

[Trade Regulation Reporter - Trade Cases \(1932 - 1992\), United States v. Aluminum Company of America and Rome Cable Corporation., U.S. District Court, N.D. New York, 1967 Trade Cases ¶71,973, \(Dec. 21, 1966\)](#)

Federal Antitrust Cases

Trade Regulation Reporter - Trade Cases (1932 - 1992) ¶71,973

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United States v. Aluminum Company of America and Rome Cable Corporation.

1967 Trade Cases ¶71,973. U.S. District Court, N.D. New York. Civil No. 8030. Decided December 21, 1966. Case No. 1512 in the Antitrust Division of the Department of Justice.

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**Headnote**

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### Clayton Act

**Divestiture—Proposed Plan—Court Approval.**—A proposed plan for the divestiture of a low voltage conductor manufacturer by an aluminum company, under which a high-voltage conductor manufacturer owned by a large, diversified corporation would purchase it, was acceptable. An objection that the anticompetitive effects of the original merger would not be dissipated was rejected, since the relevant product market found to have been injured was aluminum conductor, and the acquiring corporation does not manufacture aluminum products of any kind. An overlap of copper products which would result from the proposed plan would be of little significance. Based upon past activities and business policies of the firms, it did not appear that they were potential competitors. The proposed plan was simply “a merger between two small companies to enable the combination to compete more effectively with larger corporations dominating the relevant market.”

For the plaintiff: Justin J. Mahoney, United States Attorney, Albany, New York, Donald F. Melchior, Charles D. Mahaffie, Jr., Attorneys, Department of Justice, Washington D. C. of counsel.

For the defendants: Ferris, Hughes, Dorrance & Groben, Utica, New York, Bergson & Borkland, Washington, D. C., Robert Groben, of counsel, Herbert A. Bergson, Howard Adler, Hugh Latimer, of Counsel.

#### Petition to Approve Plan of Divestiture Memorandum Decision and Order

BRENNAN, Judge: Pursuant to the terms of the final judgment herein, the defendants under date of October 17, 1966, have filed a petition requesting this court's approval of a proposed plan of divestiture of the properties of the Rome Cable Corporation now held by Aluminum Company of America. The plaintiff opposes the approval of such plan.

This proceeding arises out of a contested antitrust litigation, the background of which is found in *United States v. Aluminum Company of America and Rome Cable Corporation* [ [1963 TRADE CASES ¶ 70,653](#)], 214 F. Supp. 501, reversed in [ [1964 TRADE CASES ¶ 71,116](#)], 377 U. S. 271; and in this court's decision [ [1967 TRADE CASES ¶ 71,980](#)], (unreported) dated April 27, 1966 which fixed the terms of the final judgment. Familiarity with these decisions will be assumed. As in previous decisions, the defendants will be referred to as “Alcoa” and “Rome” respectively.

In accordance with the direction of the United States Supreme Court, and the provisions of the subsequently entered final judgment, Alcoa was directed to sell all of the assets of Rome acquired by Alcoa in 1959. Such sale is to include the manufacturing facilities of Rome, New York, Torrance, California and Colleagueville, Pennsylvania, together with all subsequent capital improvements, machinery, inventory and work in process. As indicated above, defendants now present a proposed plan whereby such assets will be sold to The Okonite Company,

hereinafter referred to as "Okonite". The purchase price of such assets will apparently involve a payment of between thirty and thirty-five million dollars, same to be paid in cash in three installments, the first payment of one-third of the purchase price to be made on the date of the closing of the transaction and the balance in equal installments three and six months thereafter. Alcoa retains or obtains no creditor or lien interest in such assets. In other words, the plan contemplates the complete divestiture ordered. Other details of the proposed plan would seem to be unnecessary to this decision.

Under date of October 27, 1966, the plaintiff filed with this court a memo in opposition to the defendants' petition, referred to above. The quotation below, taken from the above memo, sets out the bases of the plaintiff's opposition. "Plaintiff objects to Alcoa's proposal on two grounds: (1) it will not adequately dissipate the anti-competitive effects of its acquisition of Rome; and (2) the combination of Rome and Okonite would raise additional significant competitive problems". The issues, thus created, came on for a hearing before this court on November 2-4, 1966. Oral evidence was offered by defendants and documentary evidence on behalf of the defendants was received. The plaintiff relied upon documentary evidence alone. Briefs have been submitted and the problem is before the court for decision. Since the decision necessarily involves the consideration of the status of the three interested corporations in the business world, a summary statement relative to same would seem appropriate at this point.

