JURISDICTION OVER THE FOREIGN MULTINATIONAL IN THE EEC: LIFTING THE VEIL ON THE ECONOMIC ENTITY THEORY

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1. INTRODUCTION

Recent years have witnessed an exponential growth in the importance of the multinational enterprise as a participant in international trade and investment. This growth has spurred an increasing awareness that the traditional principles of national jurisdiction to prescribe often provide insufficient legal and political tools for the protection of legitimate national interests.

The inadequacy of traditional jurisdictional principles, which is acutely felt in the area of competition (antitrust) law, flows in large measure from the inherent tension between the existence of an interna-

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2 Jurisdiction to prescribe, with jurisdiction to adjudicate and jurisdiction to enforce, comprise the troika of general types of jurisdiction recognized under international law. The RESTATEMENT defines them as follows:

(a) jurisdiction to prescribe, i.e., the authority of a state to make its laws applicable to persons or activities;
(b) jurisdiction to adjudicate, i.e., the authority of a state to subject particular persons or things to its judicial process; and
(c) jurisdiction to enforce, i.e., to use the resources of government to induce or compel compliance with its law.

RESTATEMENT, supra note 1, Introductory Note, pt. IV.

It is a basic premise of international law that a state's power to exercise each of these types of jurisdiction is limited. RESTATEMENT, supra note 1, § 414. Except where otherwise made explicit, this Comment is exclusively concerned with issues in the area of jurisdiction to prescribe.

3 See RESTATEMENT, supra note 1, § 414 comment a.

4 See id. at Reporter's Notes 1, 2. This Comment uses the phrases "competition law" and "antitrust law" interchangeably.
tional system of sovereign states based upon the principles of territoriality and the essentially nonterritorial nature of the modern multinational corporation. Multinationals carry on their business in an increasingly unified world market. Correspondingly, their activities are often not clearly bounded by the geographic borders that define modern states. Multinationals may have a tremendous economic impact on the economy and people of a particular state, yet have no tangible legal presence there for the purposes of national or international law.

In response to the rise of the multinational enterprise as a major player in international trade, sovereign states and nations have sought to develop principles of jurisdiction suitable to the nonterritorial nature of the modern multinational corporation and compatible with the political realities of the nation-state system. This Comment examines the attempt of the European Economic Community (Community or EEC) to tailor its competition laws to current economic and political reality. In particular, the Comment examines the adoption by the Commission of the European Communities (Commission) and by the Court of Justice of the European Communities (Court of Justice) of the "economic

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6 Id. § 414, Reporter's Note 1. See also BarNet & Müller, supra note 1, at 14-15.

6 Restatement, supra note 1, § 414 comment a.

7 Although commonly discussed as a single entity, the Common Market community actually consists of three separate legal bodies: the European Coal and Steel Community, the European Economic Community and the European Atomic Energy Community. While the other two bodies are severely limited in their legal and economic scope, the European Economic Community has been granted wide-ranging general powers throughout the Common Market. See Hartley, The Foundations of European Community Law 3 (1981) [hereinafter Hartley]. The Community as originally founded in 1957 consisted of six member nations: the Federal Republic of Germany; France; Italy; and the three Benelux countries. On January 1, 1973, the original six were joined by Denmark, Ireland, and the United Kingdom. This brought the total to nine. In 1979, Greece was admitted, followed by Spain and Portugal in 1986. See Hartley, supra, at 3-5.

8 The Commission of the European Communities is the Community body responsible for the coordination of national policies, the formulation of new Community policies and the administration of existing policies. It is often described as the "Initiator and Executive" of the Community. See W. Alexander, The EEC Rules of Competition 37-38 (1973); Hartley, supra note 7, at 3; Information Office of the European Community, The Institutions of the European Community (1982); D. Lasok & J. Bridge, An Introduction to the Law and Institutions of the European Communities 161-71 (1982) [hereinafter Lasok & Bridge]. As such, it is primarily responsible for enforcement of the Community's competition policy contained within the 1957 Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter Treaty of Rome].

9 The European Court of Justice has general power of judicial review under the Treaty of Rome, supra note 8, "[to] ensure observation of law and justice in the interpretation of this Treaty." Treaty of Rome, supra note 8, 298 U.N.T.S. at 73. See generally Hartley, supra note 7 at 26-63.
entity theory as a means of applying the Community’s competition law to non-Community parent multinational corporations operating Community subsidiaries. After sketching the judicial development of the economic entity theory in the EEC, the Comment analyzes the legal foundations of the theory as a jurisdictional device. The Comment concludes that the EEC’s application of the theory has served to obfuscate what is perhaps better understood as the EEC’s use of an effects-based criterion of jurisdiction over non-Community parent enterprises. This obfuscation has frequently led to the criticism that the EEC has overreached its jurisdiction under the principles of international law. Finally, the Comment proposes that explicit recognition of the EEC’s effects-based jurisdictional claims over foreign parent multinationals would provide a less misleading, and economically sounder, criterion of jurisdiction.

2. Development of the Economic Entity Doctrine in the EEC

The economic entity theory first appeared in the area of international law as a theoretical device used by the home state of a parent corporation to assert limited jurisdiction over subsidiaries of that company located outside of the sovereign’s territory. In its original form as a theory of domestic corporate law, it allowed abandonment of the legally-granted status of independent corporate structure based upon a judicial finding that the parent and subsidiary functioned as a single economic and legal unit. Insofar as the theory has been applied to parent and subsidiary corporations formed under the laws—and subject to the jurisdiction—of a single nation, it has proven relatively noncontroversial. In international law, its use as a lever to regulate the subsidiaries of a parent corporation formed under the regulating nation’s laws has also received general acceptance. As adopted by the EEC in attempting to enforce its competition laws, however, the theory has

10 See infra notes 11-17 and accompanying text.
11 A “parent corporation” is a corporation that has working control through stock ownership of another company, which is correspondingly denoted the “subsidiary.” BLACK’S LAW DICTIONARY 1004 (5th ed. 1979). A “parent company” is defined as owning more than 50% of the voting shares of another company, the subsidiary.
13 See infra notes 80-81 and accompanying text.
14 Id.
15 RESTATEMENT, supra note 1, § 414 comment a.
16 Community competition law is embodied in Articles 85-89 of the Treaty of Rome. Relevant portions of Articles 85 and 86, the two core provisions, are reproduced
been, in effect, turned upon its head in order to serve as the sole ground for justifying Community jurisdiction over foreign multinationals that have partially or wholly-owned subsidiaries operating within the Common Market.17

The following discussion is meant to give the reader a sense of how the EEC's use of the doctrine has developed since the economic entity theory's first articulation by the EEC in the early 1970s. Particular attention will be paid to the evolution of the standard of proof of parental control over the actions of the subsidiary that the EEC requires before it will invoke the doctrine as a device for gaining jurisdic-

below:

**ARTICLE 85**

1. The following shall be deemed to be incompatible with the Common Market and shall hereby be prohibited: any agreements between enterprises, any decisions by associations and any concerted practices which are likely to affect trade between the Member States and which have as their object or result the prevention, restriction or distortion of competition within the Common Market . . . .

