

IN THE MATTER OF
INSTITUT MERIEUX S.A.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND
SEC. 7 OF THE CLAYTON ACT

Docket C-3301. Complaint, Aug. 6, 1990—Decision, Aug. 6, 1990

This consent order requires, among other things, a Lyon, France based firm that sells rabies vaccine and inactivated polio vaccine in the United States, to lease a rabies vaccine business—acquired from Connaught BioSciences, Inc.—in Toronto, Ontario, Canada, for at least 25 years, to a Commission-approved lessee. Respondent also is required, for a period of ten years, to obtain FTC approval before acquiring any interest in a company that produces a human vaccine for a disease for which it currently manufactures a vaccine.

Appearances

For the Commission: *Claudia R. Higgins* and *James C. Egan, Jr.*

For the respondent: *William R. Norfolk, Sullivan & Cromwell*, New York City and *Victor Friedman, Fried, Frank, Harris, Shriver & Jacobson*, New York, N.Y.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that the respondent, Institut Merieux S.A. ("Merieux"), a corporation subject to the jurisdiction of the Commission, has offered to purchase all of the voting securities of Connaught BioSciences, Inc. ("Connaught") and such offer, if completed, would violate the provisions of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; that said agreement constitutes a violation of Section 5 of the FTC Act, 15 U.S.C. 45; and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

I. DEFINITIONS

1. For the purposes of this complaint, the following definitions will apply:

a. "*Merieux*" means Institut Merieux S.A., a corporation organized, existing, and doing business under and by virtue of the laws of France with its principal offices at 58 Avenue Leclerc, BP 7046, 69342 Lyon Cedex 07, France, as well as its officers, employees, agents, parents, divisions, subsidiaries, successors, assigns, and the officers, employees, or agents of Merieux's divisions, subsidiaries, successors and assigns.

b. "*Connaught*" means Connaught BioSciences Inc., a corporation organized, existing, and doing business under and by virtue of the laws of Canada with its principal offices at Suite 1500, 55 University Avenue, Toronto, Ontario, Canada, M5J 2H7, as well as its officers, employees, agents, divisions, subsidiaries, successors, assigns, and the officers, employees or agents of Connaught's divisions, subsidiaries, successors and assigns.

c. "*Inactivated polio vaccine*" means a vaccine used to prevent poliovirus disease administered by means of injection.

d. "*Rabies vaccine*" means a vaccine used to prevent or treat rabies disease.

II. THE PARTY

2. Merieux is a corporation organized and existing under the laws of France, with its principal place of business at 58 Avenue Leclerc, BP 7046, 69342 Lyon Cedex 07, France. Merieux's wholly-owned subsidiary, Merieux Institute Inc., organized and existing under the laws of Delaware, has its principal place of business at 7855 N.W. 12th Avenue, Suite 114, Miami, Florida.

3. In fiscal year 1988, Merieux estimates its sales of rabies vaccine at approximately \$5 million in the United States. Merieux is expected to have sales of inactivated polio vaccine of approximately \$1 million in the United States in the first full year that the vaccine is sold.

4. Merieux is, and at all times relevant herein, has been engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

III. THE PROPOSED ACQUISITION

5. On or about September 28, 1989, Merieux offered to purchase all of Connaught's voting securities. The transaction is valued at approximately \$798 million. Merieux is engaged in the manufacture and sale of rabies vaccine, as well as the development of inactivated polio vaccine. Connaught is engaged in the manufacture and sale of inactivated polio vaccine, as well as the development of rabies vaccine. After the acquisition, Merieux will be the dominant firm in the manufacture and sale of both rabies vaccine and inactivated polio vaccine.

IV. TRADE AND COMMERCE

6. A relevant line of commerce in which to analyze the proposed acquisition of Connaught is rabies vaccine. Another relevant line of commerce in which to analyze this proposed acquisition is inactivated polio vaccine.

7. The relevant geographic market is the United States.

V. MARKET STRUCTURE

8. The manufacture and sale of rabies vaccine and inactivated polio vaccine is a highly concentrated market in the United States. In the rabies vaccine market, Merieux is the only firm selling rabies vaccine nationwide with Connaught being one of two potential entrants. In the inactivated polio market, Connaught is the monopolist with Merieux being one of two potential entrants.

