Price Strategies of Intellectual Property Rights Holders of Technology Products and Antidumping Policies: The Legal Risks of Price Discrimination beyond Competition Law

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Abstract

Producers of technology products, including intellectual property (IP) rights holders, should not ignore the importance of states' rights to apply antidumping duties in their pricing strategies. Although World Trade Organization (WTO) law aims at reducing states' market barriers, antidumping is a legitimate barrier to trade. It offsets those pricing strategies where a producer dumps the export price, i.e. the export price is lower than the price charged by the producer on the domestic market. WTO law considers dumping as unfair trading practice. The article highlights why producers of technology products, including IP holders, need to consider antidumping policies when they make their pricing strategies. As competition law regulates pricing conduct, the article discusses the relationship between antidumping law and competition law, and it shows areas where antidumping policies go further than competition law. Finally, the article discusses the limits in pricing conduct by IP holders in light of antidumping policies.

Key words: Price discrimination, technology, pricing strategies.

Introduction

Producers of technology products should be in the frontline of research and development (R&D) to improve and differentiate their products from the competitors. R&D of technological products may carry high sunk costs, and the producers of technological products need a high return for further investments in R&D. By obtaining intellectual property (IP) rights, like patents, the producers get a legal monopoly that to some extent may limit

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competition,[1] and that may give the producer the opportunity to charge a price above competitive market prices. However, the legal protection of the IP has its limits. The IP holder is not free to eliminate competitors of the like products through predatory pricing or through price discrimination if it violates competition law. On top of these limits is the *trade dimension*. States' antidumping policies affect producers of technology products on the global market.

The article highlights why producers of technology products, including IP holders, need to consider antidumping policies when they make their pricing strategies. The article pins out the areas where antidumping law goes further in the regulation of the price strategies than competition law, and the extent to which an IP holder can claim special adjustments in the antidumping determination due to the IP rights. The article has World trade Organization (WTO) law as its main legal basis, and it uses the European Union (EU) law and policies as examples. The EU is a member of the WTO, and EU law and policies must comply with WTO law accordingly.

The paper provides in (II) an introduction to antidumping law. It provides a brief account of the limited competition law elements in WTO law, and the legitimate basis of state protectionism underlying antidumping law. In (III), the article discusses the relationship between antidumping law and competition law and identifies similarities and differences. The article has a particular focus on predatory pricing and price discrimination. It also discusses the situation where the producer under antidumping investigation is up against anticompetitive conduct by the EU industry. In (IV) the article addresses the use of antidumping on IP holders. It concerns questions whether the IP protected product can be subject to an antidumping investigation of a broader category of products, and questions whether adjustments should be made for IP holders if they only have IP protection on their domestic markets. In (V) the article has its conclusion.

Introduction to WTO Antidumping Law and Its Context

The WTO is an intergovernmental organization that regulate global trade. It provides fora for trade negotiations between its members, it administrates the multilateral and plurilateral trade treaties, and it provides the Dispute Settlement Body (DSB) including its quasi-judicial bodies; panel and Appellate Body (AB). The overall aims of the WTO are to facilitate trade by

[1] That is not to suggest that competition in R&D is limited or that competitors' cannot be engaged in products that share the same functions or end-uses. Rather, it is a limit of competitor's production and marketing of the patented product.

eliminating trade barriers and reducing tariffs. One trade policy dimension concerns states' rights to impose measures against *unfair trading practices*, including measures against *dumped* products. WTO law condemns dumping that is defined as:

"if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country."

Art. VI of the General Agreement on Tariffs and Trade (GATT) 1994 and the Antidumping Agreement (ADA) regulate antidumping for the WTO Members. States may impose antidumping duties if they meet two conditions:

- the prices are *dumped*, i.e. the export price is lower than the *normal value*, i.e. the price charged in the ordinary course of trade on the domestic market by the producer, and
- the dumped prices cause or threaten to cause *injury* on the producers of the like product in the importing state.

Antidumping duties are applied on top of ordinary duties, but they target specifically at those producers who actually dump the prices, i.e. the antidumping duty is not country-wide.[2] The EU refers to these WTO instruments in its own regulation of antidumping: the Basic Regulation.[3]

Producers of technology products can easily be caught by antidumping investigations as the rules leave wide discretion to the investigating authorities. The result might be the imposition of antidumping duties on technology products including those protected by IP law. The antidumping duty is a legitimate trade barrier under WTO law: it is a tool against low-priced import. In that respect, antidumping and competition law share some common ground: They shield the market participants against certain pricing policies of a producer, including producers holding IP rights.

WTO Law and Competition

The general rules of WTO law ensure that producers of goods and services can get access to the export markets and have rights to import and export

[2] *See EC – Fasteners*, WT/DS397/AB/R, adopted by the DSB on 28 July 2011, para. 354.

[3] The Basic Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union OJ L 176, 30.6.2016, 21–5, amended in Regulation (EU) 2017/2321 of the European Parliament and of the Council of 12 December 2017 OJ L 338, 19.12.2017, 1–7, and in Regulation (EU) 2018/825 of the European Parliament and of the Council of 30 May 2018 PE/24/2018/INIT, OJ L 143, 7.6.2018, 1–18.

without arbitrary measures preventing the trade. The multilateral treaties build on four core principles:[4] non-discrimination, which includes the Most Favoured Nation (MFN) principle, i.e. a state must not discriminate between its trading partners, and the National Treatment principle, i.e. a state must not treat foreign products less favourable than national products once the foreign products have passed through the legitimate trade barriers, like tariffs. Besides non-discrimination, WTO law is based on principles of market access, transparency, and fair trading.

WTO law does not contain a multilateral or plurilateral treaty with minimum standards regulating anticompetitive conduct. Nevertheless, unilateral competition policies are relevant in light of the WTO principles, and competition and trade regulation are closely connected. Discriminatory administrative treatment in competition cases between national and foreign companies can fall under the non-discrimination principles of the WTO. Furthermore, without a strong competition policy at national level, there is the risk that a company with a dominant position on the national market can make market access difficult for foreign goods and services through abusive conduct.

Since 1996, the WTO members have discussed the potential of introducing a treaty to regulate the aspects of WTO members' competition policies that interact with trade. Different approaches between the WTO members make the discussions difficult. The article will not go into the debate between different economic schools about how to design a proper competition regime that is not itself a barrier to efficiency.[5] The work on a multilateral agreement has been on hold since 2004 due to the complex and difficult trade negotiations in other areas, like trade facilitation, which the WTO Members gave priority over competition regulation.[6] Although WTO law does not

[4] Some WTO Members have committed to the plurilateral Information Technology Agreement of 1996 through their respective tariff schedules. It is specific concerning technology products. The aim is to eliminate tariffs on information technology products that are specified in the appendices to the ITA. So far, 82 WTO Members have signed up to comply with the ITA. Ministerial Declaration on Trade in Information Technology Products, WT/MIN(96)/16, MINISTERIAL CONFERENCE, Singapore, 9-13 December 1996.

