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Competition and anti-dumping: continued peaceful co-existence?

Edwin Vermulst[1]

This paper reviews the relationship between anti-dumping and competition laws and discusses the overlap and differences in their application in a concrete example. That will take us into the issue of contestability of markets.

As an advance observation it must be noted that our perspective is Brussels-oriented. As long as anti-trust rules are not globally harmonised, differences between anti-trust regimes in different jurisdictions will of course lead to a different relationship with anti-dumping practice in those countries.

1. Different rationales: trust-busting vs market segregation

For the purposes of comparing the anti-dumping instrument with EU competition law, the main provisions on competition policy in the EU context are Articles 85 and 86 of the EC Treaty. These provisions have been implemented by a lot of secondary legislation.

Article 85 prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their objective the prevention, restriction or distortion of competition within the common market. Agreements falling under the prohibition of Article 85(1) are automatically void unless they meet the requirements of an individual or block exemption justified by their compensating beneficial effects stipulated in Article 85(3). Restrictive trade practices explicitly prohibited under Article 85(1) are fixing of prices or other trading conditions, limiting production, markets, technical development or investment and sharing of geographical markets. Furthermore, agreements applying dissimilar conditions to equivalent transactions with other trading parties and agreements making the conclusion of contracts subject to the acceptance by other parties of supplementary obligations which have no connection with the subject of such contracts are not allowed by the provision. Generally speaking, two broad types of agreements between firms that tend to be condemned under Article 85 have developed in practice: vertical and horizontal agreements.

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1. Parts of this paper have been published as P.K.M. Tharakan, Edwin Vermulst and Joe Tharakan, 'Interface between anti-dumping policy and competition policy: a case study'. The author wishes to thank P.K. Mathew Tharakan and Bart Driessen for their valuable comments. However, the responsibility for the contents remains with the author.

Member States. The emphasis was here very much on preventing restrictions on parallel imports because such restrictions were obstacles to the internal market. This aspect, while important in practice, is quite alien to the stated rationale underlying anti-dumping policy.

The stated rationale of EU anti-dumping measures is, in the words of the Commission, [4] One authoritative commentary has provided a more extensive justification:

[5]

Systematic, as opposed to incidental,[6] dumping presupposes separation of markets[7] and existence of a closed home market.[8] It is perceived to be unfair not to allow competition in one's home market, yet to benefit from the openness of other markets to sell at low prices there. This notion of unfairness can be said to form the basis for current anti-dumping legislation.

The key element here is . Conceptually, market segregation is a pre-condition to the concept of dumping: if there would be no barriers to market access anywhere (an obviously hypothetical presumption), then anti-dumping would not be necessary because price discrimination

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4. Peroxodisulphates (persulphates) from China (provisional), OJ (1995) L 169/15 at Recital (39).
5. Müller, Khan, Neumann, , John Wiley & Sons, Chichester 1998 at 5-6.
6. Incidental dumping can be caused, for example, by differences in economic or business cycles in two markets, or, indeed, may result purely from biased dumping margin calculation methods, such as asymmetrical comparisons between domestic and export prices, systematic exclusion of sales below cost and use of remaining sales above cost as the basis for normal value, use of constructed normal values with unrealistically high profit margins, .
7. Partly for this reason, some free trade agreements, ANZCERTA and (save fishery products) EEA, preclude use of anti-dumping actions among FTA members. Compare Hoekman, (World Bank 17/2/1998).
8. If these conditions are not met, the merchandise will be re-exported to the country where the higher price levels prevail.

between markets would be regulated by the fluidity of the markets themselves. This is one of the reasons why conceptually no dumping is supposed to take place within the European Community.[9]

By inference, as long as (legal or practical) barriers between markets continue to exist, price discrimination between markets will remain possible. Apart from the question whether it is to use anti-dumping measures in each case of price discrimination, it would be at least to do so.

Several matters are of importance here. First, from an economist's perspective, there are a number of scenarios under which dumping can take place. They include: predatory pricing; dumping resulting from the existence of steep learning curves and the use of forward pricing; excess capacity dumping; and profit maximisation by discriminating monopolists. Economists tend to feel that profit maximisation by discriminating monopolists is the most likely form of dumping although they do not rule out the possibility that other forms of dumping can occur. Nevertheless, they point out that certain necessary conditions have to be fulfilled for any form of dumping to take place. Such necessary, but not always sufficient, conditions include the international segmentation of markets and/or a market structure characterised by imperfect competition in the country of the firm carrying out the dumping.