VI. ENTRY CONDITIONS

9. Entry into the relevant markets is difficult or unlikely.

VII. COMPETITION

10. Merieux and Connaught are potential competitors in the manufacture and sale of both rabies vaccine and inactivated polio vaccine. This acquisition would make Merieux the dominant firm in each relevant market.

VIII. EFFECTS

11. The effect of the acquisition, if consummated, may be substantially to lessen competition in the relevant lines of commerce in the United States in violation of Section 7 of Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

IX. VIOLATIONS CHARGED

12. The proposed acquisition of Connaught by Merieux violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and would, if consummated, violate Section 7 of the Clayton Act, 15 U.S.C. 18 and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

Commissioners Azcuenaga and Owen dissenting.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of respondent's proposed acquisition of certain voting securities of Connaught BioSciences, Inc., and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Clayton Act and the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Institut Merieux S.A. is a corporation organized, existing and doing business under and by virtue of the laws of France, with its office and principal place of business located at 58 Avenue Leclerc, BP 7046, 69342 Lyon Cedex 07, France.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That for the purposes of this order the following definitions shall apply:

1. "*Merieux*" means Institut Merieux S.A., a corporation organized, existing, and doing business under and by virtue of the laws of France with its principal offices at 58 Avenue Leclerc, BP 7046, 69342 Lyon Cedex 07, France, as well as its officers, employees, agents, parents, divisions, subsidiaries, successors, assigns, and the officers, employees, or agents of Merieux's divisions, subsidiaries, successors and assigns.

2. "*Commission*" means the Federal Trade Commission.

3. "*Connaught*" means Connaught BioSciences Inc., a corporation organized, existing, and doing business under and by virtue of the laws of Canada with its principal offices at Suite 1500, 55 University Avenue, Toronto, Ontario, Canada, M5J 2H7, as well as its officers, employees, agents, divisions, subsidiaries, successors, assigns, and the officers, employees or agents of Connaught's divisions, subsidiaries, successors and assigns.

4. "*Connaught's rabies vaccine business*" means Connaught's dedicated rabies vaccine production facility in Canada and all production technology and know-how related to the purified human diploid cell rabies vaccine developed and currently marketed by Connaught in Canada. As used in this order, "Connaught's rabies vaccine business" shall be construed to include all the results of research and development efforts by Connaught relating to improvements, developments and variants of the rabies vaccine product needed to obtain a product license from the Food and Drug Administration.

5. "*Investment Canada*" means the Agency of the Government of

Canada established pursuant to the *Investment Canada Act* (S.C. 1985, C. 20) of Canada.

II.

It is further ordered, That:

A. Merieux shall lease on a long-term basis for a minimum of 25 years, at reasonable and customary terms, Connaught's rabies vaccine business, within three (3) months from the date this order becomes final, *provided that* the terms of the lease shall include a lump-sum payment under reasonable and customary terms for the existing inventory of Connaught rabies vaccine and shall include a commitment from the lessee to supply rabies vaccine sufficient to satisfy the Canadian demand for rabies vaccine;

B. Merieux shall, as soon as practicable, but no later than thirty (30) days after the execution of the lease agreement required by this order, deliver to the lessee Connaught's manuals, drawings, blueprints, technology, know-how, specifications and other tangible documents or documentation sufficient to operate Connaught's rabies vaccine business and Connaught's rabies vaccine facility;

C. Merieux shall, coincident with subparagraph II.B., make available to the lessee such Connaught personnel, assistance and training as the lessee might need to operate the production facility on its own and shall continue providing such personnel, assistance and training for a period of time sufficient to satisfy the management of the lessee that its personnel are well enough trained in the rabies vaccine business to produce rabies vaccine; *provided, however*, Merieux shall not be required to continue providing such personnel, assistance and training for more than one year after the execution of the lease agreement;

D. Merieux shall use its best efforts to secure from the Food and Drug Administration a product license for Connaught's rabies vaccine and shall assist in securing such license for the lessee as a part of the lease agreement; and

E. Merieux shall lease Connaught's rabies vaccine business only to a lessee that receives the prior approval of the Commission, and only in a manner, that receives the prior approval of the Commission; *provided that* if prior to the expiration of the three-month period, Merieux has proposed a lessee and the Commission has neither approved nor disapproved of such lessee, then the three-month period

shall be extended until thirty (30) days following the Commission's approval or disapproval of such lessee. However, this three-month period cannot be extended beyond an additional three months for any reason.

III.