[5] *See*, e.g., JOE S. BAIN, INDUSTRIAL ORGANIZATION, (John Wiley & Sons Inc., 1968); Leonard W. Weiss, *The Structure-Conduct-Performance Paradigm and Antitrust*, 127 U. Pa. L. Rev. 1104 (1979); Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. Pa. L. Rev. 925 (1979); Joseph E. Stiglitz, *Technological Change, Sunk Costs, and Competition*, 3 Brookings Paper on Economic Activity 883 (1987); Harold Demsetz, *How Many Cheers for Antitrust's 100 Years*, 30 Eco. Inq. 207 (1992); Oliver E. Williamson, *Assessing Vertical Market Restrictions: Antitrust Ramifications of the Transaction Cost*, 127 U. Pa. L. Rev. 953 (1979).

provide a specific competition treaty, there are competition law elements in the existing treaties.[7] For example, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) contains a few optional provisions related to competition law.[8] Another example is the General Agreement on trade in Services (GATS) where the WTO Members may commit to special competition rules concerning the telecommunication sector.[9] GATT 1994 also contains rules of relevance to competition law in a broad sense; in particular concerning state trading practices, subsidies, and dumping.[10]

Although the WTO aims at open trade based on economic ideals of comparative advantages,[11] the WTO provides the possibility for the states to defend their industries from low-priced import by imposing antidumping duties on low-priced goods. Even though regulation of producers' pricing conduct can be related to competition law—and it can have economic reasoning similar to that of industrial economics—the legitimate basis of WTO antidumping law is more than just economic reasoning, as dumped prices may be efficient in the importing market. Both the aims of open global markets as well as the right to defend the national industries may reflect the principal basis of traditional international law and international relations: *the interest of the state*.

State Interests and Protectionism

Antidumping finds legitimacy in the assumed *unfairness* for the competing industry in the importing state when an exporter lowers the export price below the price of the like product on the domestic market of the producer.[12] It is a protectionist tool. The risk is that the exporter may injure—or even

[6] Decision Adopted by the General Council on 1 August 2004, WT/L/579, 2 August 2004.

[7] *See generally* Robert D. Anderson, William E. Kovacic, Anna Caroline Müller and Nadezhda Sporysheva, *Competition Policy, Trade and The Global Economy: Existing WTO Elements, Commitments in Regional Trade Agreements, Current Challenges and Issues for Reflection*, Staff Working Paper, World Trade Organization, Economic Research and Statistics Division, 31 October 2018.

[8] *See* Art. 8.2, Art. 40, and Art. 67 of TRIPS.

[9] Telecommunications Services: Reference Paper, 24 April 1996. Written into the specific WTO Members' Country Schedules.

[10] State trading practices are regulated in GATT 1994, Art. XVII, and subsidies are regulated in GATT 1994, Art. VI and XVI, and the Agreement on Subsidies and Countervailing Measures.

[11] The Understanding the WTO at the WTO website (https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact3_e.htm) refers explicitly to David Ricardo, who presented the theory of the law of comparative advantages in DAVID RICARDO, ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION (John Murray, 1817), available at https://www.econlib.org/library/Ricardo/ricP.html?chapter_num=1#book-reader

[12] The article does not address the concept of legitimacy. The article builds on the traditional assumption of international law that states are sovereign and does not enter the debate on the legitimacy of states' actions.

eliminate—the producers in the importing state unless the importing state imposes trade barriers to stop the harmful effect of the low export prices.[13]

Theories of international relations and political economy can explain the state's response.[14] It is not necessarily a question of economic theory. The protectionist approach does not question whether there are high or low entry barriers in the exporting country, whether the industry in the importing country easily could dump the prices in the exporter's country,[15] or whether the overall global market is efficient as a result of the dumped prices. The protectionist approach gains further political support if the importing state and the exporting state have different levels of worker protection, environmental protection, and transparency of government. For example, an importing state with a high level of protection of workers and transparency in governmental actions can be under domestic pressure from the national industry and other stakeholders to protect the national industry if the exporting state keeps low standards, and if the importing state cannot easily detect the level of governmental influence on business decisions and subsidies.

The question is whether the antidumping instrument truly can counter such differences in levels of protection of workers, environment and governmental transparency. After all, one would believe that dumping only occurs if the export price is lower than the normal value. Nevertheless, when the international community established the international trading system, GATT, it was deemed necessary to keep some protectionist instruments for the states. Otherwise, the GATT Members would never have reached the international trade agreement.[16] The antidumping design leaves wide discretion to the investigating authorities

[13] Gunnar Niels, *What is Antidumping Policy Really About?,* 14 (4) J. Econ. Surv. 467, 478 (2000).

[14] *See, e.g.*, Wissam Aoun, *Constructivism, Embedded Liberalism, and Anti-Dumping – Canadian Public Interest Inquiry as Case Study of Embedded Liberalism*, 41 Can. U.S. L.J. 1 (2017), P. K. M Tharakan and J. Waelbroeck, *Antidumping and Countervailing Duty Decisions in the E.C. and in the U.S - An Experiment in Comparative Political Economy*, 38 Eur. Econ. Rev. 171 (1994), J.M. Finger, H. Keith Hall, and Douglas R. Nelson, *The Political Economy of Administered Protection*, 72 Am. Econ. Rev. 452 (1982).

[15] However, if an industry in the importing country benefits from the low-prices, they might persuade the government not to act and impose antidumping duties if the national law provides that opportunity. EU law does not give that option at the initial stage of the investigation as only the EU industry of the like products, the Member States or in special circumstances the EU Commission may initiate a case, cf. Art. 5 of the Basic Regulation. However, the EU Commission can only apply antidumping duties after having considered whether it is in the interest of the Union, cf. Art. 21. However, it is only rarely that the Commission finds that the interest of other stakeholders, than the industry filing the complaint, outweighs the advantages of imposing the antidumping duties

[16] Henrik Andersen, EU Dumping Determinations And WTO Law 32 (Kluwer Law International, 2009).

in determining the product scope, the normal value, the various methodologies in price comparison between normal value and export price, and in determining injury. That discretion can be used as a trade protectionist tool.

With basis in the wide discretionary scope of WTO antidumping law, the EU has taken the step in its trade relations with China to introduce *'distorted economy'* in its antidumping policies. These new policies succeed the 'old' non-market economy regime against China. They are partly a response to differences in worker protection, environmental protection, and an opaque Chinese governmental system. For example, the EU Commission finds that Chinese and EU producers are on an uneven playing field, as China is not committed to the same extent as EU countries to conventions of the International Labour Organization. The new rules are also a response to China's policies concerning technology transfer requirements from foreign investors or operators in China.[17] According to the EU Commission, the requirements of technology transfer for foreign investors are part of the overall Chinese strategy to develop its technological and innovation capabilities.[18] The result is that the normal value must be *"constructed exclusively on the basis of costs of production and sale reflecting undistorted prices or benchmarks."* The EU Commission bases the undistorted prices and benchmarks on producers' from other countries data or from international prices.[19] Although the EU applies the antidumping trade defence mechanism to force China to make an even playing field for the market of new technologies, scholars debate

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[17] *See, e.g.*, European Commission, Commission Staff Working Document, Impact Assessment*, Possible change in the calculation methodology of dumping regarding the People's Republic of China (and other non-market economies),* SWD (2016) 370 final, Brussels, 9.11.2016, p. 17. The EU has made a complaint against China in the WTO DSB for violations of TRIPS and for not administrating its laws in a uniform, impartial and reasonable manner in *China — Certain Measures on the Transfer of Technology*, WT/DS549, currently pending.

[18] European Commission, Commission Staff Working Document On Significant Distortions In The Economy Of The People's Republic Of China For The Purposes Of Trade Defence Investigations*,* Brussels, 20.12.2017, SWD (2017) 483 final/2,185.

