JURISDICTIONAL STANDARDS UNDER EEC COMPETITION LAW: THE EVOLUTION OF THE ECONOMIC ENTITY TEST

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1. Introduction

This comment examines the jurisdictional standards which the European Economic Community (EEC) employs when applying its competition laws to foreign companies that own subsidiaries operating in the Community. In Imperial Chemical Industries, Ltd. v. Commission of the European Communities [1] (the Dyestuffs case), a 1972 opinion, the Court of Justice of the European Communities (the Court) first applied the “economic entity” test to assert jurisdiction over non-EEC companies [2]. Under this test, the Court claimed jurisdiction by imputing the actions of the EEC-based subsidiaries to their respective foreign parents. By adopting the economic entity test, the Court attempted to avoid the controversy of using an effects-based method of extraterritorial jurisdiction [3]. The Court was, however, criticized for its liberal application of the economic entity test [4]. The basis for this criticism stemmed from the Court’s failure to examine properly the overall control relationship between the parent and its subsidiary before imputing the subsidiary’s actions to its parent [5]. Without this requisite finding of a control relationship, it was difficult to justify viewing the parent and subsidiary as an economic entity.

The cases from 1969 to 1973, as exemplified by the Dyestuffs case, reflect the EEC’s emphasis on the foreign parent; the actions of EEC-based subsidiaries were imputed to their respective parents. This approach was used both by the Court and the Commission of the European Communities (the Commission), the administrative agency empowered to apply the Community’s laws [6]. The use of the economic entity test in these early cases [7] would have been less controversial had the Commission and the Court thoroughly examined the nature of control between the parent and its subsidiary before imputing the subsidiary’s actions to the foreign parent.

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The more recent cases illustrate the EEC's greater sophistication in applying its competition laws to foreign companies [8]. In the cases from 1975 to 1980, the EEC tended to hold the foreign parent liable only when it exerted actual or overall control over its EEC-based subsidiary [9]. This approach created less controversy in the area of international law because the economic entity test was invoked only after a requisite finding of parent control.

The cases from 1980 to present illustrate a shift from suing the parent to suing only the subsidiary [10]. Nonetheless, the practical result is that the parent still feels a deterrent effect because its subsidiary's potential liability affects the parent's overall profitability. Indeed, case analysis suggests that the EEC may be partly targeting its antitrust cases to foreign companies even though they may not be named in the suit. By suing only the subsidiary, the EEC has avoided the controversies of extraterritorial jurisdictional standards while providing foreign companies the incentive to ensure that their EEC-based subsidiaries comply with the Community's competition laws.

Although the Commission has never explicitly noted this shift in focus, this comment will evaluate the changes by which the EEC has applied its competition laws to foreign companies that have EEC-based subsidiaries. The comment begins by discussing the EEC's objectives, the principal competition law provisions – Articles 85 and 86 of the Treaty of Rome, and the roles that the Commission and the Court assume in formulating and applying competition policy and laws. The following section presents the reference points from which to view the evolution of the Community's jurisdictional standards – principles of international law and the Commission's characterization of their application of competition law against foreign companies with EEC-based subsidiaries. Against this background, the EEC case law on competition and the jurisdictional standards that have evolved therefrom are analyzed.

2. Competition law – policy, treaty, and institutions

The European Economic Community (EEC) is a supranational institution which was established in 1957 [11] to promote the formation of one common market [12]. In order to fulfill this broad goal of market integration, the EEC formulated competition laws to prevent the fragmentation of the Community and to protect competition within it. Two of the EEC's institutions, the Commission and the Court, are responsible for interpreting and applying the EEC's competition laws consistently with the Community's objectives.

The manner in which the EEC applies its competition laws to foreign undertakings is influenced by the policies underlying the Community's competition laws, the structure of the competition law provisions, and the characteristics of the Commission and the Court. Analysis of these considerations serves as a useful background from which to study the evolution of the jurisdictional
standards used to bring foreign enterprises within the purview of the EEC's competition laws. Moreover, the flexibility inherent in the Commission's and Court's roles illustrates that the means of implementing competition laws are susceptible to change.

2.1. Policy

Application of the EEC's competition rules is influenced by policy considerations [13]. Because an important focus of the Community's antitrust laws is to preserve competition only insofar as it serves the other aims of the EEC [14], the underlying tenets of these antitrust provisions shed light on the evolution of standards used to gain jurisdiction over foreign undertakings.

Three policies buttress the EEC's competition rules. First, the Treaty provisions are intended to further the EEC's objective of integrating the economies of the member states by establishing a common market among the member states [15]. By creating a common market, the EEC can "promote throughout the Community a harmonious development of economic activities [and] a continuous and balanced expansion..." [16]. One commentator characterized this objective more poignantly: "To prosper, Europe must establish itself as an independent counterbalance to the United States" [17]. Thus, a goal of the EEC is to establish Europe as a viable competitor in world markets.

The second policy behind the EEC's competition laws is articulated in Article 3(f) of the Treaty of Rome: "The activities of the Community shall include ... the establishment of a system ensuring that competition shall not be distorted in the Common Market" [18]. In the first of its annual reports on competition policy, the Commission stated that the Community's antitrust laws would serve to protect and promote competition by preventing member states and undertakings from implementing programs and agreements designed to fragment the Common Market [19]. Nevertheless, because the competition laws are also a means of achieving market integration, exemptions are given for reasons of public interest and efficiency [20]. For example, exemptions are granted for joint research and development ventures [21].