It is further ordered, That the lease agreement ordered and directed by this order shall be made in good faith and the obligation to enter into such a lease agreement shall be absolute consistent with the terms of this order.

IV.

It is further ordered, That if Merieux has not leased Connaught's rabies vaccine business as provided in Paragraph II within three (3) months after the date this order becomes final, Merieux shall consent to the appointment of a trustee by the Commission who shall have the power and authority to lease Connaught's rabies vaccine business. The trustee shall use his or her best efforts to negotiate the best price and terms available consistent with this order's absolute obligation to lease Connaught's rabies vaccine business; *provided that* the terms shall include a commitment from the lessee to supply rabies vaccine sufficient to satisfy the Canadian demand for rabies vaccine.

V.

It is further ordered, That the appointment of a trustee by the Commission pursuant to paragraph IV of this order shall not constitute a waiver by the Commission of its rights to seek civil penalties and other relief available to it for any violation of this order, including a violation of paragraph II. In the event that the Commission brings an action pursuant to Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, or another statute enforced by the Commission, Merieux shall consent to the appointment of a trustee in such action.

VI.

It is further ordered, That if a trustee is appointed by the Commission or by a court pursuant to paragraph IV or V of this order,

Merieux shall consent to the following terms and conditions regarding the trustee's powers, authority, duties and responsibilities:

A. The Commission shall select the trustee, subject to Merieux's consent, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures.

B. The trustee shall have the exclusive power and authority, subject to the prior approval of the Commission, to lease Connaught's rabies vaccines business. The trustee shall have nine (9) months from the date of appointment to accomplish the lease agreement, which shall be subject to the prior approval of the Commission. If, however, at the end of the nine-month period, the trustee has submitted a plan for leasing or believes that a lease can be executed within a reasonable time, the lease period may be extended by the Commission and, in the case of a court-appointed trustee, by the court; *provided, however*, the Commission or the court for a court-appointed trustee may only extend the lease period one additional three month period. Merieux shall cooperate fully with the trustee and shall provide all consents, perform all such acts, and execute all such documents as may be necessary to permit the execution of the lease agreement for Connaught's rabies vaccine business as the trustee may determine.

C. After its appointment, the trustee shall file monthly reports with Merieux and the Commission describing the trustee's efforts to accomplish execution of the lease agreement. If the trustee has not accomplished execution of such lease agreement within nine (9) months after its appointment, the trustee shall thereupon promptly file with the Commission a report setting forth (i) the trustee's efforts to accomplish execution of the required lease agreement, (ii) the reasons, in the trustee's judgment, why the required lease agreement has not been executed, and (iii) the trustee's recommendations. The trustee shall at the same time furnish such report to Merieux, who shall have the right to be heard and to make additional recommendations. Subject to paragraph IX, the Commission, or a court for a court appointed trustee, may, as it deems appropriate, extend the term in which to accomplish the execution of the lease agreement and the term of the trustee's appointment.

D. The trustee shall have full and complete access to the personnel, books, records and facilities of Connaught's rabies vaccine business which the trustee has the duty to lease, and Merieux shall cooperate with the trustee and shall develop such financial or other information

relevant to the assets to be leased as such trustee may reasonably request. Merieux shall take no action to interfere with or impede the trustee's accomplishment of the lease agreement. Any delays in obtaining the lease agreement caused by Merieux shall extend the time for lease under this order in an amount equal to the delay, as determined by the Commission.

E. The trustee shall serve, without bond or other security, at the cost and expense of Merieux on such reasonable and customary terms and conditions as the Commission or a court, for a court-appointed trustee, may set. The trustee shall have authority to retain, at the cost and expense of Merieux, such consultants, attorneys, business brokers, accountants, appraisers, and other representatives and assistants as are reasonably necessary to assist in the execution of the lease agreement. The trustee shall account for all monies derived from the execution of the lease agreement and all expenses incurred. After approval by the Commission of the account of the trustee, including fees for his or her services, all remaining monies shall be paid to Merieux and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee leasing Connaught's rabies vaccine business.

F. Merieux shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, or liabilities to which the trustee may become subject, arising in any manner out of, or in connection with, the trustee's duty under this order, unless the Commission determines that such losses, claims, damages, or liabilities arose out of the misfeasance, gross negligence, or the wilful or wanton acts or bad faith of the trustee.

G. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as in paragraph IV of this order.