[19] *See Certain Organic Coated Steel Products II,* Commission Implementing Regulation (EU) 2019/687 of 2 May 2019, OJ L 116, 3.5.2019, p. 5–38; *Certain Aluminium Foil in Rolls,* Commission Implementing Regulation (EU) 2019/915 of 4 June 2019, OJ L 146, 5.6.2019, p. 63–97; *Ceramic Tableware and Kitchenware*, Commission Implementing Regulation (EU) 2019/1198 of 12 July 2019, OJ L 189, 15.7.2019, p. 8–67; *Threaded Tube or Pipe Cast Fittings,* Commission Implementing Regulation (EU) 2019/1259 of 24 July 2019, OJ L 197, 25.7.2019, p. 2–36; *Tungsten Electrodes*, Commission Implementing Regulation (EU) 2019/1267 of 26 July 2019, OJ L 200, 29.7.2019, p. 4–32; *Bicycles II,* Commission Implementing Regulation (EU) 2019/1379 of 28 August 2019, OJ L 225, 29.8.2019, p. 1–52.

heavily whether the new rules are in conformity with WTO law,[20] and China has filed a complaint against the EU in the WTO DSB.[21] The question about EU's conformity with WTO antidumping law in respect of China is outside the scope of this paper. Regardless of EU's compliance with WTO law in this respect, the example demonstrates that the EU applies antidumping as a tool to establish a *fairer* balance between the EU and Chinese producers. That reasoning goes beyond questions of efficiency.[22]

Similarities and Differences between Antidumping Law and Competition Law

Although states' interests in protecting their national industries from low-priced foreign competition serves as a legitimate basis of antidumping law, it can in certain situations also find legitimacy in economic reasoning.[23] It has certain overlaps with competition law. This part will first relate antidumping to predatory pricing and discriminatory pricing in the context of competition law. Next, the article discusses differences between competition law and antidumping law where the latter can be applied to pricing policies that will not be caught under competition law. This part finishes by discussing situations how anticompetitive conduct by the EU industry affects the antidumping determinations.

Predatory Pricing and Price Discrimination

Antidumping policies have been related to situations with *predatory pricing*: the exporter dumps the price in order to eliminate the competitors in the importing state for thereafter to raise the price of the product.[24] However, scholars disagree whether anti-predatory pricing policies can sufficiently distinguish between beneficial competitive pricing and harmful predatory pricing,[25] whether there is an economic rationale behind predatory pricing

[20] *See generally* Weihuan Zhou and Delei Peng, *EU – Price Comparison Methodologies (DS516): Challenging the Non-Market Economy Methodology in Light of the Negotiating History of Article 15 of China's WTO Accession Protocol*, 52 (3) J. WORLD TRADE 505, 508(2018).

[21] *EU — Price Comparison Methodologies,* WT/DS516, panel is composed but the case is currently suspended by China.

[22] That is not to suggest that EU's policies against China will not improve the overall welfare. However, the article does not address the economic consequences of China's economic policies on global level.

[23] Gunnar, *supra* note 13 at 475.

[24] Henrik, *supra* note 16 at 12.

[25] *Cf.* Harold Demsetz, *Barriers to Entry*, 72 Am. Econ. Rev. 47, 52 (1982); and Phillip Areeda and Donald F. Turner, *Predatory Pricing and Related Practices under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697 (1975).

at all,[26] and whether anti-predatory policies are actually leading to inefficient markets.[27] Nevertheless, predatory pricing has been used as a legitimate basis for the use antidumping.[28] In that respect, antidumping law shares common ground with EU competition law.

In competition cases, the Court of Justice of the European Union (ECJ) has made direct reference to predatory pricing. In *AKZO v Commission*, the ECJ established that if prices are below average variable costs, they are presumed to aim at eliminating competitors from the market.[29] In addition, if the prices are below average total costs, but above average variable costs, they are abusive *"if they are determined as part of a plan for eliminating a competitor"*.[30] The ECJ nuanced that view in *Post Danmark.*[31] The company in question had applied a low price policy towards one of its competitor's customers with prices below the average total costs but higher than the average *incremental* costs, i.e. costs that disappear in the short to medium term, on the market for unaddressed mail. Post Danmark offered higher prices to two other of its competitor's customers that were above the average total costs. The ECJ stated that as Post Danmark had identified the great bulk of costs attributable to the activity of distributing unaddressed mail, it was not anti-competitive conduct. According to the ECJ:

"to the extent that a dominant undertaking sets its prices at a level covering the great bulk of the costs attributable to the supply of the goods or services in question, it will, as a general rule, be possible for a competitor as efficient as that undertaking to compete with those prices without suffering losses that are unsustainable in the long term."[32]

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[26] Demsetz, *supra* note 25 at 47. *Cf.* Paul Milgrom and John Roberts, *Predation, Reputation, and Entry Deterrence*, 27 J. Econ. Theory 280 (1982).

[27] Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. Chi. L. Rev. 263 (1981).

[28] Jacob Viner, Dumping: A Problem Of International Trade, 35-50 (University of Chicago Press 1923), who finds that predatory dumping was not proved but nevertheless served as a reason for adopting the antidumping laws in the 1900th century. *See also* Gunnar, *supra* note 13 at 475.

[29] *See* AKZO Chemie BV v. Commission of the European Communities, Judgment of the Court (Fifth Chamber) of 3 July 1991, Case C-62/86, European Court Reports 1991 I-03359, ECLI identifier: ECLI:EU:C:1991:286, para. 71.

[30] *Id*. at para. 72

[31] Post Danmark A/S v. Konkurrencerådet, Case C-209/10. ECLI identifier: ECLI:EU:C:2012:172, Judgment of the Court (Grand Chamber), 27 March 2012. Reference for a preliminary ruling from the Højesteret.

[32] *Id*. at para. 38.

Thus, for the ECJ predatory pricing does exist but the objective and subjective criteria for its existence are relatively narrow. However, the antidumping instrument goes beyond predatory pricing as the price discrimination can be non-predatory and a result of different price elasticities of demand between different countries.[33] The EU antidumping policies apply to any situation where the price of the imported good is lower than the exporter's price on the domestic market. Thus, the actual application of antidumping cannot solely find legitimacy in theories of predatory pricing. It must necessarily be supported by the protectionist aims as described above.

Price discrimination is also prohibited in EU competition law when an undertaking with a dominant position on the market price discriminates between its business partners and it creates competitive disadvantages to one or more of the business partners.[34] Such competitive disadvantage is assessed on basis of an analysis of the costs, profits or any other relevant interest of the potentially affected business partners.[35] However, in economic theories a difference in price is not necessarily price discrimination. Gifford and Kudrle have defined price discrimination as "two or more similar goods are being sold at prices that bear different ratios to their marginal costs."[36] The implication is that an actual difference in price is not price discrimination if the price ratios to their marginal costs are the same. Scholars debate about the welfare impact of price discrimination that should not be discouraged if it has a positive welfare impact. For example, Posner has argued that in a monopoly market, price discrimination drives the monopolist's output closer to that of a competitive market and reduces the potential welfare gaps associated with monopoly markets.[37] Furthermore, according to Layson, price discrimination should not be eliminated by regulation when it opens up for markets that otherwise would not be served.[38] Differences in prices on different geographical markets should not necessarily be banned if the negative welfare consequences outweigh the positive. That has lead economists to criticize the ECJ's approach in *United*

[33] Joseph E. Stieglitz, *Dumping on Free Trade: The U.S. Import Trade Laws*, 64 Southern Econ. J. 403, 405 (1997).

[34] Art. 102 of the TFEU. *See MEO – Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência,*.Judgment of the Court (Second Chamber) of 19 April 2018. Request for a preliminary ruling from the Tribunal da Concorrência, Regulação e Supervisão. Case C-525/16. ECLI identifier: ECLI:EU:C:2018:270.

[35] *Id*. at para. 37.

