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Ingo Schmidt and Sabine Richard\*

# Conflicts between Antidumping and Antitrust Law in the EC

*Antidumping policy aims at protecting single firms or industries from distortions in trade with third countries. A broad definition of dumping can, however, lead to protectionist measures which conflict with antitrust policy. To what extent is this the case in the EC?*

According to Art. 113 EEC Treaty the common trade policy in the EC is to be based on uniform principles, "particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade such as those to be taken in case of dumping or subsidies." Art. 113 determines the exclusive jurisdiction of the EC over the protection against dumped or subsidized imports and is at the same time the basis for the enactment of the EC antidumping regulation.

Antidumping measures are supposed to offset distortions in trade with third countries and thereby to prevent foreign importers from gaining competitive advantages not justified by higher efficiency over their EC competitors. Insofar, "... dumping is considered to be unfair since it is based on an *artificial, rather than a true comparative advantage*, in the sense that the low price does not necessarily result from cost-efficiency. It has also to be remembered that dumping is made possible only by market isolation in the exporting country ... (so that exports) are often made at a loss, or are financed from the profits made from the same or different products in a protected domestic market."<sup>1</sup>

If we accept this definition of dumping, we have to ask if EC antidumping policy is appropriate. This policy has been subject to much criticism in the past and has been accused of favouring protectionism.<sup>2</sup>

From 1980 to 1989 the EC concluded 388 antidumping investigations, 279 of which with a positive finding.<sup>3</sup> These

figures show that the European antidumping activities have been much more voluminous than in the USA, Canada or Australia.<sup>4</sup> In 183 investigated cases price undertakings by the foreign firms were accepted, in 96 cases antidumping duties were imposed, and 109 investigations were concluded without findings.<sup>5</sup> The investigations in the 1979 - 1988 period concerned only 176 different products.<sup>6</sup> The fact that the number of products is lower than the number of cases shows that most of the investigations involve more than one country. This gives reason for the suspicion that the EC antidumping law is used by EC industry as protection against more efficient foreign rivals.<sup>7</sup> Moreover, the majority of antidumping measures benefited highly concentrated industries, e. g. the chemical industry: 35 % of the measures imposed between 1979 and 1988 concerned imports of chemical products.<sup>8</sup> The newest

<sup>1</sup> Willy de Clercq: Fair Practice, Not Protectionism, in: Financial Times, November 21st, 1988 (emphasis added), quoted from Phedon Nicolaides: Anti-dumping Measures as Safeguards: The Case of the EC, in: INTERECONOMICS, 1990, Vol. 25, No. 6, pp. 273-279, here p. 274.

<sup>2</sup> Cf. Wolfgang Sierski: Die Politik der EG auf dem Anti-Dumping-Sektor, in: BGA-Nachrichten, 1989, Vol. 5, p. 8; and Patrick A. Messerlin: The EC Antidumping Regulations: A first Economic Appraisal, 1980-85, in: Weltwirtschaftliches Archiv, 1989, Vol. 125, pp. 563-587.

<sup>3</sup> Cf. Commission of the EC: Seventh Annual Report on the Community's Antidumping and Antisubsidy Activities, Brussels 1990, Appendix O; idem: Eighth Annual Report on the Community's Antidumping and Antisubsidy Activities, Brussels 1991, Table 1, p. 2.

<sup>4</sup> Cf. Phedon Nicolaides, op. cit., p. 276.

<sup>5</sup> Cf. Commission of the EC: Seventh Annual Report ..., op. cit., Appendix O; idem: Eighth Annual Report ..., op. cit., Table 1, p. 2.

<sup>6</sup> Cf. Phedon Nicolaides, op. cit., p. 276.

<sup>7</sup> Cf. for example the urea investigation, which concerned suppliers from eight quite heterogeneous countries. Cf. Council Regulation No. 3339/87, in: Official Journal L 317 (1987), pp. 1-12.