2. Any agreements or decisions prohibited pursuant to this Article shall be null and void.

3. Nevertheless, the provisions of Paragraph 1 may be declared inapplicable in the case of:

- any agreements or classes of agreements between enterprises;
- any decisions or classes of decisions by associations of enterprises; and
- any concerted practice or category of concerted practices; which contributes to the improvement of the production or distribution of goods or to the promotion of technical or economic progress while reserving to users an equitable share in the profit resulting therefrom . . . .

**ARTICLE 86**

To the extent to which trade between any Member States may be affected thereby, action by one or more enterprises to take improper advantage of a dominant position within the Common Market or within a substantial part of it shall be deemed to be incompatible with the Common Market and shall hereby be prohibited . . . .


In addition to the jurisdictional use of the economic entity theory examined in this Comment, the economic entity doctrine has been employed under the provisions concerning abuse of dominate position found in Article 86. See T. Pawlikowski, *Intra-Group Arrangements under Articles 85 and 86 of the Treaty Establishing the European Community, with a Comparative Survey of the Treatment of Intra-Group Arrangements under the American Antitrust Law and the Competition Law of Canada* 48 (1984). The economic entity doctrine has also been employed as a means for determining the applicability of an Article 85(3) negative clearance. See Note, *The Economic Unity Doctrine in the EEC: A Limited Exemption to Article 85 of the Treaty of Rome*, 9 FORDHAM INT'L L.J. 373 (1986).

17 Since the effect has been considered analogous to the judicial results achieved under that doctrine, this method of obtaining jurisdiction over the parent multinational enterprise has been characterized as a "piercing of the corporate veil." The present Comment argues that this analogy is an essentially misleading one and should be abandoned. See in the next commentary notes 79-85.
tion over a foreign parent multinational enterprise. It is submitted that recent statutory and case law demonstrate a clear trend towards weakening the standard of proof of control to the point that the per se application of the doctrine has become a matter of course.\(^\text{18}\)

2.1. The ICI Case

The economic entity theory was advanced as a ground for Community jurisdiction over a non-Community parent multinational for the first time\(^\text{18}\) by the Court of Justice in *Imperial Chemical Industries v. EEC Commission (ICI)*.\(^\text{20}\) In 1969, the Commission had levied fines against ten Community and non-Community enterprises for alleged violations of the Treaty of Rome's\(^\text{21}\) article 85(1) prohibition against concerted price fixing.\(^\text{22}\) Imperial Chemical Industries (Imperial), which at the time of the fine was a non-Community enterprise,\(^\text{23}\) appealed the fine to the Court of Justice. In that forum, Imperial argued primarily that the Commission lacked jurisdiction to fine it for acts that it may have committed outside of the territorial borders of the Community.\(^\text{24}\)

As a second ground for denying the validity of the Commission's decision, Imperial stressed that the acts at issue were solely those of its independent Community subsidiary and in no way those of Imperial itself.\(^\text{25}\)

The court rejected these arguments and upheld the Commission's jurisdiction.\(^\text{26}\) The court based its holding on evidence that, on one occasion, Imperial had sent binding orders by telex to its Community

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\(^{18}\) See infra text accompanying notes 41-67.


\(^{21}\) See supra note 8.

\(^{22}\) See supra note 16.

\(^{23}\) Imperial was an English corporation. England did not become a member of the EEC until 1973. See supra note 7.

\(^{24}\) The acts in question consisted of contracts for the supply of dyestuffs. Imperial urged upon the court the argument that, on the fact that the contracts were made in and governed by the law of England, Imperial itself had not carried on any activity within the EEC that could be construed as subjecting it to EEC law. *ICI*, 1972 E. Comm. Ct. J. Rep. at 687, 11 Comm. Mkt. L.R. at 593-94.

\(^{25}\) Id. at 688, 11 Comm. Mkt. L.R. at 594 (1972).

\(^{26}\) This decision has been described as an obvious attempt to circumvent the international problems of the extraterritorial application of EEC competition law. See 2 U. TOEPPE, EEC COMPETITION LAW: BUSINESS ISSUES AND LEGAL PRINCIPLES IN COMMON MARKET-ANTITRUST CASES (1982).
subsidiary requiring the subsidiary to increase its prices.\textsuperscript{27} While the court chose not to elaborate upon the matter, it also took note of the fact that Imperial held at least a majority of the voting shares of the Community subsidiary.\textsuperscript{28} In response to Imperial's claim that the Commission lacked jurisdiction over it, the court stated:

Since a concerted practice is involved, it is first necessary to ascertain whether the conduct of the applicant [Imperial] has had effects within the Common Market . . . . By making use of its power to control its subsidiaries established in the Community, the applicant was able to insure that its decision was implemented on that market . . . . The fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company. Such may be the case in particular where the subsidiary, although having separate legal personality, does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company.\textsuperscript{29}

For the purposes of this discussion, two principles of the court's decision should be emphasized. First, in order to be subject to the jurisdiction of the EEC under the economic entity test as articulated here, the parent company must hold, at the time of the offense in question, all or a majority of the voting shares issued by the Community subsidiary. This degree of ownership is taken as the threshold test for allowing the implication that at least the potential for foreign parental control, and thus for non-autonomous behavior of the subsidiary, exists. Unless the foreign parent multinational owns at least a majority of the voting shares of the Community corporation, EEC jurisdiction cannot be based upon the economic entity theory.\textsuperscript{30} Second, in order to "manifest" itself in the Common Market, the foreign parent multinational must exercise sufficient control over the Community subsidiary such that the subsidiary "does not in fact have autonomy."\textsuperscript{31} The court's decision in \textit{ICI} stands for the proposition that jurisdiction is properly asserted pursuant to the economic entity theory where there has been a showing of actual "control" over the subsidiary by the parent. This showing in turn requires that the parent company actually and directly


\textsuperscript{28} \textit{Id.} at 662, 11 Comm. Mkt. L.R. at 629.