This richness in possible dumping situation

therefore, anti-dumping duties are in nature,[12] in that they focus on restoring fair competition in the importing country market.

Classic economic literature,[13] on the other hand, has mostly held that mainly , dumping with the objective to destroy competitors and subsequently increase prices to monopoly levels, is harmful for the importing country's economy. There is consensus that anti-dumping action against predatory dumping must be possible.[14] However, while accusations of predatory pricing are sometimes made, as such it has never been proven to exist.

1.3

A recent position paper from the Government of Japan filed in the WTO stated that:

15

As far as the European Community is concerned this seems only partly correct. Admittedly, there is a certain overlap between the rationales underlying competition law and anti-dumping policy, in the sense that both are concerned with creating or maintaining healthy competition on the EU market. On the other hand, there are very tangible differences in purpose also: while competition law is also used as an instrument to complement the freedom of movement of goods between EU Member States (a goal alien to anti-

12. They are not punitive and in fact, there is no prohibition of dumping in the GATT/WTO.
13. Viner, (1942, 1966 edition).
14. This was, for example, one of the conclusions of a Japanese working group, consisting of in-house trade litigation experts of Japanese companies, established within the framework of a project of the Semiconductor Industry Research Institute Japan (SIRIJ). The group distinguished between four forms of dumping: market segmentation dumping (export price lower than home market price, due to market size and other conditions), below cost dumping (export price is below cost, for example because of demand-supply imbalance, typical in cyclical industries such as semiconductors), strategic dumping (export price lower than home market price, and possibly below cost, due to closed home market) and predatory dumping, and agreed that the last two forms of dumping ought to be actionable. As regards below cost dumping, the working group reviewed whether such dumping ought to be actionable , but was unable to reach agreement. As regards the first form of price dumping, it was felt that it ought not to be actionable unless it violated competition laws.
15. WT/WGTCP/W/92 of 21 September 1998.

dumping), anti-dumping action may also be taken in cases where competition on the EU market is not in jeopardy.

At the level of the stated aims of both policies it would thus seem that the picture is one of partial overlap at most. This may be one of the conceptual reasons why anti-dumping policy and competition policy in the European Community are not seamlessly integrated.

2. The practice: the interaction between anti-trust and anti-dumping in the EU

The Japanese Government's observation on the contradictory effects of anti-dumping law and competition law is borne out by experiences in the European Union. There are several different factors here which influence the picture. Without aiming to be exhaustive, we would like to mention the most important ones.

First, it may indeed happen that anti-dumping measures help restore effective competition on the Community market. This is normally at least the stated aim of such measures. For example, in the European Commission argued that:

[16]

Then, there may be concerns that the of anti-dumping measures will lead to situations whereby effective competition is in itself impaired. Such claims normally get short thrift from the EU institutions. For example, in

16. (provisional), OJ (1995) L 252/2 at Recitals (38)-(39).

(discussed in more detail below) the EU institutions defended the anti-dumping measures as follows:

[17,18]

As an additional factor, unlike the anti-dumping legislation of for instance the United States, EU anti-dumping law requires a limitation of anti-dumping measures if a lesser anti-dumping duty would be sufficient to remove the injury (even if not all the dumping). By this lesser duty rule, EU anti-dumping law limits itself to neutralising the harmful of unfair trade practice, rather than the trade practice itself. Article 9.1 of the WTO Anti-Dumping Agreement specifically expresses the desirability of such treatment.

Notwithstanding the above there have been occasional cases where competition arguments became a major issue. One notable case led to the court case. This case concerned an anti-dumping proceeding concerning calcium metal from China and the USSR. Extramet was the largest importer of calcium metal in the EU. It produced from such calcium metal granules of pure calcium used primarily in the metallurgical industry. Péchiney, the only producer of calcium metal in the Community, complained of dumping of calcium metal in the EU. The Commission initiated an anti-dumping proceeding and anti-dumping duties were imposed. Extramet appealed to the European Court of Justice, arguing that Péchiney had self-inflicted its injury by refusing to supply calcium metal to it, and that

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17. (definitive), OJ (1998) L 128/1 at Recital 121.