[36] Daniel J. Gifford and Robert T. Kudrle, *The Law and Economics of Price Discrimination in Modern Economies: Time for Reconciliation?*, 43 U.C. Davis L. Rev. 1235, 1239-1240 (2010).

[37] Richard, *supra* note 5 at 926.

[38] Stephen K. Layson, *Market Opening under Third-Degree Price Discrimination*, 17 J. Ind. Econ. 335 (1994).

Brands and United Brands Continentaal v Commission. The ECJ found it an abuse of the company's dominant position that it had price discriminated between two different geographical markets without taking into consideration the negative welfare impact if the prices had been raised on the weaker market.[39]

Antidumping law concerns price discrimination between geographical markets and is subject to the same welfare criticism. However, as mentioned above, antidumping—in contrast to competition law—finds particular legitimacy in state protectionism regardless of the welfare consequences. For example, if the product is an intermediary part of a final product, the producers of the final product in the exporting state may be disadvantaged compared with their competitors in the importing state due to the higher prices they must pay. In this sense, antidumping seems disadvantageous for the importing state. However, the protection of the industry in competition with the imported intermediary product may be decisive in this respect. Nevertheless, EU antidumping law includes an assessment of the Union interest, which could consider the EU markets and consumers more broadly. However, it is only rarely that the EU Commission finds that the imposition of an antidumping duty is not in the interest of the Union.

Differences between Antidumping Law and Competition Law

Although competition law and antidumping law have overlaps by their concern of predatory pricing and price discrimination, there are significant differences. Investigating authorities can only apply antidumping duties if the dumped prices cause or threat to cause injury to the producers of the like product in the importing country. In competition law, the investigating authorities consider the market power of the company under investigation. The market power assessment involves analyses of the company's market share and ability to keep competitors out of the market by keeping high market entry barriers.[40] That is different from the injury assessment in antidumping law; even a company with low market shares and with no ability to eliminate competition on the market can cause injury and be subject to antidumping duties.

In respect of predatory pricing, the subjective element in EU competition law is different from antidumping law. As the ECJ stated in *AKZO v Commission;*

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[39] *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, Judgment of the Court of 14 February 1978. Chiquita Bananas. Case 27/76. European Court Reports 1978 -00207, ECLI identifier: ECLI:EU:C:1978:22, paras 204-234. *See also* Bernadette Andreosso and David Jacobson, 'Industrial Economics and Organization – A European Perspective' 237-238 (2nd ed., Maidenhead – McGraw-Hill Education, 2005).

[40] Gunnar, *supra* note 13 at 482.

"Prices below average variable costs (…) by means of which a dominant undertaking seeks to eliminate a competitor must be regarded as abusive. (…) Moreover, prices below average total costs, (…), but above average variable costs, must be regarded as abusive if they are determined as part of a plan for eliminating a competitor."[41]

In the first test, the ECJ presumes that a company with a dominant position on the market has the intention to eliminate its competitor, as it "must, in principle, be regarded as abusive, inasmuch as, in charging those prices, a dominant undertaking is deemed to pursue no economic purpose other than that of driving out its competitors."[42] In the second test, it is necessary to establish the intention of the company in question. If a producer intents to eliminate competition, it is a violation of EU competition law. Antidumping law does not contain such a subjective element. As the AB made clear in *US – 1916 Act*:

"under Article VI:1 of the GATT 1994 and Article 2 of the Anti-Dumping Agreement, neither the intent of the persons engaging in "dumping" nor the injurious effects that "dumping" may have on a Member's domestic industry are constituent elements of "dumping"."[43]

Thus, even though antidumping law and EU competition law target some of the same issues of predatory pricing, they are significantly different by excluding a subjective element in antidumping law.

In respect of price discrimination, we also see differences. EU competition law considers the competitive disadvantage by the price discriminatory conduct for both upstream and downstream sales. Antidumping law does not take the competitive disadvantage into account apart from the injury test in respect of producers of the like product. Thus, even if an exporter of products into the EU does not create any competitive disadvantages as a result of the dumped prices, the dumped prices may still be subject to antidumping duties if they cause injury on the competitors in the EU market.

Furthermore, in *Post Danmark*, the ECJ stated that even if the price policies of a company with a dominant position on the market cause an exclusionary effect, that company may demonstrate that that effect can be counterbalanced

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[41] *AKZO Chemie BV v. Commission of the European Communities*, Judgment of the Court (Fifth Chamber) of 3 July 1991. Case C-62/86. European Court Reports 1991 I-03359. ECLI identifier: ECLI:EU:C:1991:286, paras 71-72.

[42] *Post Danmark A/S v. Konkurrencerådet*, Judgment of the Court (Grand Chamber), 27 March 2012. Reference for a preliminary ruling from the Højesteret. Case C-209/10. ECLI identifier: ECLI:EU:C:2012:172, para. 27

[43] US – 1916 Act, WT/DS136/AB/R and WT/DS162/AB/R, adopted on 26 September 2000, para. 107.

by advantages to the consumers and provide an efficient state on the market.[44] Antidumping law is different as the investigating authorities may impose antidumping regardless of the efficiency caused by the dumped prices.

Nevertheless, scholars debate whether a WTO competition treaty should replace WTO antidumping law.[45] The arguments in favour suggest that the analyses of market and conduct under competition law are better suited to ascertain the *actual effect on the market* following from the conduct by the companies subject to investigation than antidumping law, and that it is inefficient to use two sets of laws, i.e. competition law and antidumping law, to counter predatory conduct.[46] Furthermore, some scholars suggest that antidumping law is not suitable to detect predatory behavior where competition law is better equipped, and that antidumping may harm competition.[47]

The arguments against a replacement of antidumping law with competition law highlight that antidumping is a *trade political instrument* for states to regulate import. There is no need to demonstrate abusive conduct beyond dumping and no need to analyze whether there is a potential or actual effect on the market apart from the threat of injuring the competing producers. It should further be noted that the different aims of competition law and antidumping law, i.e. efficiency on the market, and protection of domestic producers, imply that a competition investigation and antidumping investigation are not mutually exclusive. For example in *Franco-Japanese ball-bearings agreement*, the EU Commission found that an agreement between Japanese ball bearing manufacturers and their French counterparts violated Art. 101 of the Treaty on the Functioning of the European Union (TFEU). The agreement implied that the Japanese manufacturers agreed to raise the prices in France with the aim of restricting competition on the market.[48] In 1976, the Commission initiated an antidumping investigation against the same Japanese ball bearing manufacturers and found that they dumped the prices and caused injury to the EU industry. Thus, the EU investigating authorities imposed an antidumping duty on the ball bearing

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[44] *Post Danmark A/S v. Konkurrencerådet*, Judgment of the Court (Grand Chamber), 27 March 2012. Reference for a preliminary ruling from the Højesteret. Case C-209/10. ECLI identifier: ECLI:EU:C:2012:172, para. 41.

[45] It is beyond this paper to engage in the debate.

[46] *See* Joseph E. Stieglitz, *Dumping on Free Trade: The U.S. Import Trade Laws*, 64 South. Econ. J. 403, 420 (1997).

[47] Robert D. Willig, *Economic Effects of Antidumping Policy*, Brook. Trade Forum 57, 76 (1998).

[48] 74/634/EEC: Commission Decision of 29 November 1974 relating to proceedings under Article 85 of the Treaty establishing the EEC (IV/27.095 - Franco-Japanese ball- bearings agreement). OJ L 343, 21.12.1974, p. 19–26.

products from the Japanese producers.[49] Even though the ECJ overruled the EU investigating authorities as they had introduced final measures whilst accepting an undertaking by the Japanese manufacturers,[50] the case nevertheless shows that a finding of anticompetitive conduct under Art. 101 and Art. 102 of the TFEU does not exclude the same companies from an antidumping investigation.

