Greece			
Ireland	Untied	Tied, amount unspecified	Tied, amount unspecified
Italy	36.1	1.8	5.7
Luxembourg	Untied	-	-
Netherlands	12.1	30	42.8
Portugal	17.4	32.8	48.3
Spain	73.9	10.8	17.7
Sweden	11.6	3.7	5.6
UK	20.4	18.8	34.1

Source: DAC development co-operation report 2000

The ECJ has already established that even though development aid is principally concerned with exports to states outside the EU, it can still be subject to internal competition policy rules¹.

The Commission has always taken the view that tied aid is a state aid, most recently when it tried to include it in a list of block exemptions from notification². Its preferred solution has consistently been for Member States to untie all aid on a European Union-wide basis. A series of written questions in the early 90s confirms this. For example written question 1140/91, OJ 1991 C259/41 states " tied development aid can distort or threaten to distort competition and affect trade in the EC. Since Article 92 of the Treaty can be applicable to this type of export aid, a major objective [of the study being undertaken] is therefore to find ways to eliminate the possible negative effects of such aids on competition and trade in the EC... **a solution is best sought ..[through]...the untying of national development aid vis-à-vis all other Community countries.**"

The state aid rules

Article 87(1) of the EC Treaty provides that:

“... any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.”

For an aid to fall within Article 87(1) each of the following five conditions must be fulfilled:

- a. it must confer an advantage;
- b. it must be granted by a Member State or through state resources;
- c. it must favour certain undertakings or the production of certain goods;
- d. it must distort competition; and
- e. it must affect inter-Member State trade.

How does tied aid fulfil these conditions?

1. Evidence suggests that aid tying increases the costs of goods and services by between 15 and 30 per cent. This implies that the company selected to supply the goods or services obtains better than market prices for its goods. Therefore, condition *a* is satisfied.
2. Conditions *b*, *c* and *d* are satisfied since the aid is granted through state resources because the decision to pay the money is instigated by the state and is subject to its approval. For example, the UK government in its Guidelines on procurement of goods and associated services funded by the British Government External Assistance Programmes of January 1996 (the UK Guidelines) sets out the procurement policy according to which donees are to enter into contracts with undertakings. This includes the requirement at Annex 1, para 5.2 that “not more than 20% of the total aid allocation for a particular purpose may be spent on non UK goods and associated services” where the items cost in excess of

¹ "Article 112 (now 132) which concerns the harmonisation of national export aid in the context of the common commercial policy, does not exclude the application of Articles 92 to 94 (now 87- 89). It is not impossible for export aid to affect intra-Community trade." (Case C-142/87 [1990] I-ECR 959; [1991] 3 CMLR 213).

² Proposal for a Council Regulation on the application of articles 92 and 93 EC to certain categories of horizontal state aid, COM (97) 396 final, OJ 1997 C262/6

£25,000.³ It also follows from the UK Guidelines that UK undertakings which export are favoured in preference to those which do not (condition c), as well as in preference to other Community undertakings, and therefore competition between undertakings is distorted both within the UK market and the wider Community market (condition d). Other Member States maintain similar rules. For example, a recent review of French development assistance by the OECD states, "Theoretically, **French bilateral assistance is tied aid**, even if the wording of the origin clause that formalises this feature permits the financing of goods and services originating from franc zone countries or other assisted countries, on terms that may vary according to the instruments used. In an effort to highlight the inappropriateness of aid tying the report goes on to state, "With protocol-linked assistance, **aid tying means a constant concern with fostering commercial penetration and local investment by French firms.**"

3. As far as condition e is concerned, the Commission has stated in its annual reports on competition policy that, "measures that help firms expand in non-Community countries affect trade between Member States because Community firms are in competition with one another when it comes to doing more business outside the common market. Aid for direct investment abroad is thus deemed to be caught by Article 92"⁴. **So even aid given in respect of trade outside the EU can affect trade within it and the larger the aided enterprise, the more likely it is that such an effect on inter-State trade will be present.**

Tied aid therefore appears to meet all the criteria for definition as a state aid. That being the case, Member States should notify the Commission every time they plan to grant it. The aid should not be granted until the Commission has confirmed that it is compatible with the state aid rules.

In actual fact, as far as can be ascertained no Member States notify the Commission of tied aid contracts. They are therefore in breach of community law. The Commission is also failing in its legal duty to uphold the Treaties by not taking action against Member States either for their failure to notify it when this type of aid is granted or against the anti-competitive practices that tied aid represents.

³ It should also be noted that Section 10 concerning payment procedures provides that "CAFSL on behalf of DFID" is responsible for authorising invoices due for payment. It appears from this document therefore that payment is made direct to suppliers by the UK government.

⁴ XXVIIth Report on Competition Policy, point 230, European Commission, 1997

Annex

List of NGOs/networks that signed the legal complaint

ACEP (Portugal)
APRODEV (Association of World Council of Churches related Development Organisations
in Europe
ARA (Germany)
Ayuda en Acción (Spain)
Cafod (UK)
Catholic Institute for International Relations (UK)
Christian Aid (UK)
Concern Worldwide (Ireland)
CRID (France)
Earthlink - The People & Nature Network (Germany)
Eurodad Secretariat (Belgium)
Farm Africa (UK)
Fern/world Rainforest Movement
Friends of the Earth (Netherlands)
Forest Peoples Programme (UK)
Gaia (UK)
Handicap International
IBIS (Denmark)
Intermon (Spain)
ITDG (UK)
Mani Tese (Italy)
NCOS/11.11.11 (Belgium)
Norwegian People's Aid (Norway)
Novib (Netherlands)
Oxfam GB
Oxfam Ireland
Oxfam-Solidarity (Belgium)
Save the Children (Netherlands)
Save the Children Fund (Sweden)
Save the Children Fund (UK)
Social Alert (Belgium)
Tearfund (UK)
Trade Union Solidarity Centre of Finland
SASK
VIDA (Portugal)
War on Want (UK)
WIDE (Belgium)
World Development Movement (UK)
WWF (UK)
Young Christian Democrats of Sweden (KDU)