\textsuperscript{29} \textit{Id.}, 11 Comm. Mkt. L.R. at 628-29.

\textsuperscript{30} \textit{Id.}

\textsuperscript{31} \textit{Id.}
influences the specific anti-competitive action of the subsidiary being challenged under Community competition law.  

2.2. Continental Can

The next notable development in the economic entity theory came in the Court of Justice's holding in an appeal from a Commission ruling under the Treaty of Rome's article 86 abuse-of-dominant position provisions. In Europemballage Corp. v. EEC Commission, (Continental Can), the Court of Justice reaffirmed that the legal personality of a Community subsidiary does not shield a foreign parent corporation from the operation of the Community's competition law based on its subsidiary's actions. In 1971, the Commission had issued a ruling that required Continental Can Co., a multinational corporation based in the United States, and its wholly-owned European subsidiary, Europemballage Corp., to divest two European companies that Europemballage had recently acquired.

On appeal to the Court of Justice, Continental argued that it was an inappropriate subject of Community jurisdiction; it had no registered office in the Community and the acts complained of were those of Europemballage alone. On these facts, Continental urged that the Commission's order, insofar as it was addressed directly to Continental,

32 B. BARACK, THE APPLICATION OF THE COMPETITION RULES (ANTITRUST LAW) OF THE EUROPEAN ECONOMIC COMMUNITY 65 (1981). A judicial finding of the requisite degree of control can, however, be based upon largely circumstantial evidence of parental control in the matter at issue. Such, indeed, was the case in ICI, where the court found that the parent's control over the subsidiary was not complete, but merely such that the subsidiary carried out the parent's orders "in all material respects." ICI, 1972 E. Comm. Mkt. L.R. at 662, 11 Comm. Mkt. L.R. at 629. The fact that telex messages ordering price increases were sent from the parent to its subsidiary was taken by the court as sufficient evidence, absent a showing by the parent to the contrary, to place the parent directly under EEC jurisdiction. Id. at 663, 11 Comm. Mkt. L.R. at 629. Moreover, as discussed below, current EEC case law establishes the presumption that ownership equals control. See infra notes 41-67 and accompanying text. For a somewhat different reading of the jurisdictional consequences of the ICI case, see Lopez-Balboa & Myers, JURISDICTIONAL STANDARDS UNDER EEC COMPETITION LAW: THE EVOLUTION OF THE ECONOMIC ENTITY TEST, 6 J. COMP. BUS. & CAP. MKT. L. 383, 392-93 (1984).

33 See supra note 16.


exceeded the Community's jurisdictional reach as permitted under generally accepted principles of international law. The Court of Justice rejected this argument. In upholding the Commission's direct jurisdiction over Continental, it found that:

The fact that the subsidiary has its own legal personality is not sufficient to rule out the possibility that its conduct can be imputed to the parent company. This applies particularly where the subsidiary does not determine its market conduct autonomously but in the main follows the instructions of the parent company. It has been established that Continental caused Europemballage to make an offer . . . and it made the necessary funds available for this purpose . . . . Thus this operation, on the basis of which the Commission took its decision, must be imputed not only to Europemballage but also and primarily to Continental . . . . The fact that Continental does not have its seat in the territory of one of the Member States is not sufficient to remove this enterprise from the application of Community law.

Although no direct order from Continental to Europemballage was introduced into evidence, the court nevertheless assumed that Continental, as the parent corporation, had "caused" Europemballage's violative behavior. In spite of the fact that neither the Commission nor the Court of Justice engaged in a concerted effort to investigate the degree of control that Continental exercised over Europemballage's acquisitions, *Continental Can* appears to have solidly reaffirmed IFI's holding: The operation of the economic entity theory presupposes a finding, judicial or otherwise, of the foreign parent's actual control of the Community subsidiary. Nevertheless, *Continental Can*'s language represents a clear erosion of the standard of proof of actual control that the Court of Justice requires before upholding the Commission's assertion of jurisdiction in cases brought under the economic entity theory. In particular, both the Commission and the court emphasized Continental's share ownership of Europemballage, while neglecting to investigate in detail whether an actual pattern of parental control of the market behavior of Europemballage in the matter at issue could be established and, thus, whether Europemballage had in fact acted autonomously.

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37 Id.
38 Id. at 242, 12 Comm. Mkt. L.R. at 221-22.
39 See supra notes 30-32 and accompanying text.
40 The court has been taken to task by commentators for its apparent lack of analysis of the issue of actual control. See, e.g., Griffin, supra note 12, at 393.
2.3. Commercial Solvents and Recent Developments

Istituto Chemioterapico Italiano SpA v. EEC Commission\(^{41}\) (Commercial Solvents) involved an Article 86\(^{42}\) proceeding against Commercial Solvents Corporation (CSC) of New York and its fifty-one-percent-owned Italian subsidiary, Istituto Chemioterapico Italiano SpA (Istituto). In a decision of December 14, 1972,\(^{43}\) the Commission held that CSC’s alleged actions in refusing to allow Istituto to supply its chemical products\(^{44}\) to an Italian purchaser, Laboratorio Chemico Farmaceutico Giorgio Zoja (Zoja), constituted an abuse of dominant position under the provisions of Article 86 of the Treaty of Rome.\(^{45}\) The Commission had addressed its order directly to CSC, requiring it to provide to Zoja an amount of its products sufficient to allow Zoja to meet its market demand both within and outside of the Common Market.\(^{46}\) In asserting jurisdiction over CSC, the Commission relied on its application of the economic entity test.\(^{47}\) In particular, the Commission focused on the fact that, as the majority owner of Istituto’s voting shares, CSC could be assumed under the provisions of Italian company law\(^{48}\) to exercise control over Istituto.\(^{49}\) Since the subsidiary’s actions were, at least according to Italian legal principles, influenced by CSC, the Commission asserted that it was unable to find any legal basis for respecting the separate legal personalities of the two companies; the acts of Istituto were to be treated as indistinguishable from those of CSC itself.\(^{50}\)

On appeal, the Court of Justice once again upheld the Commission’s jurisdiction over a non-Community parent enterprise on the basis of the economic entity theory. In particular, the court noted along with the Commission that CSC exercised formal legal control over Istituto under Italian law.\(^{51}\) Moreover, the court stressed the circumstantial fact

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\(^{42}\) See supra note 16.