H. Within thirty (30) days after appointment of the trustee and subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, Merieux shall, consistent with the provisions of this order, execute a trustee agreement that transfers to the trustee all rights and powers necessary to permit the trustee to lease Connaught's rabies vaccine business.

I. The trustee may ask the Commission to issue, and the Commission may issue, such additional orders or directions as may be necessary and appropriate to accomplish the execution of the lease agreement required under this order.

J. The trustee shall have no obligation or authority to operate or maintain any of the properties, assets, contracts, arrangements or enterprises required to be leased under this order.

VII.

It is further ordered, That any lease agreement entered pursuant to this order shall be in a manner which preserves the product and business leased as a viable rabies vaccine business and as a viable competitor.

VIII.

It is further ordered, That pending the lease agreement for Connaught's rabies vaccine business:

A. Merieux shall hold and operate Connaught's rabies vaccine business and shall take all reasonable measures to preserve the Connaught's rabies vaccine business as a separate viable product and business such that it can be readily leased pursuant to this order. In its conduct of Connaught's rabies vaccine business, Merieux shall promote and maintain Connaught's rabies vaccine business and shall maintain and preserve all of the intangible rights and other assets of Connaught's rabies vaccine business so that such business can be leased and operated as an effective and viable business in accordance with the requirements of this order. Without limiting any of Merieux's obligations under this order, Merieux shall observe the limitations and restrictions set forth in the remaining subparagraphs of this paragraph VIII.

B. Merieux shall refrain from taking any action which may cause any material adverse change in the business or financial condition of Connaught's rabies vaccine business.

C. Merieux shall maintain separate records as to the sales and cost of goods sold of each of the products of Connaught's rabies vaccine business and on an aggregate basis for the entire Connaught rabies vaccine business.

D. Merieux shall continue to utilize all currently used Connaught product trademarks and trade names related to Connaught's rabies vaccine business.

E. If Merieux uses its name on the products of Connaught's rabies vaccine business, and purchases advertising and other promotional

services for such products under or pursuant to Merieux's contracts and other arrangements for such services, Merieux shall preserve the separate identity of such products.

F. Merieux shall refrain from, directly or indirectly, selling, disposing of, or causing to be transferred any assets, property or business of Connaught's rabies vaccine business, except that Merieux may sell or otherwise dispose of manufactured products in the ordinary course of business, and may sell or otherwise dispose of assets, property or business to accomplish the lease required by paragraph II.

G. Merieux shall refrain from mortgaging or pledging the assets of Connaught's rabies vaccine business pursuant to any loan transaction in which the borrower is Merieux or any entity other than Connaught's rabies vaccine business, except in connection with the lease agreement described in paragraph II, unless any such mortgage or pledge does not interfere with the ability to obtain or maintain the lease agreement required by this order.

H. Merieux shall refrain from causing Connaught's rabies vaccine business to guarantee any debts or obligations pursuant to any loan transaction in which the borrower is Merieux or any entity other than Connaught's rabies vaccine business, except in connection with the lease agreement described in paragraph II, unless any such mortgage or pledge does not interfere with the ability to obtain or maintain the lease agreement required by this order.

I. Merieux shall hold in strict confidence and shall not divulge to any third party or use for its own or any third party's benefit any confidential information which Merieux has obtained or may obtain from Connaught's rabies vaccine business, except in the normal course of business, or for the purpose of accomplishing the lease agreement required by paragraph II.

J. For the purpose of assuring compliance with this order, duly authorized representatives of the Commission shall be permitted, upon written request and reasonable notice to Merieux, to interview officers, directors, and employees of Merieux and examine documents, at reasonable times and in the presence of Merieux counsel, regarding matters covered by this agreement.

K. Merieux shall remain in compliance with the lease agreement entered pursuant to paragraph II of this order, and shall not, without the prior approval of the Commission, permit any modifications, directly or indirectly, of any of the terms of such lease agreement.

IX.

It is further ordered, That, in recognition of the sovereign rights of Canada and of the interests of Canada in the disposition of Connaught's rabies vaccine business, and in view of the importance of that business in supplying rabies vaccines to satisfy the health needs of Canadians, the appointment and term of a trustee, the selection of any lessee, the terms of any lease and any modifications, directly or indirectly of such lease with respect to that business pursuant to this order shall be subject to the approval of Investment Canada in accordance with Canadian law.

X.