18. Similarly, in the Council argued that:

(definitive), OJ (1998) L 111/1, Recitals (55)-(56)).

this had been the reason why it started importing. Extramet also submitted a complaint alleging an abuse of a dominant position, but this was not yet decided upon by the time the Court handed down its Judgement. The Court disagreed with the Council and the Commission that, if a violation of Articles 85 or 86 were established, a review of the measures would still be possible. It argued that:

19

Following the Judgement the Commission notified its intention to collect additional data. In April 1994 the Commission again imposed a provisional anti-dumping duty. In the Regulation it noted that:[20]

[formerly: Extramet]

19. Case C-358/89, , [1991] ECR I-2501, Recital 20.
20. (provisional), OJ L (1994) 104/5.

In October 1994 the Council confirmed this assessment and imposed definitive anti-dumping duties.[21]

Independent pricing is considered to be one of the key forms of competition. For example, in the European Commission noted that:

22

21. (definitive), OJ (1994)L 270/27.
22. ( ), OJ (1985) L 85/1 at Recital 114.

There is one anti-dumping measure deserving some special attention in this context because of its direct influence on pricing. Once the European Commission determines that dumping and injury exist, it may impose anti-dumping measures. In most cases such measures take the form of anti-dumping duties which are levied at the EU border.

The undertaking is an important exception to anti-dumping duties. Under EU law, the European Commission, once it has determined dumping and injury, may accept such undertakings from the exporters concerned. Under the terms of such an undertaking exporters commit themselves to refrain from exporting under the minimum price (which is normally calculated by reference to the normal value).[23]

Such measures are actively used, mostly—but certainly not solely—in cases involving Central and Eastern European countries. Although price undertakings as an anti-dumping instrument are widely accepted and often enough actively sought by exporters, there may be a somewhat dubious competition angle about them. These effects will differ depending on the type of undertaking:

: under the terms of such undertakings the exporter is obliged not to export for prices under the normal value for the product. In such cases, each exporter will normally be subject to different minimum prices;

: under the terms of such an undertaking the exporter is obliged not to export for prices underselling the Community industry. Since injury margins will normally differ per exporter, minimum prices will normally differ as well, similarly to the first type of undertaking;

: if a global injury margin for the whole exporting country (or, in case of sampling situations, for the co-operating producers) is calculated and the undertaking is based on this basis, the minimum price for that whole country (or the vast majority of exporters therefrom) is effectively aligned to the selling price of the Community industry. If the Community industry and the exporting country together control a substantial part of the EC market, such undertakings may effectively imply a minimum market price;

Such undertakings are used less and less in EC practice, presumably because they are the crudest type of anti-dumping measure, directly interfering with supply.

It may follow that the effects on competition of each type will be different with (3) and (4) restricting competition most, while (1) and (2) will be less directly affecting competition.

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23. Occasionally, the EC may accept an undertaking based on quantitative restrictions instead, but this is become rather rare.

The aim of the undertaking is to offset either dumping or injury (whichever is the lowest). If now producers accounting for a large part of the EU market conclude such minimum price undertakings, effectively an EU-sponsored cartel is created aimed at maintaining a certain minimum price. Certainly in cases where the number of players in the industry is fairly small, this can lead to situations where effectively the law of supply and demand is strongly curbed.

The whole point of the undertaking concept is to raise the EU market price of the product concerned to a level whereby the Community industry can again compete with imports. It seems that, for their competition-limiting effects, price undertakings are not popular in the United States and other jurisdictions.

From the situation of an exporter concluding a price undertaking with the European Commission we must distinguish the situation of two industries trying to deal with a dumping allegation without European Commission involvement. Such cases have occurred, but are considered by the Commission to be serious infringements of competition rules. For example, in a decision concerning the , the Commission stated that:

[24]

The European Commission will thus not condone industry-to-industry agreements, even if these are designed to deal with dumping accusations.

One other interesting half-exception to this was provided by the proceedings. The European Commission had initiated a review of anti-dumping measures on DRAMs from Japan and South Korea in 1995.[25] In 1997, partly because of the developments surrounding the Information Technology Agreement, the complainant (the European Electronic Component Manufacturers' Association) negotiated an industry-to-industry agreement with the Japanese (and Korean) industries in the framework of which it requested the withdrawal of the anti-dumping measures.[26] This agreement was negotiated in close consultation with the European Commission services. It entailed a collection and maintenance of data system with the sole objective to deal with the anti-dumping dispute. The collected data was not shared within the industries concerned, but was mainly intended for the use of EU or Japanese/Korean anti-dumping authorities, as the case

24. OJ (1992) L 246/45.
25. (initiation of review), OJ (1995) C 181/13.
26. Termination notices in OJ (1997) L 324/38 (Japan) and OJ (1997) L 324/11 (Korea).

may be. The Japan-EU and Korea-EU industry agreements were subsequently notified in accordance with EU competition rules.[27]

Another relevant factor is the of measures. Anti-dumping action is typically directed against whole countries. Typically, the EU will impose anti-dumping measures against a whole country, with lower individual anti-dumping measures imposed on individual co-operating producers.