\(^{47}\) See Zoja, 12 Comm. Mkt. L.R. app. at D57.

\(^{48}\) C.c. art. 2359 (Italy), cited in Zoja, 12 Comm. Mkt. L.R. app. at D56.

\(^{49}\) Id.

\(^{50}\) See Zoja, 12 Comm. Mkt. L.R. app. at D57.

that five of the ten members of Istituto’s management board were representatives of CSC, and that the president of CSC was active as chairman of Istituto’s board. Upon these facts and inferences, the court concluded that CSC and Istituto had, for all judicial purposes in the matter at hand, acted as a single entity in denying Zoja access to its product:

As regards the market in nitropropane and its derivatives the conduct of CSC and Istituto has thus been characterized by an obviously united action, which, taking account of the power of control that CSC had over Istituto, confirms the conclusions in the decision that as regards their relations with Zoja the two companies must be deemed an economic unit, and that they are jointly and severally responsible for the conduct complained of.

It is important to note that the Court of Justice upheld jurisdiction over CSC despite the absence of any evidence that CSC had actually influenced Istituto’s actions towards Zoja, or that Istituto had failed to act as an independent legal person. Thus, the standard of proof of actual, as opposed to formal, control required by ICI, and the comparatively weaker standard of Continental Can, were further eroded by Commercial Solvents. In place of even the cursory consideration of actual control evidenced in the first two of these cases, Commercial Solvents relied almost exclusively on inferences from the circumstances surrounding the formal parent-subsidiary relationship. The decision indicated the Court of Justice’s bold willingness to invoke the economic entity theory as a ground for jurisdiction over non-Community parent multinationals predicated solely upon the parent’s position as majority owner of the subsidiary. Ownership, by this reading, equals control. And parental control over a Community subsidiary becomes the determinative factor in justifying the Community’s assertion of jurisdiction over non-Community parent enterprises.

The effect of this shift in the standard of proof required for the assertion of jurisdiction has been to create a situation in which the Commission may petition to regulate foreign multinationals with majority investments in Community enterprises on what clearly amounts to a per se basis. The mere creation of a parent-subsidiary relationship appears sufficient to confer the economic unit status upon what are

L.R. at 343.

53 Id. at 226, 246, 13 Comm. Mkt. L.R. at 313, 336.
54 Id. at 254, 13 Comm. Mkt. L.R. at 344.
traditionally conceived of as independent legal personalities.\textsuperscript{55} Moreover, this relationship is taken by the EEC as sufficient to allow the EEC to "locate" an otherwise foreign enterprise within its jurisdictional borders.\textsuperscript{56} As one commentator has put it, parent corporations, regardless of their domicile and lack of other connections with the EEC, are "put on notice" that use of the subsidiary form of business within the Common Market subjects them \textit{per se} to the full antitrust jurisdiction of the EEC.\textsuperscript{57}

Recent developments in the EEC have reaffirmed the presumption of parental control, with its attendant jurisdictional consequences. In both \textit{United Brands Co. v. EEC Commission}\textsuperscript{58} and \textit{Hoffmann-La-Roche & Co. v. EEC Commission},\textsuperscript{59} the Court of Justice upheld the Commission's assertion of jurisdiction over the non-Community multinationals based exclusively on the parents' relationships to wholly-owned majority or Community subsidiaries.\textsuperscript{60} More recently, in \textit{Allgemeine Elektricitäts-Gesellschaft AEG-Telefunken AG v. EEC Commission},\textsuperscript{61} the court held explicitly that the Commission may presume that a parent company, in this case one based in the Community, actually made use of its potential for control over a wholly-owned Community subsidiary, regardless of whether factual or circumstantial evidence to that effect exists:

As AEG has not disputed that it was in a position to exert a decisive influence on [the distribution and pricing policy of] its subsidiaries, consideration must still be given to the question whether it actually made use of this power. However, such a check appears superfluous in the case of TFR [AEG's subsidiary, Telefunken Fernsch- und Rundfunk GmbH] which, as a wholly-owned subsidiary of AEG, necessarily

\textsuperscript{55} See U. Toepke, \textit{supra} note 26, at 101.
\textsuperscript{56} Id.
\textsuperscript{60} See U. Toepke, \textit{supra} note 26, at 101. Toepke notes that neither of the parent companies raised jurisdictional arguments in their defense before the Court of Justice. He takes this as strong evidence that the Commission's approach to the economic entity theory has been accepted by foreign companies operating through subsidiaries in the territory of the EEC, if not by theorists of international law. Id.
follows a policy laid down by the same bodies as, under its statutes, determines AEG’s policy.\textsuperscript{62}

Further evidence of the EEC’s move towards justifying its regulation of foreign companies through the invocation of the economic entity test on a \textit{per se} basis can be found in the proposed Vredling Directive.\textsuperscript{63} This regulation, if ratified, would require a multinational parent corporation, defined as a majority owner of a Community subsidiary, to disclose annually a record of the activities of the parent corporation and its subsidiaries, as well as to tender to the Commission advance notice of any business decisions that might have serious consequences for the employees of its Community subsidiaries.\textsuperscript{64} Similarly, the Commission’s Seventh Directive requires parent multinationals to submit annual financial information concerning the condition of their subsidiaries, regardless of where the registered offices of these subsidiaries are located.\textsuperscript{65} The proposed European company law\textsuperscript{66} provides a further demonstration of the EEC’s readiness to predicate jurisdiction solely upon the basis of intercorporate affiliation. Under the terms of the proposed law, the legal concept of “control” is explicitly equated with the ownership of a majority of the shares of a company.\textsuperscript{67} In this respect, the proposed law echoes the Italian company law that formed the basis of Commercial Solvents.\textsuperscript{68}

3. \textbf{ECONOMIC ENTITY THEORY UNDER INTERNATIONAL LAW}

The traditional foundations of a nation’s jurisdiction to prescribe—territoriality and nationality\textsuperscript{69}—remain those upon which states continue most frequently to base their claims of legitimacy in the international forum for their laws and regulations.\textsuperscript{70} Nevertheless, in deter-

\textsuperscript{62} AEG, 1983 E. Comm. Ct. J. Rep. at 3198, 41 Comm. Mkt. L.R. at 395. Note that AEG is a West German-based multinational and so does not qualify as a non-Community parent.