It is further ordered, That, for a period of ten years from the date this order becomes final, Merieux shall not, directly or indirectly, acquire any stock, share capital, assets or equity interest in any concern, corporate or noncorporate, engaged in the manufacture or sale in or to the United States of any human vaccine which may be used to prevent, cure, or treat any disease for which Merieux currently manufactures a vaccine without the prior approval of the Commission, if such concern:

A. Is incorporated in one of the United States or organized under the laws of one of the United States or has its principal offices within the United States; or

B. Manufactures human vaccines in the United States; or

C. Had annual net sales of human vaccines of five million dollars or more in or into the United States in the most recently completed calendar year prior to the date of the requested approval;

provided that this paragraph shall not apply to investments by Merieux in research joint ventures or to Merieux's funding of independent research and that Merieux shall file with the Commission under the Commission's rules of confidentiality copies of all agreements that pertain to such research joint ventures or independent research arrangements within thirty (30) days of such agreement or arrangement.

XI.

It is further ordered:

A. Merieux shall, within sixty (60) days from the date this order becomes final and every sixty days thereafter until the lease agreement required by this order is accomplished, submit in writing to the Commission a verified written report setting forth in detail the manner and form in which Merieux intends to comply, is complying, and has complied with the terms of this order and such additional information relating thereto as may from time to time reasonably be required by the Commission. All such compliance reports shall include, among other things that may be required from time to time, a full description of all contacts or negotiations with anyone relating to the lease of Connaught's rabies vaccine business, including the name and address of all parties contacted, copies of all written communications to and from such parties, and all internal memoranda, reports and recommendations concerning the lease pursuant to the provisions of this order.

B. On the anniversary of the date of this order becomes final, and on every anniversary thereafter for the following nine (9) years, and at such other times as the Commission or its staff may request, Merieux shall submit a verified written report setting forth in detail the manner and form in which Merieux intends to comply, is complying, and has complied with the terms of this order.

XII.

It is further ordered, That for a period of ten (10) years from the date this order becomes final, Merieux shall notify the Commission at least thirty days prior to any change in Merieux which may affect compliance with the obligations arising out of this order, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other similar change in the corporation.

Commissioners Azcuenaga and Owen dissenting.

STATEMENT OF COMMISSIONER DEBORAH K. OWEN

The purpose of this statement is to elaborate on, and express some concerns about, certain elements of the consent agreement accepted

by the Commission in this matter. In particular, this agreement constrains an acquisition that involves two foreign entities, who, between them, maintain minimal relevant assets in the United States; yet the effects of the agreement may bear substantially more upon our neighbor to the north, Canada. The Commission's order also includes a remedy—a vaccine production facilities lease—of questionable efficacy; and, a prior approval provision that covers a product market beyond that alleged in the complaint on which the order is based.

But, first, I wish to forestall any possible misunderstanding as to the meaning of my negative vote in this matter.

I share Chairman Steiger's publicly stated desire to enhance the Commission's scrutiny of, and vigilance with respect to mergers "at the margin"; in particular those involving high concentration and high barriers to entry.¹ This policy is one in which I wholeheartedly concur, and I commend the Chairman for her leadership in this area, and my colleagues and the staff for their strong support of that direction. I also emphasize that this so-called "margin", in appropriate cases, may certainly include anticompetitive conduct that occurs wholly outside the boundaries of the United States, but affects a U.S. market.

The instant case was a difficult one; legitimate disagreements were reasonably expressed. My dissent from accepting the proffered, as well as the modified, consent agreements is based on the combined weight of essentially three concerns:

1. Whether, as a matter of prosecutorial discretion, in the interests of comity and other factors, the Commission should have taken any enforcement action² in this matter;
2. Whether this consent agreement is fair and effective; and
3. Whether the Commission has sufficiently articulated the premises of its action.

Raising the issue of prosecutorial discretion, and the subset of comity, presupposes that the Commission has subject matter jurisdiction over the transaction and can exercise personal jurisdiction over the parties. Judge Hand's 1945 opinion in the *Alcoa* case³ launched a struggle for the courts, law enforcement authorities, and commentators to come up with criteria with which to determine whether jurisdiction may be appropriately exercised over foreign transactions

¹ See, e.g., Remarks of Chairman Janet D. Steiger before the 23rd New England Antitrust Conference (November 3, 1989) at 4-5.