The third objective, the encouragement of cooperation among Community firms [22], is closely related to the first two. Indeed, as the Commission stated: "The Commission welcomes cooperation among small and medium-sized enterprises where such cooperation enables them to work more economically and increase their productivity and competitiveness in a larger market" [23]. One commentator noted that this policy is perceived as an anti-American or antimaginational attitude because smaller EEC firms are competitively disadvantaged vis-à-vis larger non-EEC corporations [24]. While the EEC's competition laws cannot fairly be characterized as directed solely against foreign enterprises, an awareness concerning the activities of multinational enterprises has influenced the EEC's approach towards cooperation among Community firms [25].

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Given the foregoing policies, what type of jurisdictional criteria would best fulfill the Community’s objectives? Since the competition laws have a protectionist bias [26], the EEC’s objectives are best served by broadly asserting jurisdiction over foreign undertakings to the extent permitted by international law.

2.2. Articles 85 and 86 of the Treaty of Rome

The main EEC competition law provisions are contained in Articles 85 and 86 of the Treaty of Rome [27]. Article 85(1) prohibits “agreements between enterprises, any decisions by associations of enterprises and any concerted practices which are likely to affect trade between the Member States” [28]. Any arrangement which violates Article 85(1) is declared “automatically void” under Article 85(2). If an agreement violates Article 85(1) but enhances the growth and integration of the Common Market, the Commission may grant an exemption under Article 85(3) [29]. Such exemptions include mergers and contracts among small and medium size firms as well as joint research and development ventures involving foreign undertakings [30]. Article 86 proscribes any abuse of competition by a company in a dominant position that may affect trade between member states [31]. Unlike Article 85, Article 86 does not provide any exceptions.

Although a detailed analysis of Articles 85 and 86 is beyond the scope of this comment, it is important to note that the terms of Articles 85 and 86 neither restrict their applicability to nationals of the member states nor require that the anticompetitive arrangement or behavior occur within the EEC [32]. As a result, the Commission and the Court enjoy wide latitude in developing jurisdictional standards to be used against foreign undertakings to the extent that such standards comport with the principles of the EEC and international law [33].

2.3. The roles of the Commission and the Court of Justice

2.3.1. The Commission

The Commission’s tasks, although largely administrative, are also political, executive and judicial in nature. The Commission fulfills its political function by issuing its annual Report on Competition Policy [34]. These reports present the Commission’s competition policy with respect to general and specific issues, and describe the previous year’s developments in the competition area [35]. In particular, these reports explain how the Commission balances the Community’s interest in promoting a common market and each member state’s interest in protecting national industries.

The Commission fulfills its executive and judicial functions by enforcing Articles 85 and 86 of the Treaty of Rome. It is empowered to initiate
investigations on possible infringements of the Treaty of Rome [36], and in so doing can create standards upon which to analyze competition cases. Moreover, this institution can exercise discretion by granting a party "negative clearance" [37], which is a determination that Article 85(1) does not apply, or by providing an exemption under Article 85(3) [38].

The Commission can also shape competition policy by the size of fines it chooses to levy. In order to deter future violations, the Commission recently stated it will levy larger fines for flagrant violations of the competition laws [39]. Furthermore, the Commission has the general power to make regulations, issue directives and deliver opinions in the furtherance of its responsibilities [40]. These specific examples are instances of the "power of initiative" reserved to the Commission to "... express the general interests of the Community" [41].

2.3.2. The Court of Justice

The Court of Justice has jurisdiction over the Commission's decisions. While the Court largely has upheld the Commission's findings [42], it is important to understand the nature of the Court's judgments in order to appreciate the status of existing jurisdictional standards.

Three aspects are worthy of note. First, the Court's opinions consist of single judgments and dissenting or concurring opinions are not allowed [43]. Perhaps because a consensus is sought, one commentator has observed that the Court's judgments often avoid controversy and lack ratio decidendi [44]. Second, the Court is not bound by the doctrine of stare decisis [45]. Nonetheless, "[l]ike any court, the Court of Justice seeks to be consistent, and to the extent that consistency prevails over the competing pressure to adjust Community law to ever-changing circumstances, the Court's decisions are 'precedents' ... being at most persuasive and never binding upon the Court for the future" [46]. Third, the Court interprets the EEC laws with reference to Community policies [47].

The flexibility inherent in the Commission's and the Court's roles allows these institutions to adopt and change jurisdictional standards in order to best fulfill the Community's objectives while still complying with the limits of international law. The following section will consider what limits international law imposes on extraterritorial jurisdictional standards and what the Commission considers to be the EEC's well-defined approach of claiming jurisdiction over foreign undertakings.

3. Perspectives of extraterritorial jurisdiction: International law and the Commission

To the extent that the EEC must abide by principles of international law [48], it is important to assess the Commission's and the Court's exercise of
jurisdiction over foreign undertakings against principles of international law. In particular, this section will present the foundations and requirements of the economic entity under international law. By studying these issues, the groundwork will be established for analyzing the evolution of jurisdictional standards.

Apart from considerations of international law, there are additional issues raised by the Commission's recent statement on its assertion of jurisdiction over foreign undertakings [49]. The Commission indicated that it considers its exercise of jurisdiction over foreign undertakings valid and stressed that defenses based on the impropriety of the economic entity test would prove futile [50]. Analysis of the issues raised by the Commission's statement is useful in assessing whether its characterization of past events and of future developments accurately depicts the evolution of jurisdictional standards in the EEC.

3.1. Extraterritorial jurisdiction under international law

3.1.1. The economic entity test under international law

Under the economic entity test, the Commission imputes the illegal actions of an EEC-based subsidiary to its parent in order to bring the parent company within the Community's jurisdiction [51]. In order for the economic entity test to be valid in international law, it appears that evidence of actual and overall parent control over the subsidiary is required.