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figures show that the percentage of investigations concerning electronics and textiles is increasing.<sup>9</sup>

In the first part of this article the principles of the substantive EC antidumping law are presented. The article then analyzes whether the definition of dumping in the EC antidumping law corresponds to its objectives or whether it leads to the prosecution of firm practices which are compatible with workable competition and cannot be interpreted as the exploitation of an unfair advantage. Using a broad definition of dumping would make it possible to protect EC industries from international competition. The article then goes on to investigate the other requirements for the imposition of antidumping duties – injury and public interest – with respect to their share in solving or aggravating the conflict of antidumping and antitrust law. Finally, the effects of the antidumping investigations on competition are discussed, as not only the substantive law but also its enforcement has an impact on the competitive structure.

### EC Definition of Dumping

In conformity with Art. VI of GATT and the second Agreement on Implementation of Art. VI of GATT,<sup>10</sup> EC Council Regulation No. 2423/88 states that a product shall be considered to have been dumped "if its export price to the Community is less than the normal value of the like product" (Art. 2 sec. 2).<sup>11</sup> On any dumped product an antidumping duty may be imposed if its "release for free circulation in the Community causes injury" (Art. 2 sec. 1) and if "the interests of the Community call for intervention" (Art. 11 sec. 1 and Art. 12 sec. 1).<sup>12</sup>

In the following brief, but certainly not complete, survey of EC antidumping law three indefinite legal terms essential for the further analysis are explained: the so-called normal value (Art. 2 sec. 3), the required injury (Art.

4), and the interests of the Community (Art. 11 sec. 1 and Art. 12 sec. 1).

Art. 2 sec. 3 lit. a deals with the problem of *spatial price discrimination* between two markets. The normal value is meant to be "the comparable price actually paid or payable in the ordinary course of trade for the like product intended for consumption in the exporting country or country of origin", deducting all discounts and rebates. According to Art. 2 sec. 3 lit. b this price differentiation criterion is not applicable "when there are no sales of the like product in the ordinary course of trade on the domestic market of the exporting country or country of origin, or when such sales do not permit a proper comparison". For this case the EEC Regulation provides three alternative methods of calculation:

□ A comparable price for the like product paid by a third country to the country of origin (a type of spatial yardstick theory).<sup>13</sup>

□ A constructed value determined by adding costs of production and a reasonable margin of profit.<sup>14</sup> In this cost-price (profit margin) concept all cases are included where firms do not differentiate prices but sell below production costs on *both* markets.

□ Art. 2 sec. 3 lit. c provides a last method for those cases where the exporter "neither produces nor sells the like product in the country of origin". Then, "the normal value shall be established on the basis of prices or costs of *other* sellers or producers in the country of origin" (another variant of the yardstick theory).

Like the definition of the normal value, injury<sup>15</sup> belongs to the most difficult terms in the antidumping law.<sup>16</sup> According to Art. 4 sec. 1 injury is assumed, "if the dumped or subsidized imports are ... causing or threatening to cause material injury to an established Community industry or materially retarding the establishment of such an industry". According to Art. VI GATT an injury can be

<sup>9</sup> Cf. Phedon Nicolaides, op. cit., p. 276; Michael Davenport: The Charybdis of Anti-Dumping: A New Form of EC Industrial Policy?, in: Discussion Paper 22, The Royal Institute of International Affairs, 1989, p. 2; Jacques H. J. Bourgeois: Antitrust and Trade Policy: A Peaceful Coexistence? European Community Perspective (Parts I and II), in: International Business Lawyer 1989, Vol. 17, p. 62 (Part I).

<sup>9</sup> Cf. Commission of the EC: Seventh Annual Report ..., op. cit., p. 6.

<sup>10</sup> Cf. Richard Senti: GATT – System der Welthandelsordnung, Zürich 1986, pp. 378 ff.; Agreement on Implementation of Art VI of the General Agreement on Tariffs and Trade of 12. 4. 1979, in: GATT: Basic Instruments and Selected Documents (BISD 26 S/171). Cf. also Jean-François Bellis, Edwin Vermulst and Paul Waer: Further Changes in the EEC Anti-Dumping Regulation: A Codification of Controversial Methodologies, in: Journal of World Trade, 1989, Vol. 23, pp. 21-34, here p. 22, who question the conformity of the EC-Antidumping regulation with the GATT Antidumping Code. For a potential conflict between the GATT-Antidumping Code and Council Regulation No. 1761/87, which was intended to complete EC-antidumping law concerning input dumping, cf. Kay Hailbronner and Rainer M. Bierwagen: Neuere Entwicklungen im Außenwirtschaftsrecht der Europäischen Gemeinschaften, in: Neue Juristische Wochenschrift, 1989, Vol. 22, pp. 1385-1394, here p. 1393.