Even though the complaining Community industry may wish to target only few companies, the net thrown by an anti-dumping action often normally catches more than intended: all producers in the targeted country and all exports from the country concerned to the EU.

This becomes relevant, among others, as a result of the EU's methods of calculation, whereby zeroing practices may technically create or inflate dumping where none was intended. Even if the Commission in the course of its investigation finds that some producers in the targeted country have zero dumping or injury margins, the Commission may still conclude that generally imports from the country concerned have caused injury to the Community industry. The imports from the companies with zero dumping or injury margins will then still be counted as dumped imports for the assessment of the impact of dumped imports. Moreover, newcomers who have not exported the product concerned to the EU during the dumping investigation period, will in principle be subject to the highest ( ) anti-dumping duty.

As a separate issue, an anti-dumping action also shoots broader than an Article 85 investigation since it requires no concerted practice. An example may show where the differences lie. In the recent second proceeding literally hundreds of exporters in Asian countries were targeted and subjected to provisional anti-dumping duties. The Commission did not find that there was any concerted effort among these companies to export for dumped prices to the EU (indeed, there is no such requirement in EU anti-dumping law). It is difficult to conceive of a competition law proceeding dealing with the issue: in order to get the case going, the complainant would have had to provide at least some indication of a concerted practice between the exporters concerned. Even with the European Commission's very wide interpretation of the term this was patently not the case.

3. <u>Options to integrate anti-dumping and competition law</u>

27. Notifications in OJ (1998) C 156/10 (Japan) and OJ (1997) C 378/5 (Korea).

These observations make it clear that—although there are clearly connecting sides to anti-dumping and competition law—these two remain different worlds. Let me now look at proposals to take more account of competition aspects in anti-dumping proceedings.

In the absence of a fully integrated world market and effective international harmonisation of competition rules, pragmatic suggestions for enhancing the role of competition policy disciplines in the anti-dumping policy application by seeking multilateral agreement on a very limited number of common, minimum standards, acquire particular significance. One such interesting proposal is advanced by Hoekman and Mavroidis.[28] The essential elements of that proposal can be stated in a(n) (over)simplified form as follows.

If the necessary conditions for dumping include market segmentation and imperfect competition, any anti-dumping procedure should contain provisions to verify whether these conditions do prevail in the countries of the defendant(s), and complainant(s). As for the latter (the complainants), the rationale of this proposal is that, whether dumping is injurious to competition (and not only to competitors), depends crucially on the market structure prevailing in the importing country. So in the case of applying competition discipline in the anti-dumping context, the subject of investigation should be the contestability of the markets in both the importing and exporting country. Here three options are possible.

: each country applies its competition policies to the actions of firms located in their respective territories when an anti-dumping investigation is initiated. In cases where the investigating authorities in the exporting country find that no competition law bas been violated and that there are no significant barriers to entry for foreign products, and where their counterparts in the importing country agree to this finding, the case would be closed.

The major point of disagreement between the respective investigating authorities following this option is almost certain to be about the competitive conditions prevailing in their respective markets. The authorities of the exporting countries are likely to point out that they do have competition laws in operation. Nevertheless, the implementation of option 1 will at least provide the possibilities for an in-depth analysis of the practice of the national competition authorities and courts.

: the second option would be to take the route of the “non-violation” complaints at WTO. However, this is fraught with practical difficulties, as for example the WTO panel case has shown.

28. B.M. Hoekman and P.C. Mavroidis, ‘Dumping, Antidumping and Antitrust’, 1996, 27-52.

: modified anti-dumping action. If an anti-dumping investigation turns out to be inevitable, criteria which make anti-dumping action more sensitive to competition considerations should be introduced into the process. In this context, Hoekman and Mavroidis (l996) make three specific suggestions:

(i) strengthen the "Community interest clause" by giving legal standing to the consumers of the imported products in the anti-dumping cases;

(ii) a dominant position by a defendant firm or a cartel could be made a necessary condition of taking AD action. A much higher standard than the present one could be imposed;

(iii) a proper definition of the domestic like product industry in accordance with economic considerations.