\textsuperscript{64} Id.


\textsuperscript{68} \textit{See supra} note 47 and accompanying text.

\textsuperscript{69} \textit{Restatement, supra} note 1, § 402.

\textsuperscript{70} Id.
mining the scope of the application of these principles, nations and their courts have taken an increasingly modern, flexible approach when justifying their assertion of jurisdiction over foreign legal actors, often invoking principles of reasonableness and fairness vis-a-vis the claims of other jurisdictions and the multinational corporations subject to regulation.\textsuperscript{71} The United States, for example, has continued to embrace the principle of reasonableness in the extraterritorial application of its antitrust laws.\textsuperscript{72} The EEC, reflecting its established favor of \textit{per se} enforcement of its competition laws,\textsuperscript{73} has, as discussed above,\textsuperscript{74} developed a rather rigid interpretation of its jurisdictional powers under the economic entity theory.

From its first articulation in the \textit{ICI} case,\textsuperscript{75} the economic entity theory as developed by the Court of Justice and the Commission has been taken to task by theorists of international law. The theorists' challenge rests on the assumption that international law requires that a state not presume, without detailed inquiry into the actual facts of the parent-subsidiary relationship, that ownership is equal to effective control.\textsuperscript{76} Indeed, it appears that the legitimate invocation of jurisdiction by means of the economic entity theory was originally considered by almost all commentators on international law who addressed the issue to require a careful examination of the actual degree of control exercised by the foreign parent over its Community subsidiary. The following statement of the International Law Association contains a direct critique of the economic entity test as applied by the EEC:

\begin{quote}
The test in each case is whether the parent company is so directly and intimately connected with the conduct of the subsidiary that it is proper to regard the conduct of the subsidiary as that of the parent company as well. This may well involve an exhaustive examination of the general relationship
\end{quote}

\textsuperscript{71} \textit{Restatement}, supra note 1, Introductory Note at 187. The \textit{Restatement} explicitly adopts the principles of reasonableness in the assertion of extraterritorial jurisdiction to prescribe. See § 402.


\textsuperscript{73} See supra notes 53-67 and accompanying text.

\textsuperscript{74} Id.


\textsuperscript{76} Most of these theorists objected to the lack of inquiry into the actual degree of control exercised by the parent over its Community subsidiary. See Allen, \textit{The Development of Economic Community Antitrust Jurisdiction over Alien Undertakings}, in \textit{Legal Issues of European Integration} 35 (1974); Griffin, supra note 12; López-Bartola & Myers, supra note 32, at 393.
between the two related companies not confined to the particular conduct which has led to the institution of anti-trust proceedings. However, apart from cases where the subsidiary can be readily characterized as a tool of the parent company, we would doubt whether it could often be said that a parent company had acted within the territory of the prescribing State through the medium of its subsidiary.\(^77\)

Another, more recent, critique of the EEC's application of the economic entity test can be found in the American Law Institute's revised draft of the *Restatement of the Foreign Relations Law of the United States*.\(^78\) Subsection 2(a) of the draft recognizes that jurisdiction to prescribe may legitimately be based on intercorporate affiliation when states seek to exercise jurisdiction over foreign subsidiaries of corporations organized under their laws, but § 414, comment h and reporter's note 2, make clear that the exercise of jurisdiction over a foreign parent on the basis of the presence of a subsidiary remains highly controversial.\(^79\)

4. **Economic Entity Theory: A Jurisdictional or Antitrust Device?**

Limited liability of shareholders for the acts of the corporation is perhaps the central characteristic of the modern corporation.\(^80\) Nevertheless, it is quite clear that the general principle of limited investor liability has often been violated by courts seeking legal remedies for aggrieved creditors.\(^81\) Holding shareholders liable for the acts of the corporate entity in this manner has been given the colorful description "piercing the corporate veil."\(^82\)

By analogy to this traditional doctrine of corporate law, commentators on the EEC's use of the economic entity theory have described its


\(^78\) RESTATEMENT, supra note 1.

\(^79\) Id. §§ 2a, 414 comment h, 414 reporter's note 2.

\(^80\) See R. CLARK, CORPORATE LAW 15-21 (1986). Clark suggests that the development of corporate personality is one of the law's "most economically significant contributions to business life." Id. at 15.

\(^81\) See generally id. at 71-86; Berle, The Theory of Enterprise Entity, 47 COLUM. L. REV. 543 (1947); Easterbrook & Fischel, Limited Liability and the Corporation, 52 U. CHI. L. REV. 89 (1985). Courts have been particularly willing to remove the benefits of limited liability in cases of abuse of corporate personality or other illegal activity on behalf of shareholders. See H. HENN & J. ALEXANDER, LAWS OF CORPORATIONS § 148 (3d ed. 1983).

\(^82\) See generally Krendl, Piercing the Corporate Veil: Focusing the Inquiry, 55 DEN. L. J. 1 (1972).
effects as "piercing the corporate veil, Community style." Indeed, case law analysis demonstrates that both the Commission and the Court of Justice believe that the economic entity theory is simply an instance of "veil-piercing"; the separate legal personality of the Community subsidiary is ignored in order to reach its corporate shareholders. Nevertheless, the EEC's conception of the economic entity theory is essentially misleading.

The traditional application of the doctrine of "piercing the corporate veil" was to achieve just legal remedies in disputes over which the state already had legitimate jurisdictional powers. The doctrine had nothing to do with the initial assertion of jurisdiction. Indeed, courts that applied the doctrine did so in order to distribute liability for corporate acts among those over whom the state's legal jurisdiction already existed. If the corporate veil is to be effectively pierced, there must exist a legal person on the other side of the veil who has been previously subject to the jurisdiction of the state (and who has thereby previously recognized the jurisdiction of the state and been recognized by the state as subject to its jurisdiction). Without this prior jurisdiction, there can be no veil—that is, no legally granted fiction of separate corporate personality—to be lifted. The initial bestowal of the legal fiction itself requires the existence of jurisdiction over the subject of the bestowal. Only from this perspective does it make sense to assert that the sovereign state may reach behind the veil to subject the shareholder to liability for acts of the corporation.