<sup>11</sup> Cf. Council Regulation (EEC) No. 2423/88 of July 11th 1988, on Protection Against Dumped or Subsidized Imports from Countries not Members of the Economic Community, in: Official Journal L 209 (1988), pp. 1-17.

<sup>12</sup> For a survey on the basic terms of substantive antidumping law cf. for example Alexander Riesenkauff and Axel Pfeifer: Die Abwehr von gedumpten und subventionierten Einfuhren in die Europäische Gemeinschaft, in: Der Betrieb, 1987, Vol. 49, pp. 2505-2511.

<sup>13</sup> Cf. Ingo Schmidt: Wettbewerbspolitik und Kartellrecht, 3rd ed., Stuttgart/New York 1990, pp. 256 for a detailed presentation of the different types of yardstick theories.

<sup>14</sup> Cf. the cost-price (profit margin) concept in the "Chiquita case", in: Wirtschaft und Wettbewerb, 1978, Vol. 28, pp. 653 ff.

<sup>15</sup> Cf. Art. 2 sec. 1 of Regulation (EEC) No. 2423/88; and Peter C. Reszel: Die Feststellung der Schädigung im Antidumping- und Antisubventionsrecht der Europäischen Gemeinschaft, Cologne et al. 1987.

assumed even prior to its entrance; it is sufficient to determine, that "a particular situation is likely to develop into actual injury" (Art. 4 sec. 3). This likelihood is concretized by factors (Art. 4 sec. 3 lit. a-c) such as:

- ☐ rate of increase of the dumped or subsidized exports to the Community,
- ☐ existing export capacity in the country of origin or export, and
- ☐ nature and trade effects likely to arise therefrom.

The existence of an injury is specified by factors laid down in Art. 4 sec. 2 lit. a-c. Volume (lit. a) and price of dumped imports (lit. b) belong to these factors as does the impact on the industry concerned, measured for instance by production, utilization of capacity, sales, market share, prices, profits, return on investment, and employment (lit. c). The main criteria for the existence of an injury are either the loss of market shares by national suppliers in favour of dumping importers or price reductions caused by dumped imports.<sup>17</sup> The consequences of this conception of injury concerning competition policy are analyzed below.

According to Art. 11 sec. 1 and Art. 12 sec. 1 of the EC Regulation, besides the presence of dumping and injury, a further condition must be given to allow the imposition of provisional (Art. 11) or definitive (Art. 12) antidumping duties: interests of the Community must call for intervention. Whereas Art. 4 (injury) deals exclusively with the interests of an established Community industry, the inclusion of the interests of the Community gives a wide latitude to consider further interests, for example interests of customers in cheaper imported goods. In addition to weighing the interests of the Community's several industries against one another or against consumer interests, the Community interest clause also allows the inclusion of industry policy or competition policy arguments.<sup>18</sup>

### Definition from an Economic Perspective

The situation in which firms dump according to the EC definition of dumping, which includes lower prices on export markets than on home markets as well as pricing below production costs are explored below. This analysis leads to the question whether the definition of antidumping meets antitrust policy objectives or whether it furthers the undue restriction of normal price competition.

<sup>16</sup> Cf. Alexander Riesenkauff and Alex Pfeifer, *op. cit.*, p. 2508.

<sup>17</sup> Cf. Jacques H. J. Bourgeois, *op. cit.*, p. 61.