4. <u>The international contestability of markets</u>

In recent years the view has gained ground, especially among economists, that the problem with systematic dumping is not the low prices in the export market, which increases economic welfare in that market, but rather the closed nature of the home market, which precludes foreign producers from competing there.[29] But then, the argument goes, imposition of anti-dumping duties as a action is only a second-best solution and the preferable option would be to break open the closed home market by means.[30] This is an important element of the theory. Again, however, as is the case with predatory dumping, one runs into evidentiary problems because it would need to be proven that the home market is indeed closed by means violating WTO rules.

Since the entry into force of the Uruguay Round regime both the European Union and the United States in recent years show a more pro-active approach in prying open third countries' markets. The most eye-catching instances of this in the United States context were the in which the US

29. Following this line of reasoning, a Chairman's Memo for the Article 113 Committee for discussion at its informal meeting (Noordwijk, 6 May 1997) suggested that there must be a clear relation between the conditions on the market of the exporter and the alleged dumping. Compare Hoekman, Mavroidis, Dumping, Antidumping and Antitrust, 1996, 27-52.

30. Stimulated recourse to the Trade Barriers Regulation and establishment of an EU database on trade barriers in third countries against EU exports can be classified as EU Commission initiatives implicitly supporting this school of thought. Compare Towards an International Framework of Competition Rules, Communication submitted by Sir Leon Brittan and Karel Van Miert, European Commission, at 5 (18 June 1986); Chairman's Memo for the Article 113 Committee for discussion at its informal meeting (Noordwijk, 6 May 1997). The latter suggests that market access procedures could be opened in parallel with anti-dumping cases. whether this logic should lead to termination of the anti-dumping proceeding where the market access proceeding would lead to a finding that the domestic market is not closed to imports by WTO-illegal means.

31. WT/DS44/R; overall 1006 pages (findings 106 pages).

(Kodak) acted as complainant and Japan (Fuji) as respondent, and the use by the United States of its so-called "Super 301" legislation.

The proceeding was introduced by a US request for consultations under Article XXIII:1 GATT and the DSU in June 1996 and eventually led to the Panel issuing its lengthy final report to the parties in January 1998.

Both the non-violation and the violation claim of the US were rejected, basically on evidentiary grounds. The Panel decision illustrates how difficult it is to challenge national legislation and practices, which are not directly trade-related, but which—as, , any kind of national competition law—may have an impact on imported products. From the Panel's reasoning one gets the impression that the non-violation claim as such appears to be a potential avenue in these cases. But in any event it will be rather burdensome, and limited to very exceptional cases. Without judging the specific case, this approach seems to be reasonable inasmuch as it respects the national sovereignty of the WTO Members and fully corresponds to the legal limitations of the current GATT/WTO regime.

5. One example in more detail: the *Fax machines* anti-dumping case viewed through competition law eyes

Until now our remarks have covered the broad concepts. The recent anti-dumping proceeding concerning small fax machines provides an interesting illustration of the interplay between anti-dumping and competition in practice, and of how a contestability of markets analysis could be made. This proceeding was initiated on 1 February 1997 following a December 1996 complaint by Philips Personal Fax Elektronik Fabrik in Austria [hereinafter: Community industry]. Definitive anti-dumping duties were imposed on 40 April 1998, ranging from 6 to 89.8% with an average of 29%.[32]

In its complaint, the Community industry defined personal,[33] as opposed to professional, fax machines as fax machines with a weight of 5 kilograms or less and with dimensions (width x depth x height) of the main body measuring 470 mm x 450 mm x 170 mm or less. The Commission took over this definition,[34] but limited the scope of the provisional measures by excluding fax machines using ink-jet or laser printing technologies on the ground that fax machines using such technologies are aimed only at professional use.

In total, 23 foreign producers of personal fax machines co-operated in the proceeding. It may further be noted that the Commission found that:

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32. , OJ (1998) L128/1 at 15-16 (definitive).
33. Typically the small fax machines used at home.
34. It being understood that for purposes of assessing the weight and dimensions, the paper load and other consumables, as well as any cordless handset, must be excluded.

35

It follows from this statement that, in addition to the above-mentioned producers, there must have been additional producers in Malaysia, Thailand, Taiwan, Japan and China. The relevance within the context of this article is that with at least 23 foreign producers and two EU producers (Philips and Sagem) the fax machine market does not qualify as a mono- or oligopolistic market.