While the concept of piercing the veil certainly makes legal and economic sense as a judicial remedy, the EEC's assertion that the economic entity test can itself serve as a means of gaining jurisdiction over a foreign corporation not otherwise subject to its laws is patently mistaken. The EEC is, in effect, putting the cart of prescriptive authority before the horse of jurisdiction.


84 See supra text accompanying notes 19-67. The International Court of Justice has made clear that it understands the economic entity theory in a similar fashion. In Barcelona Traction, Light & Power Co. (Belg. v. Spain), 1970 I.C.J. 3, that court opined that the doctrine of piercing the corporate veil is applicable in the international legal setting.

The judicial act of piercing the corporate veil of limited liability is predicated upon the notion that public policy considerations should prevail against principles of corporate law: the creation of the legal fiction of limited liability is a privilege granted to shareholders by the sovereign and may be disregarded if abused. See R. Clark, supra note 79, at 71-90; H. Henn & J. Alexander, supra note 80, § 146.

85 See supra note 80 and accompanying text.

86 See Easterbrook & Tischel, supra note 80; Berle, supra note 80.
5. Economic Entity Theory, International Law, and Economic Effects

How can the EEC's practice of asserting jurisdiction through the economic entity test be reconciled with the principles of international law? Two approaches suggest themselves. The first, based upon civil law jurisdictional principles, seems of little practical use but will be discussed for the insight it lends into the EEC's conception of its jurisdictional powers. The second approach rests upon the concept of effects-based jurisdiction. This approach is gaining international acceptance as a principle of jurisdiction to prescribe and has frequently been employed by several jurisdictional areas, including the United States and the EEC itself. Indeed, this Comment posits, the economic entity test is best understood as a misguided application of the effects principle rather than as an alternative method of obtaining jurisdiction.

5.1. Civil Law In Rem Jurisdiction

It is possible to view the process involved in the EEC's assertion of jurisdiction over the non-Community parent multinational as based upon the civil law principle of in rem jurisdiction. According to this principle, personal jurisdiction may be achieved as a result of subject matter jurisdiction. By this logic, the EEC obtains jurisdiction over the parent multinational by dint of its subject matter jurisdiction over alleged infringements of its competition laws, regardless of the domicile of the defendant.

While this procedure might be considered a legitimate basis for the EEC's assertion of jurisdiction within its territory, it begs the issue of the legitimacy, under international principles of law, of the Community's extraterritorial application of its competition laws. The Com-

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87 See infra text accompanying notes 88-93.
88 See infra notes 108-10 and accompanying text.
89 See Filegar & Helling, supra note 56, at 11-5.
91 This assertion of jurisdiction does not necessarily mean that the state will be able to enforce its judgments abroad; the validity of a state's jurisdiction to enforce is determined by other issues. See generally Restatement, supra note 1, Introductory Note pt. IV. In fact, the enforcement of Commission and Court of Justice decisions has so far been limited to enforcement actions within the territory of the EEC. Since operation of the economic entity theory is predicated upon the presence of a subsidiary within the EEC—the assets of which are therefore available for satisfaction of EEC judgments—the Community has so far succeeded in establishing a deterrent upon the anticompetitive behavior of parent companies. See Lopez-Balboa & Myers, supra note 32, at 384; Filegar & Helling, supra note 56, at 11-9.
munity must still rely upon the principles of international comity and upon international and bilateral treaties to assert enforcement and prescriptive jurisdiction over persons outside its territories.

5.2. The Effects Test as a Basis for Jurisdiction over the Multinational Parent

One plausible explanation for the Court of Justice's use of the economic entity theory in the ICI case was the court's desire to avoid the international controversy that might have resulted from reliance on an effects-based assertion of jurisdiction. The Commission and the court have, however, used the effects doctrine rather frequently to establish jurisdiction over foreign corporations. Moreover, whatever the state of international law at the time, it now seems clear that the effects-based criterion has gained general acceptance as a means of asserting extraterritorial jurisdiction over foreign corporations when such jurisdiction is "reasonable." Indeed, a recent survey noted that the EEC Commission, most European countries with antitrust laws, the United

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98 The standard definition of comity is taken from the 1895 case Hilton v. Guyot, 159 U.S. 113, 163-64 (1895):

"Comity", in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

For an authoritative list of the sources of international law, see Restatement, supra note 1, § 102.

94 See Filegar & Helling, supra note 56, at 11-3.

95 Norton, The European Court of Justice Judgment in United Brands: Extraterritorial Jurisdiction and Abuse of Dominant Position, 8 Den. J. Int'l L. & Pol'y. 379, 388-92 (1979); Lopez-Balboa & Myers, supra note 32, at 383. The principle of the effects test is embodied in the first Restatement of the Foreign Relations Law of the United States § 18(b) (1965), as well as in the revised Restatement, which provides that "a state has jurisdiction to prescribe with respect to . . . conduct outside its territory that has or is intended to have substantial effect within its territory." Restatement, supra note 1, § 402(1)(c).