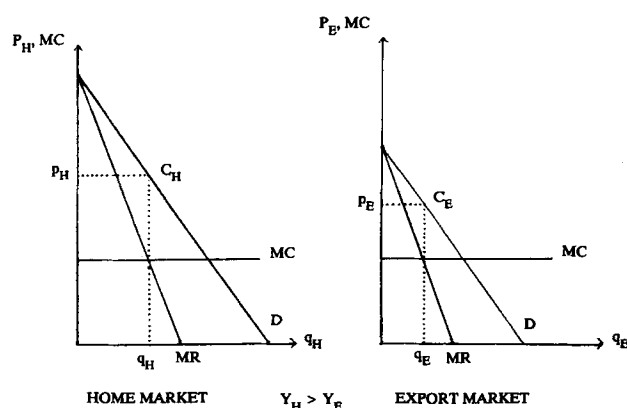
<sup>18</sup> *Idem*; John Temple Lang: Reconciling European Community Antitrust and Antidumping, Transport and Safeguard Policies: Practical Problems, in: Annual Proceedings of the Fordham Corporate Law Institute, 1989, pp. 7-24; Phedon Nicolaidis, *op. cit.*, p. 274.

There exist several explanations for such pricing behaviour, of which predatory intent is only one. The other motives analyzed in economic literature are presented briefly in the following.

### Price Discrimination

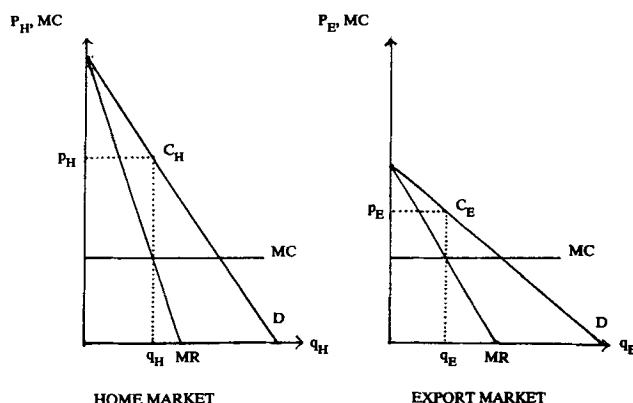
Two conditions are required for the setting of different prices on export and home markets. First, the capability of the firm to fix its prices on a negatively sloped demand curve and second, the segmentation of home and export markets, which prevents an arbitrage from eliminating price differentials. In the absence of segmentation between the two markets, the price differential may not be higher than the costs of the re-import into the home country of the producer; otherwise, there will be an incentive for

Figure 1



Notes:  $p_H$  = home market price,  $p_E$  = export price,  $q_H$  = quantity supplied on the home market,  $q_E$  = quantity supplied on the export market, MC = marginal costs, MR = marginal revenue, D = demand curve,  $C_H$  and  $C_E$  = profit maximizing price-quantity combination in the home or export market,  $Y_H$  and  $Y_E$  = income in the home or export market.

Figure 2



Notes: cf. Figure 1.

firms to re-import the goods and to realize the arbitrage profits.

Even within a strategy designated to maximize the profits of each period the firm may set lower prices in the export country than in the home country (or vice versa as Mercedes-Benz did on the US market in the past) because market prices are – apart from the production costs – influenced by the structure of demand in each market, especially by the price sensitivity of the buyers. The larger the quantity reactions are (i. e. the larger the price elasticity of demand), the lower the price on this market will be. A necessary condition for dumping (i. e. lower price on the export market than on the home market) is, therefore, that the price elasticity of demand is higher on the export market than on the home market.

The structure of demand (graphically represented by the position and the slope of the demand curve) is determined by preferences and disposable income. This means that – marginal costs being the same on both markets – the market with the higher income allows a higher price. Dumping in the sense of the EC antidumping law can also occur, therefore, when a firm from a high-income country exports to a lower-income country and adapts its prices to the lower purchasing power (cf. Figure 1).

If the intensity of competition on the export market is higher (i. e. flatter demand curve) than on the home market, the resulting higher price elasticity of demand also leads to a lower export price and consequently to dumping (cf. Figure 2).

Different preference structures in both markets lead to a parallel shift of the demand curve and/or to demand curves with different slopes.

In case of spatial price discrimination the firm maximizes its profit on each market separately. The price on each market is determined by the cost function and the demand conditions on *this* market and not by the market structure of the *other* market. Insofar, a low price on an export market alone is no evidence that the firm uses its profits on the home market to finance a predation strategy abroad. For as long as the low export price covers the production costs it will be maintained, even if the intensity of competition on the home market increases, causing the monopoly rents on this market to decrease. So, price discrimination is a result of profit maximization by a firm facing different price elasticities of demand in two markets and will – demand structure being constant – be maintained indefinitely.