In 1972, the International Law Association (ILA) endorsed the practice of imputing a subsidiary's actions to its parent as a means of claiming jurisdiction in antitrust cases [52]. In its Resolution on the Extraterritorial Application of Restrictive Trade Regulation, the ILA stated, "[a] State has jurisdiction to prescribe rules governing conduct originating outside of its territory if and insofar as such conduct is implemented within its territory by an employee or agent acting within the scope of his authority" [53]. The ILA, therefore, considered the economic entity test as a valid assertion of extraterritorial jurisdiction. However, the ILA observed that the economic entity test must be carefully applied to be consistent with international law:

It is, we believe, important that the separate corporate identity of parent and subsidiary be respected while at the same time we recognize the need to make a realistic and functional assessment of the working relationship between the two. 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 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 [54].
The ILA, therefore, argued that international law requires a state to prove that a parent company systematically controlled its subsidiary before that state can impute the subsidiary's actions to its parent. Moreover, the parent must have overall control apart from the specific allegation which constituted the subsidiary's illegal action.

The International Court of Justice (ICJ) recognized the appropriateness of "piercing the corporate veil" in international law in Concerning the Barcelona Traction, Light and Power Company, Limited [55]. Barcelona Traction was a Canadian holding company which owned subsidiaries operating in Canada and Spain, and was itself majority owned by Belgian shareholders [56]. The Barcelona Traction litigation arose out of bankruptcy proceedings brought against Barcelona Traction in Spain. Belgium argued that the veil of the Canadian incorporation should be lifted to enable the Belgian shareholders to claim the diplomatic protection of the Belgian government [57]. The ICJ rejected Belgium's argument, but stated that, "the process of lifting the veil being an exceptional one admitted by municipal law ... is equally admissible to play a similar role in international law" [58]. Although Barcelona Traction involved the issue of determining the nationality of the corporation, the analysis is similar to that of imputing the actions of a subsidiary to its parent. Both circumstances require inquiries into the true character of the corporation before attributing to it a nationality or responsibility for its subsidiary's actions.

In his Separate Opinion to the Barcelona Traction case, Justice Jessup articulated several representative conditions required for piercing the corporate veil:

To look for the link between a corporation and a State is merely another example of what is now the familiar practice of "lifting the veil" ... [I]n cases which are now very common in the commercial life of the world, the corporation may have various links with more than one State .... International law cannot be oblivious to these corporate links. As already indicated above, they include the place of incorporation, the place of management, the place of operation (probably including employment of labour and payment of taxes), the nationality of the persons (natural or artificial) who exercise control, whether through the board of directors and management, or through stock interests, which not infrequently may exercise control even when a relatively small minority [59].

Justice Jessup, therefore, emphasized factors that must be analyzed in order to establish a genuine link between the parties concerned and the states asserting the claim. By analogy, Justice Jessup's analysis would similarly require evidence illustrating the actual links, or control relationship, between a parent company and its subsidiary. The factors Justice Jessup outlined support the argument that international law demands a showing of actual parental control over its subsidiary before invoking the economic entity standard.
Under the principles articulated by the ILA and Justice Jessup, it appears that overall control is required before imputing the subsidiary's actions to its parent. International law thus recognizes that a state cannot presume a parent's control of its subsidiary based on the parent's majority ownership. In other words, formal owners may be divorced from the actual control of their subsidiaries.

3.2. The Commission's approach to extraterritorial jurisdiction

The Commission’s most recent and thorough policy statement concerning the economic entity test is contained in its Eleventh Report on Competition Policy [60]. This report generates several questions. For instance, has the Commission been free from difficulties and criticisms in applying the economic entity test? Has the Commission called attention to any changes in the way it applies the competition laws to foreign undertakings? Are there any alternative tests available? If so, does the Commission favor any of these tests?

The Commission’s report stated that it would continue to use the economic entity test by imputing the actions of a subsidiary to its parent “in particular where subsidiaries in the common market act on instructions from a decision-making centre located abroad” [61]. The Commission further noted that it had “not experienced any particular difficulties in applying the competition rules to multinationals” [62] and that the economic entity test is so “firmly established in Community case law” that it is futile for a foreign company and its subsidiary seeking to evade the competition laws to pose jurisdictional defenses [63].

In its report, the Commission did not identify any change in how it asserts jurisdiction over foreign undertakings. Moreover, the Commission's statements, prompted by its new policy of imposing substantial fines for flagrant competition law infringements [64], imply that the Commission will not hesitate to sue the foreign parents which control their EEC-based subsidiaries [65].

The following case analysis will evaluate the accuracy of the Commission’s characterizations.

4. The evolution of the economic entity standards

The EEC has changed the manner in which it applies its competition laws against foreign undertakings that have physical contacts within the Common Market. The 1969–1973 cases, Dyestuffs [66], Continental Can [67], and Commercial Solvents [68], developed the economic entity test and reflected the EEC's preoccupation with suing the foreign parent company. Contrary to the Commission’s recent suggestions, the application of the economic entity test
proved controversial in international law because the Commission and the Court did not properly examine whether the parent exercised overall control over its subsidiary before imputing the subsidiary's actions to its parent.

The 1969–1973 cases were followed by two trends. In the cases from 1975 to 1980, *United Brands* [69], *Hoffman-LaRoche* [70], and *Johnson and Johnson* [71], the Commission and the Court held foreign parent companies liable by focusing on the parents' overall control of their respective subsidiaries. This trend evidenced a more rigorous application of the economic entity test and therefore more closely comported with principles of international law [72].