96 See infra text accompanying notes 98-110 for examples of the use of the effects doctrine.

97 See Stockmann, Foreign Application of European Antitrust Laws, in Anti-trust and Trade Policy in the United States and the European Community 248 (B. Hawk ed. 1985); United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945); Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597 (9th Cir. 1976). The Restatement takes the position that "a state may exercise jurisdiction based on effects in the state, [but only] when the effect or intended effect is substantial and the exercise of jurisdiction is reasonable . . . ." Restatement, supra note 1, comment d. See also International Law Ass'n, supra note 76, at 138-39 (articulating similar guidelines for the legitimate application of the effects test as a means for establishing extraterritorial jurisdiction).
States, and a number of non-European states claim the right to exercise extraterritorial antitrust jurisdiction by virtue of an effects test.\textsuperscript{98}

5.2.1. The Foundations of an Effects Test in the EEC

While no explicit provision in the EEC’s antitrust laws provides for extraterritorial application on the basis of the effects principle, both Articles 85 and 86 of the Treaty of Rome prohibit anticompetitive behavior that “affects” the Common Market and place no definite territorial limit upon their reach.\textsuperscript{99} Thus, it seems that the drafters of the Treaty of Rome intended to give the Commission broad discretionary powers in applying the Community’s competition laws through the invocation of the effects principle. Indeed, in its first decision under the Community’s competition law,\textsuperscript{100} the Commission relied upon an inquiry into the effects caused by an exclusive license in the Common Market to grant the agreement a negative clearance.\textsuperscript{101} Similarly, the Commission’s original decision in the ICI case\textsuperscript{102} was based upon an application of the effects doctrine as a means of obtaining jurisdiction over a non-Community parent:

This decision is binding on all enterprises that took part in the concerted practices, irrespective of whether or not they were established within or outside of the Common Market. Under Article 85(1) of the Treaty setting up the EEC, all agreements between firms, and all concerted practices likely to affect trade between Member States and which have the object or effect of preventing, restricting or distorting competition within the Common Market shall be deemed to be inconsistent with the Common Market and shall be prohibited: accordingly, the rules of competition of the Treaty applied to all restraints of competition that produced effects covered by Article 85(1).\textsuperscript{103}

\textsuperscript{98} The list of countries includes Austria, Belgium, Denmark, Finland, France, Germany, Greece, Luxembourg, Norway, Portugal, Spain, Sweden, and Switzerland. It should be noted, however, that not all of these jurisdictions have actually exercised effects based jurisdiction over foreign enterprises. See Stockmann, supra note 96, for a full discussion.

\textsuperscript{99} Supra note 16.

\textsuperscript{100} Re Crossflex, 7 J.O. COMM. EUR. 915, 3 Comm. Mkt. L.R. 237 (1964).

\textsuperscript{101} Id. at 916-17, 3 Comm. Mkt. L.R. at 238-39.


\textsuperscript{103} ICI, 1972 E. Comm. Ct. J. Rep. at 662, 11 Comm. Mkt. L.R. at 629. See also COMMISSION OF EUROPEAN COMMUNITIES, SIXTH REPORT ON COMPETITION POLICY point 36 (1974) (stating that the Commission has jurisdiction to act against a non-Community corporation whenever the effects of that corporation’s restrictive practices

https://scholarship.law.upenn.edu/jil/vol11/iss2/10
While the Commission has consistently adhered to its practice of claiming extraterritorial jurisdiction on the basis of the effects test,\(^4\) the Court of Justice has just as steadfastly avoided ruling on the validity of the effects doctrine, preferring instead to decide appeals under the standard of the economic entity test.\(^5\) The analysis offered by this Comment suggests, however, that the Court of Justice’s embracing of the economic entity test demonstrates the court’s inability to truly avoid reliance upon an effects-based doctrine. Rather than serve as a complementary alternative to the effects test,\(^6\) the economic entity theory itself is better understood as founded upon the effects felt in the Common Market as a result of the non-Community parent enterprise’s ownership of a Community subsidiary.\(^7\) The Court of Justice’s application of the economic entity theory as a jurisdictional basis is revealed in this analysis as a case of judicial legerdemain, and it should be explicitly recognized as such.\(^8\)

5.2.2. The Effects Test in International Law

If one accepts that the EEC’s economic entity theory is best understood as a variation of the effects doctrine, it follows logically that the reach of the Community’s extraterritorial jurisdiction should be similarly limited. It is reasonable to believe that the EEC may exercise legitimate extraterritorial jurisdiction under the economic entity test, so understood, only in those instances where the activities of the parent corporation create a substantial intended or actual effect within the Common Market.\(^9\) Such jurisdiction must also, of course, be reasonable under the principles of international law.\(^10\)

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\(^4\) See Stockmann, supra note 96, at 260; Re French and Taiwanese Mushroom Packers, 18 O.J. EUR. COMM. (No. L 29) 26, 15 Comm. Mkt. L.R. app. at D83 (1975). The standard of proof required by the Commission has evolved in recent years. It now appears that, in addition to its use of the economic effects test, the Commission will assume jurisdiction over non-Community companies when their activities have “a direct and appreciable effect on competition and trade within the EEC.” COMMISSION OF EUROPEAN COMMUNITIES, FOURTEENTH REPORT ON COMPETITION POLICY point 60 (1984).

\(^5\) The court has been roundly attacked for its failure to rule on the validity of the effects doctrine as a basis for jurisdiction in the EEC. See Allen, supra note 75, at 58-59 (stating that the court’s refusal to address the issue represents the “easy way out”).

\(^6\) See Filegar & Helling, supra note 56, at 11-34.

\(^7\) See supra text accompanying notes 94-97.

\(^8\) Id.

\(^9\) See supra note 96 and accompanying text.

\(^10\) Id. See also RESTATEMENT, supra note 1, § 402(1)(c) (proposing that effects must be “substantial”). The requirement of reasonability is embodied in RESTATEMENT, supra, § 403 (dealing with “any of relevant factors to be considered in determin-
It thus appears that the EEC’s movement towards the per se presumption that mere share ownership of a Community company is equivalent to control of that company fails to meet the standards of the effects test.\textsuperscript{111} The application of the effects doctrine as a principle of jurisdiction arguably requires a detailed analysis of the actual or intended effects of the parent’s actions within the Common Market. Indeed, the lack of such detailed inquiry into the actual parent-subsidiary control relationship has formed the basis of most attacks on the EEC’s use of the economic entity theory.\textsuperscript{112}

From the point of view presented by this Comment, the critical commentators are correct in focusing on the degree of actual control as dispositive. They have, however, been misled by the EEC’s analysis into treating its assertion of jurisdiction as predicated upon a principle other than the effects doctrine.\textsuperscript{113} The scholarly arguments against application of the economic entity theory are thus best seen as advancing the debate over whether “ownership” always implies “control” and, in turn, what degree of “control” may be said to make a substantial “effect” upon the Common Market for the purposes of international law.\textsuperscript{114} Insofar as the economic entity theory has been invoked by the EEC as a means of avoiding the limitations imposed by international law on the power of nations to prescribe the actions of foreign multinationals,\textsuperscript{115} that theory must be recognized as illegitimate.