² For this purpose, I treat a decision to accept a consent agreement as the functional equivalent of a decision to take enforcement action.

³ *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

that have anticompetitive effects in a given U.S. market.⁴ Several cases are frequently cited for the proposition that the Commission may take enforcement action against foreign transactions, including ordering divestiture of foreign assets. Because the cases brought to my attention involved parties with substantial relevant productive presence in the United States, it is not clear to me that they are as helpful as we might otherwise desire in conducting our analysis here. Even if we leave aside the questions of whether the courts are appropriately “in the business” of making comity determinations,⁵ and whether the comity consideration should be part of the jurisdictional analysis *per se*, we must recognize that, because of the complexity of these considerations, and the differences among the courts in formulating and applying them, predicting the outcome in a litigated jurisdictional case is certainly chancy.

Even if jurisdiction over a transaction appears clear-cut, there may be good reasons to exercise prosecutorial discretion not to take an enforcement action, based upon considerations of comity, or other practical considerations. As those who object to a judicial determination of deference based on comity point out, the enforcement agencies, both the FTC and Justice, are parties to several international agreements calling for cooperation with other nations in antitrust enforcement.⁶ Both agencies work closely with the State Department and representatives of the other governments in order to assure, first, that there is adequate notice of U.S. interest in a foreign transaction and, second, that cooperation is obtained in satisfying those interests. Accordingly, this Commission is well poised to take comity considerations into account in the exercise of its prosecutorial discretion.

The Canadian Government has noted⁷ that the Commission’s action in this matter “does not reflect the approach to a wholly foreign merger which is described in [the U.S. Department of Justice

⁴ For instance, the Ninth Circuit, in *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976) adopted a three-step test with criteria to determine, first, whether a jurisdictionally-cognizable violation of the antitrust laws has occurred; second, whether that violation has some effect—actual or intended—on the foreign commerce of the U.S.; and, finally, whether as a matter of international comity, U.S. jurisdiction should be exercised. By contrast, a divided panel of the District of Columbia Circuit, in *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984), disagreed with the Ninth Circuit over whether U.S. and foreign interests in a foreign transaction can, or should, be balanced in order to decide whether the exercise of jurisdiction by U.S. courts is appropriate.

⁵ See e.g., 1988 Fordham Corp. L. Inst. 5-1 (B. Hawk ed. 1989) (discussion involving the Honorable Charles F. Rule, Edward F. Glynn, Joel Davidow, Jeffrey Kessler, and Janusz A. Ordover).

⁶ *Id.* at 5-3-5-5; 5-13-5-14.

⁷ In the Matter of Institut Merieux, File No. 891 0098, Comments of the Government of Canada, March 30, 1990 and Aide-Memoire, May 16, 1990.

*Antitrust Enforcement Guidelines for International Operations*⁸],” presumably, Illustrative Case 4. In that case, the Department indicated that, on the basis of comity, in the exercise of its prosecutorial discretion, and in light of the difficulty of obtaining effective relief, it would ordinarily decline to prosecute a merger between “leading” companies in a global product market, which are “foreign and all of their assets involved in producing and distributing [the product] are located outside the United States”, even though the shipments of those companies into the United States account for 60% of this market.

One might try to distinguish the facts in this matter from the Justice Department’s hypothetical case based on its caveat that “the Department might reach a different conclusion . . . if either [party] had production facilities or substantial distribution assets used to produce or distribute [the product] located in the United States”. But, it is my understanding that neither party maintains relevant production facilities or relevant substantial distribution assets in the United States. Other distinguishing factors not mentioned in the Justice Department Guidelines could also quite legitimately be considered in cases of this nature, such as whether one of the foreign parents dictates prices in the United States market involved.

The Canadian comments highlight the public’s understandable confusion about the basis for the Commission’s action in this case, and whether the United States Government’s antitrust agencies are consonant in their approach to extraterritorial cases. Neither the complaint, the order, nor the notice to “Aid” Public Comment indicates to the parties, or to the public at large, that we have taken any account of the Guidelines in reaching our decision. It is unclear whether we fundamentally disagree with the Justice Department on Illustrative Case 4 in its delineation of the appropriate exercise of prosecutorial discretion; it is unclear whether we agree with its premises, but feel that the assets caveat applies; and, it is unclear whether we believe additional factors should be considered. All of the foregoing will remain mysteries to interested parties outside of the Commission who legitimately have a need to know in terms of their business planning and efforts to comply with the law. We are also keeping these matters a secret from other countries who have

⁸ Reprinted in 4 Trade Reg. Rep. (CCH) ¶13,109 (November 10, 1988). The Canadian Government in its comments, *supra* note 9, nonetheless did not “wish to endorse either generally or specifically the policies articulated in the [Guidelines].”

justifiable interests in the predictability and fairness of Commission actions that affect their citizens.