In the cases after 1980 – *Pioneer* [73], *Ford Werke* [74], and *National Panasonic* [75] – the EEC only sued the EEC-based subsidiaries of foreign parents, even though the parent may have been involved. This tactic is effective because the foreign parent still feels the deterrent effect if it must ultimately bear the burden of the fine levied on its wholly-owned subsidiary. As a result, the parents have an incentive to ensure that their subsidiaries comply with the Community's competition laws.

The following analysis reveals that while the foreign parent company may not be named in the antitrust suit, it may well be the target of the EEC proceedings.

4.1. In search of a theory – Dyestuffs, Continental Can and Commercial Solvents

4.1.1. The Dyestuffs Case

In the *Dyestuffs* case [76], the Commission fined six Community, one British and three Swiss manufacturers for conspiring to fix the price of dyestuffs sold within the Common Market [77]. In holding that it has the authority to fine the non-EEC companies, the Commission relied on an effects-based notion of jurisdiction:

This decision is applicable to all the undertakings which took part in the concerted practices, whether they are established within or outside the Common Market. Under Article 85(1) of the Treaty instituting the E.E.C., all agreements between undertakings and all concerted practices which may affect trade between member-States and the object or effect of which is to prevent, restrict or distort competition within the Common Market shall be prohibited as incompatible with the Common Market. The competition rules of the Treaty are, consequently applicable to all restrictions of competition which produce within the Common Market effects set out in Article 85(1). There is therefore no need to examine whether the undertakings which are the cause of these restrictions of competition have their seat within or outside the Community [78].

The Commission, therefore, concluded that it had jurisdiction over the non-EEC companies under an effects-based principle of jurisdiction. Six Community and three non-EEC companies appealed the Commission's decision to the Court [79].
On appeal, the Commission changed its jurisdictional focus, arguing that it has jurisdiction over the foreign companies because each non-EEC parent and its respective Community-based subsidiary formed a single economic unit [80]. As a result, the Commission could impute the actions of each subsidiary to its foreign parent. As an alternative basis of jurisdiction, the Commission also presented an effects test similar to that articulated in its appealed decision.

Two other developments may have affected the Court’s judgment. In response to the Commission’s decision, the United Kingdom presented its position in an aide mémoire which stated that the adoption of an effects doctrine violated principles of international law and that any reliance of an economic entity standard must be substantiated by evidence of a parent’s actual control over its subsidiary [81]. Second, the Advocate-General, an impartial adviser responsible for presenting his opinion of the case to the Court [82], argued that the EEC should adopt an effects test [83]. Indeed, the Advocate-General cited U.S. authorities in supporting the validity of the effects doctrine in international law [84]. Confronted by these various perspectives, the Court adopted the economic entity basis of jurisdiction without referring to the effects doctrine which the Commission and the Advocate-General had espoused and the British had denounced.

In its attempt to avoid using an effects test, the Court abused the economic entity standard by failing to examine the actual control relationship between the parent and its subsidiary [85]. In applying the economic entity test, the Court held:

The fact that a subsidiary has a separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company. Where a subsidiary does not enjoy real autonomy in determining its course of action in the market, the prohibitions set out in Article 85(1) may be considered inapplicable in the relationship between it and the parent company with which it forms one economic unit. In view of the unity of the group thus formed, the actions of the subsidiaries may in certain circumstances be attributed to the parent company [86].

The Court based its findings of control on two factors. First, each non-EEC company was either a full or majority owner of its respective subsidiary [87]. Second, telex messages relating to the first of three price increases were issued to the subsidiaries by their foreign-based parents in the apparent form of an order [88]. The Court further assumed that the last two price increases were ordered by the parents — even though there was no evidence of any communications relating to the last increases: “In the absence of evidence to the contrary, it must be assumed that on the occasion of the [price] increases of 1965 and 1967, the applicant [non-EEC companies] acted in a similar fashion in [their] relations with [their] subsidiaries established in the Common Market” [89].

Under the Court’s formulation of the economic entity standard, there were two possible interpretations of the type of control the parent company must
exercise over its subsidiary: actual control or the potential for control. If the Court intended to prove that the non-EEC companies actually controlled their respective subsidiaries, the Court’s arguments are unconvincing. International law recognizes that formal ownership and actual control are not necessarily synonymous [90]. Similarly, the Court’s assumption that the telex communication between the parents and their subsidiaries indicated control does not prove that the non-EEC companies actually controlled the subsidiaries.

The mere proof that the non-EEC companies were majority owners of their respective subsidiaries is sufficient to establish that the parents had the potential to control their subsidiaries. The standards outlined by the ILA and Justice Jessup, however, suggest that international law requires more than the parent’s potential for control before holding it liable for its subsidiary’s actions [91]. Indeed, as the British government stated in its aide mémoire:

(3) A foreign parent company may not be considered to “carry on business” within the jurisdiction by a subsidiary company, unless it can be shown that the subsidiary is the agent for the parent in the sense of carrying on the parent’s business within the jurisdiction.

(4) The separate legal personalities of a parent company and its subsidiary should be respected. Such concepts as “enterprise entity” and “reciprocating partnership” when applied for the purpose of asserting personal jurisdiction over a foreign company by reason of the presence within the jurisdiction of a subsidiary … are contrary to sound legal principle in that they disregard the distinction of personality between parent and subsidiary [92].

One should note that the use of the economic entity doctrine best served the Community’s interest. Since either the economic entity or effects standards would have led to the same jurisdictional result [93], the Court chose the test which was the least politically sensitive. Moreover, the Court selected the economic entity approach without foreclosing the option of using an effects test in the future. Finally, the application of an economic entity standard obviated any difficulties of personal service or enforcement since the subsidiaries were located in the EEC [94].