As far as barriers to market access in the exporting countries for EU fax machines are concerned, the applied tariffs for HS sub-heading 8517 21[36] in these countries during the investigation period[37] were as follows:

China	12%
Japan	0%
Korea	7.9%
Malaysia	0%
Singapore	0%
Taiwan	9.2%
Thailand	5%

This may be compared with the 7.5% import duty applied by the EU.[38] We may therefore conclude that the countries under investigation overall do not protect their markets through import duties to any significantly higher degree than the EU itself does.

In the Regulation imposing provisional duties, the Commission pointed out that:

[were exported to the countries under

35. , footnote 32, at 63.
36. Source: European Commission Applied Tariffs Database, (http://mkaccdb.eu.int, 26 March 1998).
37. Calender year 1996.
38. It being understood that Thailand, Malaysia and China were able to benefit from a reduced GSP duty of 2.6%.

investigation]
39

While this conclusion may be correct, it is speculative. Moreover, it seems more appropriate to analyze total imports of fax machines into these countries as a yardstick for measuring the international contestability of the markets. Indeed, the Commission itself admitted with respect to Korea that there was a significant volume of imports of fax machines into Korea.[40] In fact, in 1996 most countries concerned imported substantial quantities of fax machines.[41]

It falls outside the scope of this paper to review the competition laws of the targeted countries in the proceeding in detail. However, all countries concerned did have competition laws on the books. These may be summarised as follows: the legislation concerned mostly contains elements pointing to some private "right" to ask for relief in case of competition law violations. But, generally speaking, the provisions overall do not seem to be very developed. Whether they have a real impact could possibly only be said after an in-depth analysis of the practice of the national competition authorities and courts which, again, falls outside the scope of this paper.

The main foundations of competition law in the EU, namely Article 85 and 86, were already mentioned. Let us now look at their possible relation to the case. It should be noted, however, that at the present state of development and interpretation of competition law in the EU the possibilities of applying those rules to the case under examination seem to be limited. It is unlikely that the behaviour of the importing companies in the case would be caught by either Article 85 or Article 85 of the EU Treaty. This does not exclude that, taking a new approach to anti-dumping cases by applying competition rules new ways of construing EU competition rules cannot be envisaged in order to make possible such an approach.

39. , footnote 32, at 75.
40. Ibid. at 70 (provisional).
41. In 1996, the countries concerned imported the following quantities of HS heading 8517 21:

Country	Quantity	Value
China	161,313	USD 24,749,000
Japan	1,151,665	¥ 28,744,000,000
Korea	NA	USD 7,000,000
Malaysia	—	—
Singapore	402,080	SD 221,032,000
Taiwan	—	—
Thailand	85,923	TB 48,525,678

To start with Article 85, as a first condition there must be a form of behaviour which is caught by competition rules. The prohibition in Article 85 of all agreements, decisions and concerted practices covers any kind of co-operation between undertakings that prevents, restricts or distorts competition. Decisive is, whether there is collusive or non-collusive behaviour between firms. In the case no evidence exists that there was any kind of co-operation between the importing companies. First of all, among most of the firms involved in the case there is fierce competition in the EU market for fax machines. This is corroborated by the submissions from Japanese exporters stating that the effects of imports from Korea and Taiwan should not be cumulated with those from other countries. It was argued by the Japanese that prices were forced down by the market behaviour of Korean manufacturers in some segments and that there were sharp increases in the level of imports and market shares from both countries.[42] There is therefore not much cause to believe that there was co-operation among firms from these countries. Furthermore, in view of the fact that in the proceeding there were already 18 exporters from six different countries involved, co-operation between all these firms seems difficult in practical terms. Also, the actual number of firms subject to EU measures will even be much higher.

Even in the case that there would have been evidence for co-operation between exporters it seems difficult to find that such co-operation would have had the object or effect of preventing, restricting or distorting competition. There is no doubt that a horizontal agreement on price discrimination would infringe Article 85(1). There have been several competition law cases, where collective price discrimination was caught under Article 85.[43] However, under the presently existing case law on Article 85 (of the European Court of Justice, Court of First Instance and in Commission decisions) there is no example that co-operation of firms in order to bring about a decrease in prices in a market would be caught by the prohibition of Article 85. Theoretically it seems to be possible to apply within Article 85 the prohibition of predatory price cutting developed in the case A relating to Article 86.[44] This issue will be referred to in the discussion on Article 86, below.