<sup>19</sup> Cf. Wilfred J. Ethier: Dumping, in: *Journal of Political Economy*, 1982, Vol. 90, pp. 487-506; Stephen W. Davies and Anthony J. McGuinness: Dumping at Less than Marginal Cost, in: *Journal of International Economics*, 1982, Vol. 12, pp. 169-182.

<sup>20</sup> Cf. Michael Davenport, op. cit., p. 15.

## Market Fluctuations

Recent explanations for spatial price discrimination assume an unstable structure of demand. In these models the firms do not know the exact quantity of demand when they have to decide upon their capacity and the quantity produced.<sup>19</sup> Uncertainty regarding demand reactions, unanticipated market fluctuations and low flexibility of output can lead to price differences between markets. So, for example, in case of a recession on the export market the firm only has to adapt to the decreased level of prices on this market without necessarily reducing its prices on the home market.

## Selling below Production Costs

Even for the stronger form of dumping – export price below production costs – there exist economic explanations other than predatory intent. This form of dumping is included in the EC antidumping regulation under Art. 2 sec. 3 lit. b (ii), where dumping is defined as a price on the export market which is below production cost plus an appropriate profit margin.

Short-run selling below production costs on export markets is caused – according to recent economic dumping literature – not only by predation objectives but also by other factors. One of these factors is market uncertainty, which has already been presented as a motive for price differences. Uncertainty regarding market fluctuations will be relevant when the firm is not flexible enough in the adaptation of its output to the changing environment. In this case output has to be determined before the actual market price is known, so that the share of fixed costs is very high when the market price is determined. The firm will also accept any price lower than the expected price as long as the relatively low variable costs or even parts of the fixed costs can be covered. A protected home market is not a necessary condition for this type of dumping though it enables the firm to maintain this pricing behaviour for longer.

A recent development in EC antidumping policy is that the EC Commission refuses to accept exporters' home market prices which in its view are not covering production costs and, therefore, cannot be the result of the ordinary course of trade. Instead of taking home market prices as a basis, constructed values are calculated.<sup>20</sup> The probability of finding dumping even when there is no price differential is increased because the Commission can also prosecute sales below costs on *both* markets, a situation which rarely is the outcome of a protected home market. If sales below costs are prosecuted on antidumping terms, the firms have to give up one of their strategies to overcome short-run demand reductions in recessions. These problems

concern e.g. sellers from countries where labour relations prevent firms from discharging their staff at short notice. Therefore the difference in institutional structures such as labour relations which lead to different costs for the production of one good in two countries can also cause dumping.<sup>21</sup>

### Predatory Dumping

In dumping undertaken with the intent of changing the existing market structure two cases can be distinguished:

□ A firm which tries to enter a foreign market can use lower prices to overcome existing market barriers consisting of the buyers' reluctance to switch from an old, well-known product to a product from a hitherto unknown seller from abroad. There is no unfairness in this pricing behaviour; it is more likely to lead to increased competitiveness of the market. Moreover, the firm will – once entry is successfully accomplished – adapt its prices to the general price level. In spite of the positive effect on competition, this behaviour can be prohibited under the EC antidumping law.

□ Crowding out established rivals is the second type of dumping with effects on market structure. In a competitive economy the exit of firms is also the sanction for insufficient efficiency and works as an incentive to strive for greater efficiency. If the pricing behaviour of one firm drives other firms out of the market, this can be the result of the superior efficiency of the remaining firm rather than predatory intent.

The case where low export prices are subsidized by monopoly rents on the home market has to be treated differently. This is the typical form of unfair advantage in the sense of the EC definition of dumping. It is assumed that firms accept temporary losses due to low export prices because they expect that their rivals without similar financial resources will not be able to sustain the low price level and, therefore, will have to leave the market.