4.1.2. Continental Can

The Court upheld the Commission’s use of the economic entity standard in Re Continental Can [95]. Continental Can, a U.S. corporation, owned Europemballage, a Delaware corporation that had offices in Belgium. Europemballage, which controlled 85% of the Common Market’s largest canning company, attempted to acquire a Dutch-based competitor [96]. The Commission found that the attempted merger constituted an abuse of Europemballage’s dominant position under Article 86 because the acquisition would eliminate competition in the canning industry in the Common Market [97]. The Commission based its jurisdictional claim on evidence that Continental Can had financed Europemballage’s purchase of the Dutch competitor and that Europemballage had not
been fully organized when it made its takeover bid [98]. Continental Can Company appealed.

Although the Commission’s decision was reversed due to its failure to define the appropriate market in which Europemballage operated, the Court concluded that the Commission had jurisdiction under the economic entity standard [99]. While the Advocate-General argued that an effects test, as well as the economic entity standard, was applicable [100], the court did not offer any comment on the effects doctrine.

The facts of the Continental Can case demonstrated a greater degree of parental control than those of the Dyestuffs case. Nevertheless, the Court was again criticized for not analyzing whether the parent company exercised actual control over its subsidiary [101]. Moreover, under the formulation of the ILA and Justice Jessup, the facts did not illustrate that the parent exerted overall control over its subsidiary.

4.1.3. The Commercial Solvents case

Laboratorio Chimico Farmaceutico Giorgio Zoja SpA v. Commercial Solvents Corp. [102] (the Commercial Solvents case) represents the Commission’s and the Court’s most liberal application of the economic entity standard. Instituto Chemioterapica Italiano (ICI) was an Italian subsidiary of Commercial Solvent Corporation (CSC), a U.S. company. From 1962 to 1970 ICI was principally responsible for reselling a chemical on which CSC held a worldwide monopoly. In early 1970, Farmaceutica Giorgio Zoja S.P.A. (Zoja), a longstanding Italian customer of ICI, cancelled a supply contract with ICI in the hope of obtaining more favorable terms from other suppliers. When Zoja was unable to find an alternative supplier for the chemical, it contacted ICI to arrange a new supply contract. CSC informed ICI that the chemical would not be available since CSC had stopped distributing the chemical in its raw form to the EEC [103]. Zoja then filed a complaint with the Commission against ICI and CSC alleging abuse of their dominant positions under Article 86 [104].

The Commission found CSC and ICI jointly and severally liable for their violation of Article 86. In claiming jurisdiction over CSC, the Commission relied on the economic entity standard [105]. Although CSC held only 51% of ICI’s voting stock and did not have majority representation on either ICI’s board of directors or executive committee, the Commission summarily concluded that CSC exercised control over ICI [106]. Thus, while the Commission had previously attempted to offer proof of actual parental control, in addition to majority ownership, in Dyestuffs and Continental Can, it merely assumed CSC’s control based on CSC’s majority ownership of ICI.

On appeal to the Court, the Commission presented both the economic entity and effects standards. The Commission’s proposed application of the economic entity test was even broader than the formulation presented in its Commercial Solvents decision. Under the new formulation, the Commission would assume

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control whenever the parent was the majority owner of its subsidiary while still allowing the Commission to demonstrate parental control when the parents were minority shareholders [107]. The Commission also used the effects test as an alternative form of jurisdiction [108]. As one commentator observed: “The resort to this discarded basis of jurisdiction may well indicate a measure of doubt on the Commission’s part concerning the applicability of the [economic entity] theory to this particular case” [109].

The Court affirmed the Commission’s decision and adopted the economic entity test [110]. Once again, no mention was made of the applicability of the effects test. In asserting CSC’s control, the court relied on three factors: (1) that CSC was the majority owner of ICI; (2) that it could be “inferred from the prohibition issued in 1970 by [Commercial Solvents Corp.] to its distributors … that [Commercial Solvents Corp.] was not abstaining from exercising its power of control over Instituto [ICI]”; and (3) that when ICI attempted to acquire Zoja in 1968 and 1969, it was “unlikely that [Commercial Solvents Corp.] played no part” [111]. The Court concluded that CSC exercised control at least with respect to ICI’s relations with Zoja.

The low level of proof that was needed to demonstrate CSC’s control does not satisfy the requirements of actual and overall control. Furthermore, the Commercial Solvents case appeared to suggest that a parent’s potential control over its subsidiary is all that need be demonstrated in the specific circumstance which led the Commission to investigate for possible Treaty violations. Broadly construed, this approach would have enabled the Commission and the Court to claim jurisdiction over any foreign-based enterprise that had a majority-owned subsidiary operating in the Community.

The Commission and the Court, however, did not pursue such a liberal approach [112]. The latest cases reflect these institutions’ greater sophistication in applying the Community’s competition laws to foreign undertakings. Thus, the EEC’s application of the economic entity test has undergone changes which conform with principles of international law articulated by the ILA and by Justice Jessup in the Barcelona Traction case.

4.2. Suing the parents — United Brands, Hoffman–LaRoche, and Johnson and Johnson

In Re United Brands [113] the Commission found United Brands Company, a U.S. enterprise, guilty of abusing its dominant position in the banana market by engaging in discriminatory pricing and distribution practices [114]. United Brands, whose banana division is vertically integrated, owned several subsidiaries operating in the EEC. Applying the economic entity test, the Commission did not attempt to show an actual or potential exercise of control in the particular transaction that constituted the alleged abuse. Nevertheless, the Commission observed that United Brands’ production and distribution opera-
tions were controlled by the company’s New York headquarters and concluded that the subsidiaries “[did] not possess any real autonomy” [115]. United Brands’ majority ownership of eight EEC-based subsidiaries combined with evidence of United Brands’ centrally controlled, vertically integrated operations was sufficient to establish control for the purposes of the economic entity standard.