Article 86 only applies where an undertaking has a dominant position on a specific product market. The European Court of Justice considers the most important issue in assessing market power to be the market share of an undertaking. Earlier, the Court held that a firm with a share in the range of 40-

42. Joint Submission of the Communications Industry Association of Japan on matters relating to injury and Community interest (19 March 1997) at 9-10.
43. See e.g. Case 209/78, , [1980] ECR at 3125; Case 240/82, , [1985] ECR at 3831.
44. Case C-62/86, , [1991] ECR at 3359.

45% range was dominant.[45] The Commission takes the view that generally a dominant position can exist even in the range between 20-40%, when other factors than the market share are taken into account.[46] Taken separately, none of the exporters in the fax machines case would have a sufficiently large market share in order to be a firm in a dominant position on the European market for fax machines. In the period from 1994 to 1996 all exporters involved in the proceeding taken together had a market share of from 51.1% up to 64.3% in 1996.[47] Since Article 86 prohibits the abuse of a dominant position by undertakings, this might be a sufficiently large market share to qualify as a collective dominant position. However, the suggestion that two or more legally independent firms might be considered to hold a collective dominant position was confirmed by the Court of First Instance only in cases dealing with oligopolistic markets.[48] This excludes an application of the concept of a collective dominant position in the fax machines case.

Apart from the fact that it seems difficult to construct any kind of dominant position among exporters in the proceeding, a point that might be of interest in relation to the cause of anti-dumping measures should be mentioned here. A form of abuse of a dominant position, which can be condemned under Article 86 is price discrimination by a dominant firm. The European Court of Justice stated in that predatory price cutting is prohibited under Article 86. In the case of predatory price cutting, a dominant undertaking faced with the threat of stronger competition reduces its price even below marginal cost, in order to prevent a new entrant from establishing itself on the market or to exert pressure on its existing competitors.[49]

ECS, a small UK firm producing benzoyl peroxide had sold this product to customers requiring it as bleach in the treatment of flour in the UK and Ireland. In 1979 ECS decided to sell it also to users in the plastic industry. AKZO, a Dutch company with a dominant position in the market informed ECS that unless it withdrew from the plastic market it would reduce its prices, especially in the flour additives market, in order to harm it. ECS ignored those threats and remained in the market, whereupon AKZO targeted certain of ECS' customers in the flour market by offering them prices, which were below previous levels and average total cost. Those low prices were subsidised by AKZO by money drawn from the plastics sector. As a result of AKZO's action ECS' business decreased significantly. In its finding the European Court of

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45. Case 27/76, , [1978] ECR at 207. Later, a market share of 50% by one firm was considered by the Court, Case 62/86, , [1991] ECR at 3359.
46. 10th Report on Competition Policy, point 50.
47. , footnote 32 Disclosure document definitive findings dated 20 February 1998 at 9.
48. Joint cases T-68/89, T-77-78/89, , [1992] ECR at II-1403.
49. Richard Wish, (1993, third edition).

Justice held that not all price competition can be considered legitimate.[50] It stated that prices below average variable costs by means of which a dominant undertaking seeks to eliminate a competitor must be regarded as abusive. Since a dominant undertaking has no interest in applying such prices except that of eliminating competitors, cost predation had to be assumed. In addition, the Court held that:

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In practice, the results of the judgement might not be easy to apply. First, because of the difficulties involved in assessing and classifying cost. Second, the Court stated that in the area between average variable and total cost there must be intention on the part of the dominant firm to harm its competitor. This, might however, be difficult to ascertain.[52]

However, theoretically the principle of predatory price cutting as established in can to some extent be applied to Article 85. It could be assumed that a number of undertakings cooperate to keep prices in a market low, thereby driving another competitor or even a number of competitors out of that market. In this "combined application" of concepts taken from Article 85 and 86, predatory dumping by a number of firms could be caught by Article 85.

As a tentative conclusion it can be said that especially the judgement in AKZO certainly shows, that to some extent it is possible to establish a link between Community competition rules and dumping in the form of predatory dumping. However, such predatory dumping cases seem to be more the exception than the rule in anti-dumping practice and—as shown earlier—in for instance the proceeding this was not at play.