The probability of this strategy's succeeding is controversial. Low prices are an investment which only pays when the firm can compensate the temporary losses through price premiums after the exit of the rival. Higher prices and resulting gains for the established firm attract new rivals, however, who endanger the profits necessary to recover from the temporary losses. Before deciding to undertake such a strategy the firm has to calculate whether the losses from the low price period are smaller than the gains in the high price period. The length of the low price period and, therefore, the magnitude of the losses depend on the existing barriers to exit. If they are high because of specific capital assets involved which cannot or only at large costs be used for alternative purposes, the firms to be driven out will stay relatively long in the market

due to low opportunity costs. If barriers to exit are low because of low specificities, rivals are driven out quickly; but in this case the danger of new rivals in the high price period is larger. Low barriers to exit resulting from the low specificity of capital also mean low barriers to entry.

Even if firms are able to finance temporary losses this strategy is risky and expensive, and the firm could probably find more profitable opportunities. The relevance of predatory dumping is questionable, therefore.<sup>22</sup> But also if the relevance of predatory dumping is accepted as a problem of economic policy, the EC Commission often cannot determine ex ante which motive guides the pricing behaviour of a firm.

The analysis shows that firms have several motives for dumping. Not all of them are objectionable from an antitrust policy point of view. In some cases dumping even leads to more intensive competition.

The existence of dumping is not the only requirement for the imposition of antidumping measures. The other requirements of the EC antidumping law are explored below with respect to their impact on the harmonization of antitrust and antidumping goals.

### Injury and Public Interest

The injury to an EC industry (Art. 4) emphasizes the protection of single firms or industries.<sup>23</sup> If this injury is caused by the import of dumped goods antidumping measures can be imposed. The evidence of causality, however, is hard to achieve because an injury might be caused by other factors as well. Two examples illustrate the problem.

□ Even if dumping cannot be found, the import of goods can lead to decreasing sales by EC firms because buyers switch to foreign firms when the new product promises a better price-quality ratio. The injury to competitors by sellers of better products characterizes the nature of competition. The success of one competitor happens at the expense of its rival.<sup>24</sup> The determination of the extent of injury has to take into consideration that even normally priced goods would damage the home industry.<sup>25</sup>

<sup>21</sup> Cf. Roger D. Blair and Leonard Cheng: On Dumping, in: *Southern Economic Journal*, 1984, Vol. 3, pp. 857-865, here p. 858; Phedon Nicolaides: The Competition Effects of Dumping, in: *Journal of World Trade*, 1990, Vol. 24, pp. 115-131, here p. 121 and Appendix D, p. 131.

<sup>22</sup> Cf. Rodney de C. Grey: Trade Policy and the System of Contingency Protection in the Perspective of Competition Policy, in: OECD (ed.): *Restrictive Business Practices Committee/Working Party No. 1, Paper No. 86.3*, Paris 1986, p. 19.

<sup>23</sup> Cf. Ingo Schmidt, op. cit., pp. 79 ff. and p. 122.

<sup>24</sup> Cf. Ingo Schmidt, op. cit., p. 2.

<sup>25</sup> Cf. Phedon Nicolaides: *Anti-dumping Measures ...*, op. cit., p. 276.

□ The second aspect of the causality problem deals with the general economic situation. If foreign firms are found to be dumping during recessions in world markets, it will exceed the capabilities of the antidumping agency to determine which part of the injury to the EC industry is caused by dumping and which part by the general recession.

In 1987, the EC Council stated in an investigation on imports of urea<sup>26</sup> that despite the recession in worldwide urea markets the EC sellers were materially injured by dumped urea. This finding protected the EC sellers at least partly from the recession.<sup>27</sup>

Jurisdiction on this point is not unambiguous, as the determination of the actual extent of injury leaves the council a large latitude for calculation.<sup>28</sup> The extent of injury, however, is decisive for the imposition of antidumping duties and their amount.

The balance of producer interests against the interests of the Community opens a second jurisdictional latitude for the Commission. The heading "Community interests" comprises the interests of other EC industries, particularly the buyers of dumped products and private consumers. The Commission has to decide whose interests are to be preferred, but has nevertheless failed so far to develop any criteria for this decision.<sup>29</sup> The Community interest clause opens the opportunity of integrating antitrust considerations into the antidumping law so that not only the protection of individual sellers or industries is practised but also the protection of competition as an anonymous control and steering mechanism.