The Commission’s approach to the economic entity test had therefore changed from that used in the earlier line of cases. In United Brands, a showing of overall control was necessary for the economic entity test, whereas in the earlier cases only evidence of the potential for control or actual control in the specific illegal transaction was necessary [116]. Furthermore, the United Brands approach better satisfied the ILA’s and Justice Jessup’s construction of the economic entity test. The Court affirmed the Commission decision [117] although the issue of extraterritorial jurisdiction was not submitted for review.

The Commission similarly evaluated evidence of the foreign parent’s overall control in Re Hoffman-LaRoche [118]. Hoffman-LaRoche, a Swiss-based pharmaceutical company, was found guilty of violating Article 86 for executing exclusive or preferential agreements in supplying vitamins to the Common Market. The Commission asserted jurisdiction over Hoffman-LaRoche, describing how the parent company directed its eight wholly owned subsidiaries to implement these illegal agreements: “A number of circulars from the parent company of the Roche group to its subsidiaries and minutes of meetings of the officers of the company confirm the main features of the ‘fidelity’ system and clearly show the benefits accruing to Roche” [119]. Although it never explicitly stated so, the Commission was using the economic entity test. The Court upheld the Commission’s findings [120].

Eurim Pharm GmbH v. Johnson and Johnson, Inc. [121] is the most recent case in which the Commission has found a foreign parent company guilty of violating the Community’s competition laws [122]. It is also the Commission’s most cautious use of the economic entity test. The Commission examined the actions of Johnson and Johnson (a U.S. company) and its British, German, and Swiss subsidiaries in their attempts to prohibit the export of laboratory pregnancy tests from England to Germany [123]. This export ban was designed to prevent German dealers from importing the less expensively priced tests from England. The Commission found that all three subsidiaries were knowingly encouraging the export bans while the parent company was merely informed of the “very unpleasant and important problem” [124]. Nevertheless, the Commission found the parent company liable since it did not stop the subsidiaries from engaging in the export ban. This finding indicates that a parent’s tacit approval of its subsidiaries’ actions is sufficient to impose liability under the economic entity test. If the parent alone had been sued in this case, the Commission’s assertion of jurisdiction would have been questionable under principles of international law which require actual control.
by the parent. The Commission, however, avoided this difficulty by holding Johnson and Johnson and its subsidiaries jointly and severally liable for the Article 85 infringement.

From the foregoing case law, it appears that the EEC has changed the way in which it applies the economic entity test. Under the Dyestuffs, Continental Can, and Commercial Solvents line of cases [125], the EEC asserted jurisdiction on the basis of the parent's control or potential for control over its EEC-based subsidiary in the specific incident that constituted the violation. Such an approach, because it did not focus on the actual overall control relationship between the parent and its subsidiary, contrasted with that of the ILA [126]. The United Brands, Hoffman-LaRoche, and Johnson and Johnson cases signaled a trend to the more conservative approach advocated by the ILA.

In subsequent cases, the Commission and the Court pursued an approach to avoid the problems of proving a control relationship under the economic entity test. The following analysis demonstrates that in these cases the EEC did not have to consider the problems of extraterritorial jurisdiction because it only sued the EEC-based subsidiaries of the foreign parents. Nevertheless, the economic consequences of these cases were felt by the parent companies.

4.3. Suing the subsidiaries – Pioneer, Ford Werke, and National Panasonic

In Re “Pioneer” Hi-Fi Equipment [127], the Commission fined Pioneer Electronic NV Antwerp (Pioneer NV), a wholly-owned marketing subsidiary of a Japanese parent company, and German, French, and British exclusive distributors for violating Article 85. The infringement involved arrangements among the three exclusive distributors to prevent the export of Pioneer products from Germany and England to France. Although Pioneer NV had not initiated the arrangements, it had transmitted information and organized sales and marketing meetings which enabled the anticompetitive arrangements to take place. The Commission characterized Pioneer NV's efforts “as an active attempt to prevent parallel imports into France” [128]. The Commission levied substantial fines on Pioneer NV and its exclusive distributors, the largest fine being levied on Pioneer.

In the Pioneer case, the Commission began its practice of imposing larger fines for flagrant violations in order to establish a deterrent effect against future competition law infringements. Although the Court of Justice reduced the fines, it affirmed the Commission's decision [129]. In analyzing Pioneer's involvement, the Court stated:

[It] should be remembered that the purpose of Pioneer [NV], which is a wholly-owned subsidiary of the parent company in Japan, is to import Pioneer equipment into Europe and to organise sales of such equipment. To that end, it attempts to find a distributor in each of the member-States in question, offers it an exclusive distributorship agreement, divides the products imported amongst the national distributors and seeks to co-ordinate their sales efforts, inter alia by holding regular meetings.
Even if those activities do not necessarily confer on Pioneer [NV] a decisive influence on the conduct of each of the distributors, that does not alter the fact that, on account of its central position, it was obliged to display particular vigilance in order to prevent concerted efforts of that kind from giving rise to practices contrary to the competition rules [130].

Given the Court’s reasoning, it is interesting to note that the Commission did not bring suit against Pioneer NV’s parent company. The parent company is always in the central position, ultimately interested in efficiently coordinating responsibilities among its subsidiaries. Under the Dyestuffs, Continental Can and Commercial Solvents line of cases [131], the Commission may well have been successful in a suit against the parent company.