From a trade perspective, antidumping law cannot easily be replaced by a competition law. Rather, it is more likely that if the WTO members at one point adopt a treaty concerning competition, it will work alongside Art. VI of GATT 1994 and the ADA. Nevertheless, having two different laws catching price discrimination and predatory pricing cause some discriminatory issues. An exporter of products into the EU may be subject to both antidumping duties and fines from violations of EU competition law whereas the EU producers of the like product on the EU market can only be subject to the competition fines.[51] Furthermore, the question is whether the industry in the importing state can request the investigating authorities to apply antidumping measures against imported products even in situations where industry in the importing state itself is carrying out anticompetitive conduct in violation of competition law.

Anti-Competitive Conduct by the Industry in the Importing Country and Antidumping Law

Often the industry in the EU files a complaint to the EU Commission about injurious dumped prices from foreign producers. The problem arises in those situations where the EU industry itself is involved in anticompetitive practices. Anticompetitive conduct may have an impact on the market and will distort the claim of injury by the industry. The WTO ADA provides that *all* relevant economic factors that have a bearing on the industry in the importing country must be included in the injury determination.[52] That would suggest that the EU Commission should include an assessment of the anticompetitive conduct by the EU industry in the injury assessment.

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[49] *Ball bearings,* Commission Regulation (EEC) No 261/77 of 4 February 1977 imposing a provisional anti-dumping duty on ball bearings, tapered roller bearings and parts thereof originating in Japan, OJ L 34, 5.2.1977, p. 60–61, endorsed by Council Regulation (EEC) No 1778/77 of 26 July 1977 concerning the application of the anti-dumping duty on ball bearings and tapered roller bearings, originating in Japan OJ L 196, 3.8.1977, p. 1–3).

[50] . *Import Standard Office (ISO) v. Council of the European Communities*, Judgment of the Court of 29 March 1979. Case 118/77. European Court Reports 1979 -01277. ECLI identifier: ECLI:EU:C:1979:92

[51] Naturally, the EU producers may be subject to antidumping duties if they export the products.

[52] Art. 3.4 of the ADA.

The EU seems partly to follow that line of WTO law. In *Ceramic tableware and kitchenware*, the Chinese exporters claimed that the injury was caused by anticompetitive practices within the EU industry and that the industry had filed an antidumping complaint in order to recuperate the losses that they incurred as a result of the fines that the EU Commission had imposed on them as a result of the competition investigation.[53] The Commission rejected the argument as the anticompetitive practices had taken place before the investigating period of the antidumping investigation. However, the EU Commission acknowledged that in Germany, the German competition authorities were currently investigating anticompetitive conduct. However, the EU Commission also dismissed that aspect, as the German authorities had not reached a conclusion, and it could not on that basis be concluded that the potential anticompetitive conduct had an impact on the injury assessment. Nevertheless, the EU Commission does not reject the possibility that anticompetitive practices may have an influence on the injury assessment,[54] and it is a factor that should be considered.

The ECJ has supported the EU Commission's approach. In *TMK Europe*, the ECJ stated that the Commission is obliged in its injury analysis to consider whether the injury derives from the dumped practices or from the EU industry itself based on "known factors". In the particular case, the EU Commission had initiated a competition case against EU producers of that industry but had not yet reached a decision. As the importer of the products subject to the antidumping duty could not demonstrate the anticompetitive conduct by the EU producers had an effect on their injury—and as the EU Commission had not finished its investigation about the anti-competitive conduct—the ECJ dismissed the claim.[55]

Later, the Commission found that the producers subject to the competition

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[53] Summary of Commission Decision of 23 June 2010 relating to a proceeding under Article 101 of the TFEU and Article 53 of the EEA Agreement (Case COMP/39.092 — Bathroom fittings and fixtures) (notified under document (2010) 4185) OJ C 348, 29.11.2011, p. 12–17; http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52011XC1129(02):EN:NOT (last visited April 22, 2020).

[54] *Ceramic tableware and kitchenware*, Commission Regulation (EU) No 1072/2012 of 14 November 2012 imposing a provisional anti-dumping duty on imports of ceramic tableware and kitchenware originating in the People's Republic of China OJ L 318, 15.11.2012, p. 28–65, recitals 174-176.

[55] *TMK Europe GmbH v. Hauptzollamt Frankfurt* (Oder), Judgment of the Court (Seventh Chamber) of 16 April 2015. Request for a preliminary ruling from the Finanzgericht Berlin-Brandenburg. Case C-143/14. ECLI identifier: ECLI:EU:C:2015:236, paras 35-44.

investigation had violated Art. 101 of the TFEU.[56] Based on the competition decision, the EU Commission amended the antidumping regulation to accommodate for the impact the anticompetitive conduct could have had on the injury assessment.[57] The implication is that any part of the antidumping analyses related to the injury determination should take the impact of the anticompetitive conduct into consideration, e.g. whether certain data from producers under competition investigations should be left out of the antidumping investigation.[58]

Furthermore, in *Certain concrete reinforcement bars and rods* the EU Commission seems to have made it clear that if there is a pending competition case, it must request the national authorities for information that can be relevant in the antidumping investigation.[59] In light of the *TMK Europe* case, the implication is that the EU Commission must take that information into account in the injury assessment. If it does not show an impact on the injury on the EU industry, the producer under antidumping investigation carries the burden of proof to demonstrate such impact. In any event, it is settled case law that the EU Commission is under an obligation to ensure that the injury is caused by the dumped prices, and not by other factors, in particular not the EU industry itself.[60]

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[56] 2003/382/EC: Commission Decision of 8 December 1999 relating to a proceeding under Article 81 of the EC Treaty (Case IV/E-1/35.860-B seamless steel tubes) (notified under document number C(1999) 4154) OJ L 140, 6.6.2003, p. 1–29. That decision was partly annulled—and the fine reduced—for one of the EU producers by the General Court; *Mannesmannröhren-Werke AG v. Commission of the European Communities*, Judgment of the Court of First Instance (Second Chamber) of 8 July 2004. Case T-44/00. European Court Reports 2004 II-02223, ECLI identifier: ECLI:EU:T:2004:218.

[57] *Certain seamless pipes and tubes of iron or non-alloy steel*; Council Regulation (EC) No 1322/2004 of 16 July 2004 amending Regulation (EC) No 2320/97 imposing definitive anti-dumping duties on imports of certain seamless pipes and tubes of iron or non-alloy steel originating in, inter alia, Russia and Romania OJ L 246, 20.7.2004, p. 10–13.

[58] *See Polyester Staple Fibres*, Council Regulation (EC) No 428/2005 of 10 March 2005 imposing a definitive anti-dumping duty on imports of polyester staple fibres originating in the People's Republic of China and Saudi Arabia, amending Regulation (EC) No 2852/2000 imposing a definitive anti-dumping duty on imports of polyester staple fibres originating in the Republic of Korea and terminating the anti-dumping proceeding in respect of such imports originating in Taiwan, OJ L 71, 17.3.2005, p. 1–33, recital 84.

[59] *Certain concrete reinforcement bars and rods* Commission Implementing Regulation (EU) 2017/1019 of 16 June 2017 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain concrete reinforcement bars and rods originating in the Republic of Belarus, C/2017/4072, OJ L 155, 17.6.2017, p. 6–20, recitals 19-24.