This latitude has not been used fruitfully by EC institutions.<sup>30</sup> The case "glycine from Japan" from 1985 illustrates the problems of the balance of interests. Two Japanese sellers were accused of dumping. But the EC market only consisted of three sellers including the Japanese firms. The imposition of antidumping duties would have created a dominant position for the only EC seller.<sup>31</sup> Because of the serious problems of the EC seller, who would have been forced to close down a new plant, the Council decided to impose antidumping duties.<sup>32</sup> The antitrust related arguments of the Japanese sellers and the buyers within the EC were accounted for by the extent of the duties, which enabled the EC firm to operate and maintain the new plant efficiently without fully eliminating

the injury.<sup>33</sup> The example shows that particularly on oligopolistic or monopolistic markets the imposed antidumping duties are of great impact for future competitive conditions. So far no criteria have been developed which allow different antidumping measures to be taken according to the different competitive conditions on markets.

In our opinion the balance of interests should differentiate between whether a monopoly, a tight oligopoly or a competitive market with more and smaller sellers is involved. The notion of unfairness has to be interpreted accordingly.

### Antidumping Investigations

Antidumping complaints must be lodged on behalf of a Community industry (Art. 5 sec. 1). According to Art. 5 sec. 2, "the complaint shall contain sufficient evidence of the existence of dumping or subsidization and the injury resulting therefrom". In the course of lodging an antidumping complaint the Community producers have to meet and exchange information relating to their individual business, e. g. prices, market shares, costs and business data, which normally are not discussed among rivals. The firms expose themselves to an infringement of Art. 85 EC Treaty, which prohibits "concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market". The requirements for lodging an antidumping investigation include, therefore, an implicit justification for coordinated behaviour which, however, has to be limited to the exchange of information necessary for the complaint to be drafted and made.<sup>34</sup> This means that the antidumping law legalizes practices prosecuted under EC antitrust law, particularly as this coordination is undertaken in order to weaken the position of foreign rivals. This conflict between EC antitrust and antidumping law has not been dealt with adequately.

The antidumping measures at the disposition of the Commission have different effects on the workability of competition.<sup>35</sup> Three basic types of duties or combinations of the basic types are used. These are duties expressed as

<sup>26</sup> Cf. Council Regulation No. 3339/87, op.cit., pp. 9 f.

<sup>27</sup> Cf. Jacques H. J. Bourgeois, op.cit., p. 64.

<sup>28</sup> Cf. Alexander Riesenkauff and Alex Pfeifer, op.cit., p. 2508.

<sup>29</sup> Cf. John Temple Lang, op.cit., pp. 7-25.

<sup>30</sup> Cf. *ibid.*, pp. 7-29.

<sup>31</sup> Cf. Commission Regulation No. 997/85, in: Official Journal L 107 (1985), pp. 8-12, here p. 11.

<sup>32</sup> Cf. Commission Regulation No. 997/85, op.cit., p. 11.

<sup>33</sup> Cf. Council Regulation No. 2322/85, in: Official Journal L 218 (1985), p. 3. The argument is reminiscent of the so-called "infant industry argument" presented by the German economist Friedrich List in 1841.

<sup>34</sup> Cf. John Temple Lang, op.cit., p. 7-44; Paul Vandoren: The Interface between Anti-Dumping and Competition Law and Policy in the European Community, in: Legal Issues of European Integration, 1986, Vol. 2, pp. 1-16, here p. 4.

<sup>35</sup> These were taken into account by the Commission in several cases, e. g. the case "glycine from Japan", where the Commission has refused to accept price undertakings for antitrust reasons. Cf. Council Regulation No. 2322/85, op.cit., p. 3.

a percentage of the price at the frontier of the EC (ad valorem duties), duties expressed as a fixed money sum per unit imported (specific duties), and a duty equal to the difference between the price at the EC frontier and a fixed minimum price (variable duties).