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50. Ibid. § 70.
51. Ibid. § 71.
52. The issue of predatory pricing was also dealt with in the judgement by the Court of First Instance on , where the Court's reasoning went along the lines of that of the Court in the leading case . Tetra Pak had sold its non-aseptic cartons at a loss in seven Member States. In Italy, cartons had been sold at below average variable cost. The Court of First Instance applied the same test as in AKZO and came to the conclusion of predatory pricing because of Tetra Pak's deliberate policy aimed at eliminating competition. , [1994] ECR at §§ II-147-149.

The analysis above has shown that the exporting countries targeted by the anti-dumping proceeding did not maintain tariff or other trade-restrictive measures at the border. This conclusion is buttressed by the fact that most of the countries concerned recorded substantial imports of fax machines.[53]

However, the Commission's finding that the Community industry did not export any fax machines to the countries concerned might indicate that the markets are closed by other means, although it seems equally possible that the Community industry did not try hard enough to penetrate the markets. Indeed, in view of the number of producers involved, it would seem that sufficient competition in the markets existed.

The high dumping margins found by the European Commission at first sight point at market segmentation and closed home markets. Indeed, if the markets were open, the fax machines apparently sold so cheaply in the EU market would be re-exported to the home markets where they could be sold at higher prices. However, this logic presupposes that dumping margins were calculated correctly. Actually, however, the Commission in many instances resorted to use of . As best information available offers the Commission to come up with any dumping margin it deems appropriate, it is not at all clear whether dumping existed based on the data of the producers concerned[54] and, if so, at the levels found by the Commission. Furthermore, in virtually all cases, there was disagreement between the foreign producers and the Commission with respect to the dumping margin calculations. This is evident from the published Regulation where the Commission noted rejection of a wide variety of adjustments claimed by the various producers, including, but not limited to, level of trade claims, allowances for physical differences, duty drawback, salesmen's salaries and payment terms under open account systems. In our view, therefore, the fact that high dumping margins were found by the Commission does not necessarily evidence closed home markets.

In summary, no evidence is available suggesting that the home markets were closed in the fax case and, in fact, counter-evidence exists that the markets appear open. Despite the high dumping margins found by the Commission, this does not appear to be a case of systemic price dumping.

6. <u>By way of conclusion</u>

It is hoped that these comments illustrate that the relationship between anti-dumping and competition policy is complicated. While at first sight there

53. However, it is possible that part of these imports concerned fax machines produced by related companies abroad.
54. In fact, we know from our involvement in the proceeding that on the basis of the questionnaire responses of at least three foreign producers involved in the proceeding, their dumping margins were zero or even negative.

appears to be an overlap between both policies, the reality is much more complicated.

First, we have not dwelled too much on the question whether anti-dumping in itself makes economic sense. That discussion is an altogether different one from the relation between competition law and anti-dumping. Second, the examples discussed are all derived from EU practice, where both competition policy and anti-dumping practice have some tradition. Experiences in other jurisdictions may be different.

The available evidence would appear to suggest that, conceptually and logically, anti-dumping is not so much an issue of competition, but rather an issue of market access. Had the title of this paper been:

, then the answer would probably have been an unqualified yes.

Keywords: Anti-dumping, competition, contestability of markets, market access

Technical abstract: EU anti-dumping and competition policy overlap to a certain extent in their goals and means. However, there are many differences in the aims and means of both policies, which makes the relationship between both policies a multifaceted one.
This paper reviews the conceptual differences between both economic policies, and attempts to consider a recent large anti-dumping proceeding from the point of view of competition policy. The conclusion is that the facts of that proceeding would clearly not be actionable under competition law.
The authors believe that market access policy might be a better replacement for competition policy.

Non-technical abstract: The European Union (EU) maintains several policies with direct consequences for trade. Two important such policies are anti-dumping and competition policy.
Under anti-dumping policy, the EU may adopt anti-dumping measures to counteract dumped imports causing injury to the Community industry of the like product. Under competition law, the EU institutions may act against certain anti-competitive practices in the EU, in order to restore competitive conditions in the EU.
EU anti-dumping and competition policy overlap to a certain extent in their goals and means. However, there are many differences in the aims and means of both policies, which makes the relationship between both policies a multifaceted one.
The paper discusses some recent interesting literature on ‘contestability of markets’ and discusses to what extent this may offer a way forward.
This paper further reviews the conceptual differences between both economic policies, and attempts to consider a recent large anti-dumping proceeding from the point of view of competition policy. The conclusion is that the facts of that proceeding would clearly not be actionable under competition law.
The authors believe that market access policy might be a better replacement for competition policy.