The Commission’s and the Court’s growing sophistication in their application of the Community’s competition laws explains why only the EEC-based subsidiary was sued. If the Commission had pursued the approach formulated in Commercial Solvents, it might have provoked the response that international law requires that a parent company actually control its subsidiary before the subsidiary’s actions can be imputed to the parent [132]. Suing the EEC-based subsidiary allowed the Commission to avoid controversy while still accomplishing its goal of applying the EEC’s competition laws to foreign undertakings. Moreover, although not directly involved, the parent company felt the effects of an adverse judgment against its subsidiary. Any fine levied on the subsidiary will affect its profitability; to the extent that the parent fully owns its subsidiary, the parent will be affected by the fine. Given that the Commission’s fines are now intended to deter future violations [133], the parent company will have a greater interest in ensuring that its subsidiary complies with the competition laws. As a result, this deterrent effect can be accomplished without making the parent company a party in the suit.

In Re Ford Werke AG [134], the Commission issued an interim order requiring Ford Werke AG, the German subsidiary of the U.S.-based Ford Motor Company (“Ford”), to resume its supply of right-hand-drive cars to England. Ford Motor Company Limited, Ford’s British subsidiary, had notified Ford Werke that the export of such cars from Germany would cause revenue losses to Ford Britain. The Commission, after having evaluated the likelihood of an Article 85 violation, entered the interim order. Indeed, the Commission noted: “Ford [Werke] AG itself manufactures the right-hand drive vehicles in question. It achieves ample profits on its sales.... Some loss on profits on the part of Ford AG’s fellow subsidiary, Ford Britain, may have to be accepted” [135]. The Court affirmed the Commission’s use of the interim order [136]. Again, the EEC accomplished its objectives without involving the parent company. Moreover, it appears that the parent company was more involved than the parent in Pioneer. It is difficult to imagine that Ford Werke would have consciously decided to forgo profits had it been operating autonomously.

The Commission found a marketing subsidiary guilty of violating Article 85
for imposing export restrictions on a distributor in Re National Panasonic [137]. National Panasonic U.K. (NPUK) is one of ten EEC-based marketing subsidiaries owned by Matsushita Electric Trading Company Ltd. (MET) of Japan. NPUK prohibited one of its distributors from exporting Panasonic products to other EEC countries which sold the same products at higher prices [138]. While MET was not sued, the suit appears to have been partially directed at MET. First, it is apparent that NPUK imposed the export bans for the benefit of its fellow subsidiaries. This imposition could not have been the design of an autonomous actor. Second, during the Commission’s investigations, MET announced that it was imposing a “code of conduct” on its marketing subsidiaries in an effort to ensure compliance with the EEC’s competition laws. MET’s actions served to reduce the fine levied on NPUK. As the Commission noted:

Such action must be considered a positive step which contributes to an awareness at all levels of the group of the daily impact of competition policy. It tends to ensure that senior management is in a position to control the behaviour of the whole group in the market place and thereby to establish effective internal rules for the compliance with EEC competition law [139].

If the suit had not been directed at MET, its “code of conduct”, imposed after the violation had occurred, would not have served to reduce the fine ultimately levied on NPUK. Once again, the Commission was able to influence the parent company without making it a party to the litigation.

5. Conclusion

The foregoing analysis has evaluated the evolution of the jurisdictional standards used to apply the EEC’s competition laws to foreign undertakings that have contacts in the Community. In the earlier cases [140], the EEC developed the economic entity test to impute the actions of an EEC-based subsidiary to its foreign parent. This exercise of jurisdiction proved controversial because the Commission and the Court did not examine the overall control relationship between the parent and its subsidiary before gaining jurisdiction over the subsidiary [141].

The more recent cases demonstrated a move away from this controversial practice. In suits in which the EEC sued the parent company, the Commission and the Court searched for an overall control relationship before asserting jurisdiction over the parent [142]. In the most recent cases, however, the EEC has sued only the EEC-based subsidiary of the foreign parent, and thus avoided the controversies of extraterritorial jurisdiction [143]. Nevertheless, it appears that the parents are highly vulnerable to these suits because they must ultimately bear the burden of their wholly-owned subsidiaries’ fines. As a
result, foreign parents still have an incentive to ensure that their subsidiaries comply with the EEC’s laws. Given this evolution, it appears that the EEC has changed its jurisdictional approach in order to comply with the principles of international law [144] articulated by the ILA and in the Barcelona Traction case. Nevertheless, this new approach continues to enable the EEC to remedy past violations and deter future infringements of its competition laws.
Notes

[2] Id. at 661–63. See infra text accompanying notes 76–84.


In a recent report, the Commission considered the effects test a valid principle in Community case law:

The Commission was one of the first antitrust authorities to have applied the internal effect theory to foreign companies…. Putting the theory into practice can, it is true, have repercussions outside the Community: but that is not a reason for regarding it as an inadmissible exercise of extra-territorial jurisdiction. To assert the contrary would be tantamount to preventing public or judicial authorities from effectively dealing with competition cases falling within their jurisdiction. Commission of the European Communities, Eleventh Report on Competition Policy 36 (1981) [hereinafter cited as “Eleventh Report”].

The Court has not formally ruled on the validity of the effects test. Nevertheless, it appears that the Commission will continue to use the effects test in circumstances when the foreign company that has violated the EEC’s competition laws has no subsidiary operating in the Community.


[5] See infra text accompanying notes 76–92. The International Law Association (ILA) argued that international law requires that the parent company must exert overall control over its subsidiary before imputing the subsidiary’s actions to its parent. Moreover, the parent’s control must exist outside of the specific incident which constituted the breach. Int’l L. Ass’n, Report of the Fifty-fifth Conference Held at New York, August 21 to August 26, 1972, at 107, 171–72 (1974) [hereinafter cited as Report of the Fifty-fifth Conference]. See infra notes 52–54 and accompanying text.