Variable duties represent the strongest interference in the mechanism, as the exporting firm loses virtually all its price-setting competence due to the equalizing duties. Moreover, the other rivals are informed about the fixed minimum price. This increases price information asymmetrically, which constitutes an additional handicap for the foreign firm. The majority of the imposed duties have price-fixing effects. Measures leaving price-setting latitude for the foreign firm, e. g. ad valorem duties fixed as a percentage, are rarely used.<sup>36</sup>

The great number of accepted price undertakings is a special feature of EC antidumping law compared to other countries.<sup>37</sup> The firms have to undertake not to sell their product under a specified minimum price (Art. 10 sec. 2 lit. b). The advantage of price undertakings for the dumping firms is that they get the additional revenues caused by the higher prices, whereas duties have to be paid to the EC agencies. The additional revenues facilitate the survival of the foreign firms on the common market and prevent a further deterioration of competitive structures which would result from the exit of foreign firms caused by antidumping measures.<sup>38</sup>

Apart from this positive aspect, negative effects on competition result from the negotiation of price undertakings. Just like variable duties, price undertakings imply that the same minimum price for all dumping sellers is determined, calculated on the basis of the EC producers' production costs plus an appropriate profit margin.<sup>39</sup> For this calculation the Commission has to rely on information provided by the industry lodging the complaint.

To achieve a price undertaking of the desired extent from the foreign competitors, the EC producers should demonstrate unanimity before the Commission. Antidumping investigations not only facilitate coordinated behaviour among the EC producers, but also force foreign firms to cooperate with each other<sup>40</sup> as well as with the EC

producers, because the foreign firms can avoid duties by offering price undertakings and because the acceptance of price undertakings depends upon the benevolence of the firms found dumping.<sup>41</sup>

Price undertakings are only accepted if the Commission is convinced that they will be kept. The EC sellers must be sure that the dumping firms adhere to their undertaking and the foreign sellers must be sure that the EC sellers do not undercut their prices. As the Commission has not controlled the observance of the undertakings sufficiently in the past, direct contacts and agreements between the two parties were necessary.<sup>42</sup> The imposition of ad valorem duties would lead neither to these control problems nor to the resulting agreements. Therefore, they are more consistent with a competitive system.

### Problems of Cooperation

Both antitrust and antidumping investigations are carried out by the EC Commission. Directorate-General IV is in charge of antitrust policy and Directorate-General I of antidumping policy. The information on prices, products, market shares and production costs acquired in the course of an antidumping investigation shall according to Art. 8 EC Council Regulation No. 2423/88 "be used solely for the purpose for which it was requested". Therefore, files and confidential information may not be exchanged between these two departments of the Commission. If the firms had to fear antitrust measures as a consequence of their cooperation with the antidumping agency, they would not be willing to reveal their information.

This may be one of the reasons why antitrust aspects have been only casually and unsystematically considered. Regular consultations between the Directorates-General are necessary to harmonize the two policy sections, e. g. one Directorate-General could submit draft decisions to the other prior to publication.<sup>43</sup>

As has been shown, EC antitrust and antidumping policy have conflicting objectives insofar as antitrust policy primarily protects competition as an anonymous control and steering mechanism whereas antidumping policy aims at protecting single firms or industries.

The potential of EC antidumping policy to solve this conflict has rarely been used by the Commission. The Commission has not developed general criteria for balancing the interests of the industry on the one hand and of the Community on the other, particularly with respect to antitrust objectives as a special Community interest. The criteria should especially include an analysis of the market structure. If an antidumping investigation also involves an analysis of the competitive situation on the market, antidumping investigations will lose much of their appeal as a protectionist device.

<sup>36</sup> Cf. Patrick A. Messerlin, *op. cit.*, p. 570.

<sup>37</sup> Cf. Phedon Nicolaidis: *Anti-dumping Measures ...*, *op. cit.*, p. 276.

<sup>38</sup> Cf. Klaus Stegemann: *EC Anti-Dumping Policy: Are Price Undertakings a Legal Substitute for Illegal Price Fixings?*, in: *Weltwirtschaftliches Archiv*, 1990, Vol. 126, pp. 268-298.

<sup>39</sup> Cf. Paul Vandoren, *op. cit.*, p. 9.

<sup>40</sup> Cf. Klaus Stegemann, *op. cit.*, p. 276.

<sup>41</sup> *Ibid.*, p. 274.

<sup>42</sup> *Ibid.*, p. 277.

<sup>43</sup> Cf. Paul Vandoren, *op. cit.*, p. 3.