6. Suggested Approach

In light of both the increasing acceptance of effects-based jurisdiction and the preceding analysis of the Community’s application of the economic entity test, this Comment recommends a two-step modification of the EEC’s procedure in applying its competition laws to non-Community parent multinationals. The first step would be explicit recogning reasonability).

\textsuperscript{111} Id.

\textsuperscript{112} See supra text accompanying notes 68-78.

\textsuperscript{113} See, e.g., Mann, The Dyestuffs Case in the Court of Justice of the European Communities, 22 INT’L & COMP. L.Q. 35, 48-50 (1973) and Lopez-Balboa & Myers, supra note 32 (both interpreting the EEC decision as dependent upon the parent company’s status as a full or majority shareholder in the subsidiary).

\textsuperscript{114} The question of what constitutes a “substantial” effect is defined in international law by reference to the “reasonableness” of the assertion of a nation’s jurisdictional powers; the two criteria are closely intertwined. Reasonableness, in turn, is defined as the limit placed upon a nation’s exercise of extraterritorial jurisdictions so as to minimize possible multinational conflicts of jurisdiction. RESTATEMENT, supra note 1, § 403 reporter’s note 3. See also Mann, supra note 112, at 45; Allen, supra note 75, at 40.

\textsuperscript{115} See Filegar & Helling, supra note 56, at 11-37.
ognition by the Commission and the Court of Justice of their reliance upon an economic effects test for prescriptive jurisdiction. This move should include the abandonment of the use of economic entity theory language and concepts in the court's analysis of the bounds of the EEC's jurisdiction.116

The second step would require the Commission and the Court of Justice to undertake a detailed inquiry into the anti-competitive economic effects felt in the Common Market as a result of the parent enterprise's activities, including the parent's ownership and extent of control of the Community subsidiary.117 Only where it can be shown that the Common Market effects of the parent's action are "substantial" should the Commission's assertion of jurisdiction be upheld.118

Taken together, these measures should both enable the EEC to effectively pursue the goals established by the Treaty of Rome119 and to ensure foreign multinationals that they will not be subject to overbroad jurisdiction from the standpoint of international law.120

Explicitly adopting the two-step effects doctrine would prove beneficial to both the EEC and foreign multinationals with Community subsidiaries. In the first place, the move to an explicitly recognized effects-based principle of jurisdiction would effectively allow the EEC to enforce its competition laws in a manner more clearly consistent with international law.121 Second, effective competition law enforcement requires more than the mere ability to regulate market players. Care must be taken to ensure not only that the consequences of anti-competitive or market-distorting acts are minimized, but also, equally important, that the antitrust laws do not discourage companies from furthering their healthful, pro-competitive activities.122 By moving from a situation in which jurisdiction is asserted on a largely per se basis to one which requires an effective inquiry into the actual nature of the questioned activity's economic effects, this second consideration is given its due.123

116 See supra Part 5.2.
117 This approach has been suggested by other commentators, who have, however, treated it as a means of "adjusting" the economic entity doctrine to the tenets of international law. See Mann, supra note 115, at 49; Allen, supra note 75, at 60; Lopez-Balboa & Myers, supra note 32, at 388-90. This Comment suggests, however, that the economic entity theory is fatally flawed.
118 This suggested approach is similar to the one adopted by the United States in Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597 (9th Cir. 1976).
119 Supra note 8.
120 See B. Barack, supra note 32, at 386.
121 See supra text accompanying notes 111-17.
The approach proposed by this Comment would not only promote economic efficiency within the Common Market, but would also increase foreign capital investment in the EEC by giving greater content to the limited liability of foreign parent multinationals that allow their Community subsidiaries to operate in accordance with their independent legal status. By imposing upon the EEC the burden of proof necessary to establish jurisdiction under the effects test, truly non-controlling parent corporations would be essentially free from EEC jurisdiction.

The reduced risk of liability for the actions of an independent subsidiary should lead to an increased willingness to invest in the EEC. Risk of liability is viewed as a cost by the investor; the lower the risk, all other things being equal, the greater the incentive to invest. Moreover, holding foreign corporations liable for the acts of their affiliated Community companies places them at a competitive disadvantage relative to unaffiliated firms. It thereby serves as an additional barrier to investment and capital formation in the Community.

By focusing upon the actual economic effects of a parent multinational’s control, rather than looking solely to ownership as the basis for imposing liability, the EEC would effectively decrease the expected costs of operating a Community subsidiary for those foreign parent enterprises that allow their subsidiaries to operate independently. At the same time, the EEC could ensure that it will be able to exercise jurisdiction to curb the possible anticompetitive behavior of “controlling” parent multinationals.

7. CONCLUSION

The economic entity doctrine was developed by the EEC as a means of asserting jurisdiction over foreign multinational parent enterprises having affiliated companies within the Common Market. The doctrine affords a way to avoid recourse to the then-controversial economic effects principle of extraterritorial jurisdiction. Careful analysis

\[\textit{See Easterbrook \\& Fischel, supra note 80, at 93-97 (providing a full discussion of the economic justifications for limited investor liability). See also R. Clark, supra note 79, at 8-10 (maintaining that limited liability is crucial to the capital formation process).}\]

\[\textit{See Easterbrook \\& Fischel, supra note 80, at 111.}\]

\[\textit{It has recently been suggested that the EEC is now ready to enter into a period of greater economic analysis of the effects of its application of Community competition law. This has been called a “sure sign of the maturity of the system.” Verstrynge, Current Antitrust Policy Issues in the EEC: Some Reflection on the Second Generation of Competition Policy, in ANTITRUST AND TRADE POLICY IN INTERNATIONAL TRADE 673, 678 (B. Hawk ed. 1984).}\]
of the EEC's application of the economic entity theory reveals that it is a variation on the effects doctrine, rather than an alternative viable under international law.

Economic analysis and consideration of the current state of international law principles suggest that the EEC should explicitly adopt an effects-based method of jurisdiction over foreign multinationals, along with the currently accepted standards for its application. Such an evolution of EEC jurisdictional law would allow the Community to effectively pursue those non-Community enterprises that have actively caused anti-competitive effects within the Common Market, while promoting increased foreign investment within its territory. This change would inure to the benefit of international trade, the Community itself, and foreign multinationals interested in investing within the EEC.