Jurisdictional standards under EEC competition law


[12] The European Common Market is comprised of three institutions, each governed by a separate treaty: the European Coal and Steel Community (ECSC), Treaty Instituting the European Steel and Coal Community, 261 U.N.T.S. 140; the European Economic Community (EEC), see supra note 11; and the European Atomic Energy Community (Euratom), Treaty Establishing the European Atomic Energy Community, 29 U.N.T.S. 169.


[14] See infra notes 15–41 and accompanying text. For example, under Article 85(3) of the Treaty of Rome, the Commission may grant exemptions to anticompetitive agreements which still enhance efficiency in the Community.

[15] Article 2 of the Treaty of Rome reads:

It shall be the aim of the Community, by establishing a Common Market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between its Member States.

298 U.N.T.S. at 15.

[16] Id.


These exemptions are permitted under Article 85(3) of the Treaty of Rome, 298 U.N.T.S. at 48. See also infra notes 29–30, 37–38 and accompanying text.


Id. at 8517.

Hawk, supra note 13, at 235.


Articles 85 and 86 provide:

**Article 85**

1. The following shall be deemed incompatible with the Common Market and shall hereby be prohibited: any agreements between enterprises, any decisions by associations of enterprises 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, in particular those consisting in:

   (a) the direct or indirect fixing of purchase or selling prices or of any other trading conditions;
   
   (b) the limitation or control of production, markets, technical development or investment;
   
   (c) market-sharing or the sharing of sources of supply;
   
   (d) the application to parties to transactions of unequal terms in respect of equivalent supplies, thereby placing them at a competitive disadvantage; or
   
   (e) the subjecting of the conclusion of a contract to the acceptance by a party of additional supplies which, either by their nature or according to commercial usage, have no connection with the subject of such contract.

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 practices or classes of concerted practice which contribute 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, and which:

   (a) neither impose on the enterprises concerned any restrictions not indispensable to the attainment of the above objectives;

   (b) nor enable such enterprises to eliminate competition in respect of a substantial proportion of the goods concerned.

**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.

Such improper practices may, in particular, consist in:

(a) the direct or indirect imposition of any inequitable purchase or selling prices or of any other inequitable trading conditions;

(b) the limitation of production, markets or technical development to the prejudice of consumers;
(c) the application to parties to transactions of unequal terms in respect of equivalent supplies, thereby placing them at a competitive disadvantage; or
(d) the subjecting of the conclusion of a contract to the acceptance, by a party, of additional supplies which, either by their nature or according to commercial usage, have no connection with the subject of such contract.

298 U.N.T.S. at 47-49.
[28] Id. at 47-48.
[31] See supra note 27.
[35] Id.; see also Hawk, supra note 29, at 424.
[42] Graupner, supra note 38, at 303; Hawk, supra note 13, at 236-37.


[47] See, e.g., the Court’s decision in Continental Can, which stated:

In order to answer this question [whether Art. 86 applies to changes in the structure of an undertaking], one has to go back to the spirit, general scheme and wording of Article 86, as well as to the system and objectives of the Treaty.

Cited in Brown and Jacobs, supra note 43, at 213. See also supra note 13.


[50] Id. at 39.

[51] See infra notes 60-112 and accompanying text.


[53] Id. at 171.

[54] Id. at 172 (emphasis added).


[56] Id. at 7.

[57] Id. at 12, 129.

[58] Id. at 130.

[59] Id. at 186, 200.


[61] Id. at 37.

[62] Id. at 39.

[63] Id.

[64] Id. at 14, 39.

[65] Cf. infra text accompanying notes 113-40.

[66] See supra note 7.

[67] Id.

[68] Id.


[70] Id.

[71] Id.

[72] See supra text accompanying notes 52-54.


[74] Id.

[75] Id.


[77] Id. at 16-17. At the time of the Dyestuffs case, the United Kingdom was not a member of the EEC.

[78] Id. at 16.


[80] Id. at 632; see also Note, Comment on the ICI-Dyestuffs Case, 14 Harv. Int’l L.J. 621. 627 (1973) [hereinafter cited as Comment on Dyestuffs]; Allen, The Development of European Economic Community Antitrust Jurisdiction Over Alien Undertakings, 2 Legal Issues of European Integration 35, 60 (1974).


[82] Article 166 of the Treaty of Rome provides:
The duty of the advocate-general shall be to present publicly, with complete impartiality and independence, reasoned conclusions on cases submitted to the Court of Justice, with a view to assisting the latter in the performance of its duties as laid down in Article 164.

298 U.N.T.S. at 74.
[85] See, e.g., Griffin, supra note 4, at 391–93; Mann, supra note 4, at 48–50.
[87] Id.
[88] Id. at 663.
[89] Id.
[91] Id.
[93] Griffin, supra note 4, at 391–93.
[94] Allen, supra note 80, at 60; see also Comment on Dyestuffs, supra note 80, at 629.
[96] Id. at 25–27.
[100] Id. at 262–63.
[101] Griffin, supra note 4, at 393.
[103] Id. at 53.
[104] Id.
[105] Id. at 54.
[106] Id.; see Allen, supra note 80, at 66.
[108] Id.
[111] Id. at 253–54.
[119] Id. at 32.
[123] Id. at 21–22.
[124] Id. at 21 (quoting letter of March 22, 1976, from Cilag Schaffhausen).
[125] See supra text accompanying notes 76–112.
[126] See supra text accompanying notes 52–54.
[128] Id.
[130] Id. (emphasis added).
[131] See supra text accompanying notes 76–112.
[133] See supra text accompanying notes 64–65.
[135] Id. at 27.
[138] Id. at 30–31.
[139] Id. at 34.
[140] See supra text accompanying notes 76–112.
[141] See, e.g., supra note 101.

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