This case underscores the need for the Commission to better articulate its standards, based on sound experience in individual cases. Speeches by extant Commissioners and staff certainly make an important contribution to this goal, but they cannot take the place of clear and judicious, collective articulation of specific policies. Among the vehicles that the Commission might consider are more comprehensive statements accompanying consent agreements, and refined guidelines, either alone or with the Department of Justice. Until such time as the Commission acts to embrace or repudiate the Guidelines, in whole or in part, they are out there for all the world to see and govern their conduct by—apparently at their peril.⁹

In this matter, the comments of the Government of Canada strongly suggest (at least to this reader) that its concerns about the acquisition of Connaught by Institut Merieux transcended the mere issue of whether the Commission had strictly fulfilled its notification obligations under the Memorandum of Understanding that exists between the two Governments.¹⁰ It is unclear whether the more speculative future concerns that the Commission harbors over pending product developments by Institut Merieux and Connaught, which may ultimately be licensed for use here by the U.S. Food and Drug Administration (FDA), outweigh the Canadians' present concerns over the effects of this transaction, and the Commission's various remedies, in their backyard. Furthermore, the Commission's original proposed consent order would have reserved to the Commission alone decisions over selection of a lessee for the vaccine production facility located in Canada, the terms of the lease, and the selection of a trustee in the event that Merieux was unable to find a lessee within a certain period of time; these reservations of authority could conflict with Canadian authority over the same transaction and assets which are located in its territory.¹¹ I trust that the Commission did not intend to charge off

⁹ Because of our clearance procedures with the Justice Department, prospective merging parties who file Hart-Scott-Rodino notifications do not know when they are in the process of constructing a transaction which antitrust agency will judge their conduct, and under what standards.

¹⁰ Memorandum of Understanding Between the Government of the United States of America and the Government of Canada as to Notification, Consultation and Cooperation With Respect to the Application of National Antitrust Laws, March 9, 1984, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶13,503. The Commission's initial failure to comply with the precise letter of that Memorandum is, of course, unfortunate; but, adequate corrective action was promptly taken. I commend Bureau Director Arquitt's plans to institute additional preventative measures to militate against any recurrence of this regrettable incident.

¹¹ While the final order has been modified to subject these decisions to the prior approval of Canadian authorities, the initial Commission proposal had an adverse effect on our relations with our neighbor and highlights the issue of how wise any action was here.

under the battle cry of "54'40" or fight!", but I wouldn't blame the Canadians if they initially viewed it that way. Curiously, the ultimate result is so solicitous of the Canadians' interests that it places this agency of the United States Government in the position of blessing priority to Canadian purchasers of vaccine, rather than Americans, in the event of a shortage.

At a time when representatives of competition authorities around the world are calling for more international cooperation in antitrust enforcement¹², I fear that our initial decision to proceed in this questionable case has sent an unnecessarily harsh message, with questionable benefits to American consumers in return.

As to the fairness and efficacy of the consent order taken in this case, I am troubled by two elements: the leasing provisions and the prior approval provision. First, as to the order's leasing provisions, the relief they promise is not guaranteed, for a variety of reasons, and considerable resources may be expended (our own and Merieux's), only to face disappointment. It is my understanding that, apart from some expressions of interest, a potential lessee has not yet been clearly identified. This is unsettling, based on what I understand to be the Commission's preference in past cases for more certainty along these lines. Finally, the FDA has expressed some concern about the feasibility of accomplishing the Commission's directive under the FDA's standards governing facilities. Finally, there is no "crown jewel" fallback position, in the event that the lease provisions cannot be effectuated.

The responses to these concerns seem to be two: first, that there is a precedent in the drug industry, including at Connaught's facilities, for lease agreements; and second, that we have nothing to lose by accepting the agreement, *i.e.*, that we cannot be worse off than we would have been if we let the proposed acquisition take place unencumbered.