[60] *See Extramet Industrie SA v. Council of the European Communities*, Judgment of the Court (Sixth Chamber) of 11 June 1992. Case C-358/89. European Court Reports 1992 I-03813, ECLI

Thus, as competition law has not replaced antidumping law, technology producers must take the antidumping dimension into account in their pricing strategies when they export their products. Any price discrimination where the export price is lower than the normal value, regardless of whether it can be categorized as predatory pricing, can be subject to antidumping duties. The antidumping investigation is not concerned with market efficiency but rather with protection of the EU producers of the like product. However, the pricing strategy can be subject to both competition and antidumping measures if it besides causing injury to EU producers also is anticompetitive.

IP Holders and Antidumping Issues

The final point concerns the situations where the producer of the technology product also has IP protection. Development of new technology can have big sunk costs. The IP protection provides the incentives for investors to develop new technologies with expected high returns. However, antidumping law can pose some challenges for IP holders: whether the product definition covers products protected by IP, and whether the dumping determination should be adjusted for IP products.

Product Definition and Antidumping

Any product, regardless of its IP protection, can be subject to an antidumping investigation.[61] WTO law does not provide any limit on the product scope concerning the product under investigation. Furthermore, for the comparison between the product under investigation and the products affected in the importing country, the national authorities must establish that the product under investigation is 'like' the national products. WTO law does not provide any definition of 'like' product in the context of the WTO antidumping law. Art. 2.6 of the ADA provides that like product;

"shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration".

identifier: ECLI:EU:C:1992:257, paras. 16-17. *Chelyabinsk electrometallurgical integrated plant OAO (CHEMK) and Kuzneckie ferrosplavy OAO (KF) v Council of the European Union,* Judgment of the Court (Second Chamber) of 28 November 2013. Case C-13/12 P. European Court Reports 2013, ECLI identifier: ECLI:EU:C:2013:780, para. 70. The principle also applies in other areas. See for example concerning state aid investigations and competition investigations; *Matra SA v. Commission of the European Communities*, Judgment of the Court of 15 June 1993. Case C-225/91. European Court Reports 1993 I-03203, ECLI identifier: ECLI:EU:C:1993:239, paras. 40-47.

[61] *See US – Zeroing*, WT/DS322/AB/R, adopted on 23 January 2007, para. 115.

Art. 2.6 is not explicit as to criteria for the 'like product' analysis.[62] However, in *Korea – Pneumatic Valves* the panel stated that it is expected that the products must be competing, as it otherwise would be difficult to establish injury caused by the dumped products.[63] Furthermore, the 'like product' requirement does not extend to the product definition, i.e. the product under investigation.[64] Thus, the investigating authorities are not bound by any specific criteria for defining the product under investigation apart from its relation to injury caused by the dumped prices.

The product definition depends on the industry in the importing country that allegedly is injured. The scope of products that the national authorities must assess can be broad. The implication is that the product scope can include products that, for example, have different levels of quality or products with IP protection. However, if the investigating authorities use a broad product scope, they must not differentiate between different sub-categories of the product when they establish the dumping margin. The investigating authorities must establish the dumping margin for the *product under investigation*.[65] That implies that a producer with a patented product cannot under WTO law claim that the patented product is exempted from the antidumping investigation if it falls under the product scope. Although the EU in its early practice attempted to distinguish between different sub-groups of products in order to apply a zeroing methodology, which violated WTO law,[66] the EU has confirmed that patented products cannot be exempted from an antidumping investigation just because of the privileged rights associated with the patent.[67] For example, in *Lever Arch Mechanisms*, the Council found that;

"patented design or an exclusive contract between an exporting producer and a European user for a certain type of product does not, as such, justify the exclusion of this type from the definition of the product concerned or the like product. A [lever arch mechanism] with all its characteristics remains the product concerned irrespective of whether it is patented or purchased via an exclusive contract."[68]

[62] Analogue interpretations from "like product" provisions should be avoided as "like product" has different scope depending on its specific context. See Appellate Body in *EC – Asbestos*, WT/DS135/AB/R, adopted on 5 April 2001, paras 98-99.

[63] Panel Report, *Korea – Pneumatic Valves*, WT/DS504/R, adopted on 30 September 2019, para. 7.275.

[64] *See EC- Fasteners (China)*, WT/DS397/R, adopted on 28 July 2011, para. 7.265.

[65] *See EC – Bedlinen*, WT/DS141/AB/R, adopted on 12 March 2001, para. 53.

[66] *Id.*

[67] *See Certain plastic sacks and bags,* Council Regulation (EC) No 1425/2006 of 25 September 2006 imposing a definitive anti-dumping duty on imports of certain plastic sacks and bags originating in the People's Republic of China and Thailand, and terminating the proceeding on imports of certain plastic sacks and bags originating in Malaysia, OJ L 270, 29.9.2006, p. 4–41, recital 37.

The EU Commission may use a range of methods to establish the product scope including the physical, chemical, and technical characteristics, the Combined Nomenclature (CN) Code, interchangeability, their use, consumer perception, distribution channels, manufacturing process, costs of production and quality.[69] In *Certain Footwear with Uppers of Leather*, the EU Commission and the Council had in the investigation included a producer who held a patent.[70] The producer appealed the regulation in *Brosmann Footwear (HK) and Others v Council* where the General Court emphasized the physical characteristics, its intended use, and the consumer perception of the product in the competition with the EU producers. The General Court stated that in that context, it is not a question of whether the product is protected by a patent in the exporting country in order to consider its competitive position in the EU.[71] The EU Commission and the Council have continued that line in its practice.[72] Nevertheless, in spite of the opportunity to make a broad definition of a product, the EU Commission may terminate an investigation if

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[68] *Lever Arch Mechanisms,* Council Regulation (EC) No 1136/2006 of 24 July 2006 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of lever arch mechanisms originating in the People's Republic of China, OJ L 205, 27.7.2006, p. 1–12, recital 8.

[69] *See Whirlpool Europe Srl v Council of the European Union*, judgment of the General Court (Sixth Chamber) of 13 September 2010, T314/06, European Court Reports 2010 II-05005, ECLI:EU:T:2010:390 EU:T:2010:390, para. 138.

[70] *Certain Footwear with Uppers of Leather,* Council Regulation (EC) No 1472/2006 of 5 October 2006 imposing a definitive anti-dumping duty and collecting definitely the provisional duty imposed on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam, OJ L 275, 6.10.2006, p. 1–41.

[71] *Brosmann Footwear (HK) Ltd and Others v. Council of the European Union*, Judgment of the General Court (Eighth Chamber) of 4 March 2010. Case T-401/06. European Court Reports 2010 II-00671, ECLI identifier: ECLI:EU:T:2010:67, Para. 135. The Judgment was overruled by the ECJ as the General Court had erred in law in other parts of the judgment: Judgment of the Court (Third Chamber) of 2 February 2012. *Brosmann Footwear (HK) Ltd and Others v. Council of the European Union*. Case C-249/10 P. Digital reports (Court Reports - general). ECLI identifier: ECLI:EU:C:2012:53.