With respect to the first assertion, there appears to be inadequate evidentiary support to conclude that the suggested precedent is sufficiently analogous to warrant our reliance. With respect to the second, there are several disadvantages to entering into a consent which faces several practical barriers to its realization. We may be worse off if we have accepted a consent requiring a lease that does not materialize, or materializes with an ineffectual competitor. Further-

¹² See Remarks of Sir Leon Brittan, Vice President of the Commission of the European Communities, "Jurisdictional Issues in E.E.C. Competition Law", Cambridge, England, 8 February 1990, as well as the remarks of several participants at the 5th International Cartel Conference in Berlin, June 17-19, 1990.

more, we should not ignore the costs of monitoring this arrangement, including the compliance reports that we will be seeing every 60 days during at least part of its tenure (and the monthly trustee's reports, if that feature of the order comes into play).

I also find some ambiguity as to how this consent would operate subsequent to possible FDA approval of the Connaught rabies vaccine. If the approval comes during Merieux's or the trustee's search for a lessee, would the "ongoing business" requirement mandate an aggressive marketing campaign on Merieux's part for a product that it may not possess in the future? Moreover, will the FDA re-qualification process unduly postpone the introduction of, or interrupt the presence of, this vaccine in the market?

My other concern as to the substance of this order is the prior approval provision, which affords this Commission, for a time certain, special powers vis-à-vis the future overlapping acquisitions of Merieux in the entire vaccine business; its scope is troubling. While the complaint accompanying the order charges anticompetitive effects in only two specific vaccine markets, rabies and IPV, the prior approval provision runs to acquisitions involving a horizontal overlap in vaccines for any human disease. While, obviously, Merieux has accepted this expansion of the product market, I question whether the Commission would necessarily adopt such a scope in a litigated case, and whether we should do so here simply because we can.¹³

A prior approval provision affords the Commission, for a time certain, special extrajudicial powers vis-à-vis the future acquisitions of the party subject to it, and may place that party at a distinct disadvantage relative to competitors who need only comply with Hart-Scott-Rodino Act restrictions. Although I am aware that prior approval provisions in consent orders have been expanded into geographic markets not covered by the accompanying complaint¹⁴, my inquiries have not yielded examples of comparable extension of product markets, nor any compelling rationale therefor.

¹³ I realize that in the ever-developing "global economy," companies like Institut Merieux may seek to accommodate regulatory authorities in order to make their way into new markets. However, I have recently expressed serious concerns about the irrelevance of parties accepting consent agreements to the merits of the case. See CPC International, Inc., No. 892 3176, and discussion of *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 246 n.14 therein.

¹⁴ An example among consent orders is *Canada Cement Lafarge* (C-3100), under which the Commission granted prior approval of an acquisition. In that case, the scope of the prior approval provision extended beyond the complaint's geographic market to encompass acquisitions of facilities within 300 miles of Lafarge's facilities. As to the geographic scope of prior approval provisions in litigated orders, see *American Medical International, Inc.*, 104 FTC 1, 221-237 (1984); *Hospital Corporation of America*, 106 FTC 361, 513-19 (1985).

The prior approval provision here would make the Commission's work easier in the event of a future merger with anticompetitive potential in other vaccine markets. But, this is not the test of a wise exercise of our power. Some special circumstance that supports the imposition of a broadened product market should be present that would lead us reasonably to believe that the regular Hart-Scott-Rodino process provided by the Congress would not protect our law enforcement interests in a future case involving these parties outside of the product market identified in the instant complaint.¹⁵

In summary, this is a matter which raises serious questions as to the judicious exercise of our prosecutorial discretion, and potential, grave complications stemming from the remedies provided. Although each of the problems discussed in this statement might not, in and of itself, have prompted me to dissent in this matter, their combination compels me to do so.

¹⁵ In the alternative, the *AMI* and *HCA* cases suggest the possibility of a prior *notification* provision of broadened scope.

Interlocutory Order

113 F.T.C.

IN THE MATTER OF

FAY'S DRUG COMPANY, INC.

Docket 9227. Interlocutory Order, August 17, 1990

ORDER AMENDING COMPLAINT TO REFLECT
CHANGED NAME OF RESPONDENT FAY'S DRUG COMPANY, INC.

Pursuant to Section 3.15 of the Rules, the Joint Motion to Amend Complaint (August 17, 1990) is granted, and henceforth with respect to Fay's, the caption of the case should read Fay's Incorporated.