[72] *See Crystalline Silicon Photovoltaic Modules,* Council Implementing Regulation (EU) No 1239/2013 of 2 December 2013 imposing a definitive countervailing duty on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China, OJ L 325, 5.12.2013, p. 66–213, recital 85. The Regulation was reviewed for other reasons—and upheld by the General Court—in *JingAo Solar Co. Ltd and Others v. Council of the European Union*. Judgment of the General Court (Fifth Chamber) of 28 February 2017. Joined Cases T-158/14, T-161/14 and T-163/14. ECLI identifier: ECLI:EU:T:2017:126. The judgment by the General Court was appealed to the ECJ that dismissed the appeal in *Canadian Solar Emea GmbH and Others v. Council of the European Union*, Judgment of the Court (Fourth Chamber) of 27 March 2019. Case C-237/17 P. Digital reports (Court Reports - general - 'Information on unpublished decisions' section). ECLI identifier: ECLI:EU:C:2019:259.

the product scope lacks clarity.[73]

However, if a product, which is subject to an antidumping duty, gets additional characteristics through the inclusion of a patented item, it may fall outside of the product definition. In *Steinel Vertrieb v Hauptzollamt Bielefeld*, the Council had imposed an antidumping duty on fluorescent lamps from China. Steinel Vertrieb, a German company, had invented and patented the 'twilight switch' to be fitted into energy-saving lamps. The energy-saving lamps could be categorized as fluorescent lamps. Steinel Vertrieb had these lamps produced in China and imported them into the EU. The antidumping investigation had taken place before Steinel Vertrieb had the energy-saving lamps with the twilight switch produced, and thus the product under investigation had been the fluorescent lamps without a twilight switch. Nevertheless, the German custom authorities, Hauptzollamt, found that the energy-saving lamps with the twilight switch should be subject to the antidumping duty as they fell under the same CN code and had the same essential characteristics as the product subject to the antidumping duty. Steinel Vertrieb challenged the Hauptzollamt before the national court that requested the ECJ for a preliminary ruling. The ECJ stated that it is not necessarily enough that the product has the same CN code and essential characteristics. The national court should assess whether the products shared the same technical and physical characteristics, had the same end-use, had the same price-quality ratio, and whether they were interchangeable and if competition existed between them.[74]

A producer who uses a patented intermediary product in the main product may fall outside of the product scope if the patented intermediary product provides a sufficient degree of variation to the main product that it is not directly interchangeable with the product under investigation. However, it is a case-by-case assessment, and it may well be that even if the product is not directly interchangeable, it may qualify on the other factors; technical and physical characteristics, end-use, and price-quality ratio. For example, in *Seamless Pipes and Tubes of Stainless Steel*, a producer claimed that the special products made for nuclear and military purposes should not fall under the product scope, e.g. seamless pipes and tubes of stainless steel. The EU

[73] *See Low carbon ferro-chrome*, Commission Implementing Decision (EU) 2018/1037 of 20 July 2018 terminating the anti-dumping proceeding concerning imports of low carbon ferro-chrome originating in the People's Republic of China, Russian Federation and Turkey, OJ L 185, 23.7.2018, pp. 48-50, recital 8.

[74] *Steinel Vertrieb GmbH v. Hauptzollamt Bielefeld*, Judgment of the Court (Second Chamber) of 18 April 2013. Reference for a preliminary ruling: Finanzgericht Düsseldorf - Germany. Case C-595/11. Digital reports (Court Reports - general) ECLI identifier: ECLI:EU:C:2013:251, paras 39-45.

Commission rejected the argument. Although the special products for nuclear and military purposes were not directly interchangeable with the other products, they shared the same physical and technical characteristics, had the same basic end-use, and had the same price-quality ratio. Furthermore, the products were in competition as they had similar production processes and producers could easily switch between productions of different types of the product that depended on the demand. Thus, the types made for nuclear and military purposes also fell under the general product scope.[75] However, the assessment by the EU Commission is currently under review by the General Court and the question is whether the General Court will apply a different assessment for the competition.[76]

The product scope of the antidumping investigation may include patented products unless they have a sufficient degree of difference based on the factors mentioned above. Thus, an IP holder, either from the exporting state or from the importing state, who has outsourced the production, can be met with an antidumping duty by the importing state. The IP right does not protect against the product scope defined by the investigating authorities. On the other side, antidumping duties can also have a protective character for an IP holder in the importing state as the antidumping duties may limit the access of products that, although beyond the scope of the patent definition, are in competition with the patented product.

Comparable Prices

Although antidumping law does not distinguish between products protected by IP law and other products, the question is whether a producer under investigation, who holds a patent right in the exporting country, but not in the EU, dumps the price by charging a higher price on the domestic market than the export market. That question is based on the assumption that a patent holder charges a high price (through the legal monopoly) in the territory where he holds the patent rights in order to generate rents for future investment in R&D.

In *Ajinomoto and NutraSweet v Council and Commission*, a patent holder of a US patent, but without a patent in the EU countries, raised that issue

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[75] *Seamless Pipes and Tubes of Stainless Steel,* Commission Implementing Regulation (EU) 2018/330 of 5 March 2018 imposing a definitive anti-dumping duty on imports of certain seamless pipes and tubes of stainless steel originating in the People's Republic of China following an expiry review pursuant to Article 11(2) of Regulation (EU) 2016/1036 of the European Parliament and of the Council, C/2018/1274, OJ L 63, 6.3.2018, p. 15–43, recital 30.

[76] *Zhejiang Jiuli Hi-Tech Metals v Commission*, Case T-307/18: Action brought on 16 May 2018, OJ C 240, 9.7.2018, p. 55–55, *case pending.*

during an antidumping investigation against him. The patent holder made his argument both before the General Court and appealed its judgment to the ECJ. At that time, the Basic Regulation (the 1988 Basic Regulation)[77] provided for three methods of deciding the normal value: the actual price paid in the ordinary course of trade, a comparable price of the like product when exported to any third country, or a constructed value. The 1988 Basic Regulation also provided that a fair comparison should be made between the normal value and the export price with an exhaustive list of factors that the investigating authorities should take into account. *None of these factors could be related to the situation with a patent.*

The EU Commission and the Council made the dumping determinations based on the actual prices in the US. The patent holder claimed that the existence of a patent only on the domestic market in the US made the domestic price and the export price incomparable. The domestic market had monopolistic characteristics due to the patent rights whereas the EU market was fully competitive. The patent holder claimed that by ignoring that aspect, the EU institutions had deprived the patent holder his patent rights, and the EU institutions would put the patent holder in an unfavorable position if the patent holder had to increase the export price to the level of the price of the patented product in the US. Thus, according to the patent holder the normal value should be based on a constructed price instead of the actual domestic price.

The ECJ rejected that argument as the patent holder had not claimed that the patent protection in the US affected the *normal* character of the sales or affected the US market.[78] The ECJ then exercised judicial economy and did not review whether the existence of a patent in the US, while not in the EU, was a factor that the EU Commission and the Council should have been taken into account in the normal value determination. In the contested judgment, the General Court had stated that the market structure was not decisive for the use of constructed value instead of the actual prices on the domestic market. According to the General Court, the patent holder had not demonstrated that the prices used by the EU Commission and the Council for establishing the normal value did not reflect the actual situation on the market in the US. The patent holder was not deprived of his patent rights by the use of the actual

[77] *1988 Basic Regulation*: Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Community, OJ L 209, 2.8.1988,1–17.

[78] *Ajinomoto Co., Inc. and The NutraSweet Company v. Council of the European Union and Commission of the European Communities*, Judgment of the Court (Sixth Chamber) of 3 May 2001. Joined cases C-76/98 P and C-77/98 P. European Court Reports 2001 I-03223. ECLI identifier: ECLI:EU:C:2001:234, para. 41.

prices to establish the normal value. The patent holder could still exercise these rights by preventing any third party from producing and marketing the product in the US.[79] The General Court further stated:

"In that regard, the production and marketing monopoly conferred by the patent enables its holder to recover research and development costs incurred not only for successful projects but also for unsuccessful ones. That factor constitutes an additional economic reason for relying, for the purposes of determining normal value, on prices charged in the context of a patent."[80]

The argument is not entirely convincing and, as mentioned below, the EU legislators have changed the rules. By using the patent holder's prices on the domestic market as normal value to compare with the export price charged on a competitive market, a patent holder may end up in an unfavorable position compared to the producers of the like product in the EU. By keeping high prices on the US market, the low export price that is necessary to compete on a competitive market cannot escape "dumping" unless the investigating authorities make adjustments for the sunk costs related to the R&D.

On the other hand, the General Court and the ECJ can justify their decisions with the basis in EU law: the 1988 Basic Regulation did not offer the opportunity to adjust for differences deriving from the specific situation where the company had a patent on one market but not on the other. Furthermore, the argument gets further legitimacy when one considers the protectionist basis of antidumping law. Furthermore, even from a trade perspective, the argument by the General Court can be accepted if there is a risk of elimination of the EU industry. If a patent holder can have monopolistic prices on the domestic market but not on the export market, it would be unfair competition on the EU producers if the patent in itself is a reason for disregarding the actual US prices and instead construct a price on the assumption of a fully competitive domestic market. It must be kept in mind that the dumped price must also cause injury to the EU producers. By keeping a monopoly profit on the domestic market, the patent holder generates revenue that can be used to off-set potential losses if the export price is lower than the market price in the EU, i.e. if the patent holder pursues a predatory pricing strategy. In the actual case, the EU market had been dominated by US and Japanese producers. Once an EU producer entered to the market, the US producers were able

[79] *Ajinomoto and NutraSweet v Council and Commission,* Judgment of the Court of First Instance (Fifth Chamber, extended composition) of 18 December 1997. Joined cases T-159/94 and T-160/94. European Court Reports 1997 II-02461. ECLI identifier: ECLI:EU:T:1997:209, paras. 126-128.

[80] *Id*. at para. 128

to lower the price to an extent where the EU producer could not utilize the production capacity and benefit from economies of scale. The patent holder had not denied that the patent gave him this opportunity. Rather, the chief executive of the company stated:

"Prices are not a problem. If necessary, we can undercut any price charged by any competitor, since we can invest more than anyone else in efficiency, thanks to the substantial resources generated by our patent."[81]

Where the patent should provide incentive to invest in R&D, it should not be used as basis for eliminating competition on those markets where the product is not protected by a patent right. That would only be unfair competition as it would indirectly extend some of the rights associated with the patent to those other markets. However, as mentioned above, EU competition law could apply to such situations if predatory pricing was taking place.

It can even be questioned whether the 1988 Basic Regulation was in full compliance with WTO law, as WTO law provided for adjustments of *"any other differences which are also demonstrated to affect price comparability"* between the normal value and export price incomparable.[82] In *US – Hot-Rolled Steel*, the AB made it clear that:

"Article 2.4 expressly requires that 'allowances' be made for 'any other differences which are also demonstrated to affect price comparability.' There are, therefore, no differences 'affect[ing] price comparability' which are precluded, as such, from being the object of an 'allowance'."[83]

Even though antidumping law can find legitimacy in protectionism under the guise of unfairness, there is a limit of the discretion in the design of national (or EU) antidumping law. If the IP holder engages in predatory pricing, EU competition law will catch that. However, if the IP holder needs to discriminate the prices due to the differences in the IP protection on the domestic and the export markets in order the generate rents for further investments in R&D, the antidumping instrument should be able to make the necessary adjustments. The protectionist approach should not be stretched to an extent where the states can design their own laws excluding the possibilities of such adjustments in particular if the differences actually affect the price comparability. EU antidumping law was later amended. Art. 2.10 (k) of the current Basic Regulation provides that:

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[81] *Id*. at para. 157

[82] Art. 2.4 of the ADA.

[83] *US – Hot-Rolled Steel*, WT/DS184/AB/R, adopted on 23 August 2001, para. 177.

"An adjustment may also be made for differences in other factors (…), if it is demonstrated that they affect price comparability as required under this paragraph, in particular if customers consistently pay different prices on the domestic market because of the difference in such factors."[84]

That provides more flexibility into the dumping determination. In *Alumina v Council*, the General Court took the opportunity to explain some of these differences between the 'old' and 'new' rules. In the actual case, the Council had relied on the 'old' case law in its legal argumentation. The General Court rejected the Council's application of the 'old' case law. According to the General Court:

"[The 'old' case law] was developed, was based on a philosophy different from that underlying the Basic Regulation, in that it did not provide for the possibility of adjusting the normal value if purchasers systematically pay different prices on the domestic market because of certain factors particular to that market which affect price comparability – a possibility which, by contrast, is provided for in Article 2(10)(k) of the Basic Regulation."[85]

The General Court seems to imply that if a producer can exercise patent rights on the domestic market—but not on the export market—the price discrimination resulting from these differences may be adjusted. That would require that the producer can demonstrate that such differences make the prices incomparable.

Thus, if the producer under investigation can demonstrate that price comparability is affected by the IP rights, the investigating authorities must adjust for such differences on the normal value and the export price. It cannot be denied that if the patent holder can demonstrate that the sunk costs of R&D affect the normal value that adjustments should be made for it in comparison with the export price.

Final Words

Producers of technology products, including IP holders, should take the

[84] When the 1988 Basic Regulations was repealed in order to bring it into conformity with the new WTO ADA, it still omitted "any other factor", cf. Council Regulation (EC) No 3283/94 of 22 December 1994 on protection against dumped imports from countries not members of the European Community, OJ L 349, 31.12.1994, p. 1–21, Art. 2(10). "Any other factor" was finally enshrined into the Basic Regulation through an amendment to Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community OJ L 56, 6.3.1996, p. 1–20; cf. Council Regulation (EC) No 2331/96 of 2 December 1996 amending Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community OJ L 317, 6.12.1996, 1–2.

[85] *Alumina d.o.o. v. Council of the European Union*, Judgment of the General Court (Second Chamber) of 30 April 2013. Case T-304/11. ECLI identifier: ECLI:EU:T:2013:224 Para. 40.

antidumping dimension into account when they make their pricing strategies. Competition law will to some extent limit the pricing conducts by, for example, prohibiting predatory pricing and certain types of discriminatory pricing. However, antidumping law goes further as any price discrimination where the export price is lower than the price charged in the ordinary course of trade on the exporter's domestic market can be subject to antidumping duties. It does not include a subjective assessment of predation as in EU competition law, nor does it take into consideration the competitive disadvantage of price discrimination as in EU competition law. Should the producer in the pricing strategy engage in both anticompetitive conduct and dumping, the producer can be subject to both competition fines and antidumping duties. Notwithstanding a potential competition law treaty in the WTO, it is not likely to replace the antidumping law, but rather work alongside with it. The different legitimate bases; protection of competition on the market and welfare, and protection of the industry from harmful prices of imported goods, will not easily be reconciled in trade negotiations. The states need a protectionist instrument.

Even IP holders cannot with reference to their IP rights be exempted from antidumping duties. The IP holders must consider the antidumping aspect in their pricing strategies. Any product can be subject to such duties. Only if the IP holder can demonstrate that the product protected by the IP rights is to a sufficient degree different from the product scope of the antidumping investigation, then the IP holder may be outside the antidumping duties. In situations where the IP holder only has IP protection on the domestic market, but not on his export market, and where the IP holder charges a higher price on the domestic market than his export market, there is space for adjustments to level the domestic and export prices if these differences affect the price comparability. However, that space of adjustment requires that the IP holder can demonstrate the actual effect on the price comparability.