[ *Acquiring Firm* ]

Okonite is a[n] eighty-three percent-owned subsidiary of Ling-Temco-Vought, Inc., hereinafter referred to as "LTV", and was organized to acquire the business and properties of a corporation of the same name in accordance with the decisions in *United States v. Kennecott Copper Corp.* [ [1964 TRADE CASES ¶ 71,181](#) ], 231 F. Supp. 95 and [ [1966 TRADE CASES ¶ 71,650](#) ], 249 F. Supp. 154. It is a non-integrated fabricator of wire and cable products with plants located in Passaic, Paterson and North Brunswick, New Jersey and Philipsdale, Rhode Island. Its wire and cable business is concentrated in heavy duty, high voltage products. Its principal lines consist of high voltage paper insulated cable, communications cable, control cable, signal cable, power cable and bare copper. Like most companies engaged in a similar business, Okonite suffered substantial financial losses from 1958 to 1963. After its acquisition by LTV, Okonite's volume of sales and income have substantially increased. Okonite is not an actual competitor in aluminum conductor lines of commerce. Since the early part of 1965, it has made no such products and is not recognized in the market as the supplier of same. Its experience for three years in the aluminum conductor products field was apparently unsuccessful from either a market share or financial return basis, it being evident that it lacked the technology necessary in that field. In a word, it specializes in high voltage copper cables and its plants are oriented to principally produce such products.

[ *Parent of Acquiring Firm* ]

Concededly LTV is a strong, well-managed diversified business corporation. It operates through four subsidiaries in the development and production of materials in the fields of aeronautics, electronics, missiles, space and through Okonite in wire and cable products. It thus seeks protection through product diversification from serious financial loss resulting from the cycles of business expansion and recession. It shows steadily increasing net assets which approximate 220 million dollars as of June 30, 1966. It also shows a substantial increase in sales and profits for the first nine months of 1966 as compared with the same period of 1965. It has continued to successfully operate its several business enterprises as indicated in Judge Ryan's decision in *United States v. Kennecott Copper Corp.*, *supra*, the repetition of which is unnecessary here. We borrow from the above decision by paraphrasing Judge Ryan's statement to the effect that we find that LTV has the financial and top-level management capabilities necessary to permit its subsidiary Okonite to purchase Rome for cash and thus sever all financial and management ties with Alcoa. Its success in the operation of Okonite justifies the decision to permit its purchase of that corporation and contributes to the attractiveness of the submitted plan. This court is satisfied that the intention of both LTV and Okonite in the purchase of Rome is to maintain and expand its position as a competitor in the market available to its products. It seems plain that the purpose of the purchase of Rome is to obtain a full line of aluminum and copper wire and cable products which will complement those

already manufactured and sold by Okonite. Again it seems plain that the purpose of the purchaser here is to complement its product line rather than to assimilate a competitor.

[ *Divested Firm* ]

Rome's position in the market both at the time of its acquisition by Alcoa and subsequent thereto has been specifically found in the prior decisions referred to above and a detailed repetition thereof would serve no useful purpose. It would appear to be sufficient to state that Rome is substantially the producer of the wire and cable products limited to what is termed in the trade as low voltage. It is non-integrated as to both copper and aluminum products and like many corporations engaged in similar activities, it conducted its business at a substantial financial loss for the years 1960, 1961, 1962 and 1963. It presently shows a profit in its operations which is apparently due to the unusual favorable market conditions, especially in the matter of copper products.

Rome's operations, which show a profit for the years 1964, 1965 and 1966, indicate that this is a favorable time for a sale of its assets. If any mistake has been made in the past, it seems to the writer that it rests upon the doubtful assumption that Rome would have had, or could obtain, the required working capital to survive the over 12 million dollar loss incurred in operations during the 1960 to 1963 period and additionally to provide the apparently necessary improvements to its machinery and facilities which required an outlay of approximately 5 million dollars. While the dark period of the above picture occurred subsequent to the acquisition of Rome by Alcoa, no fault is attributed to its management. In fact, the Government pays a high complement to Alcoa's stewardship of Rome's operations which is referred to at some length in this court's decision dated April 27, 1966 and referred to above.

[ *Guidelines for Approval* ]

We do not need to go beyond the decision of *United States v. DuPont Co.* [ [1961 TRADE CASES ¶ 70,017](#) ], 366 U. S. 316 to find the guidelines which this court must use in determining the legal and factual effectiveness of the proposed plan to accomplish the divestiture directed. In sum, they seem to indicate that this court is vested with a degree of discretion to be exercised in the light of the object to be obtained. As in the above decision, the violation here was "not actual monopoly but only a tendency towards a monopoly. The required relief therefore is a remedy which reasonably assures the elimination of that tendency". "Divestiture is itself an equitable remedy designed to protect the public interest". The public importance of the proper disposition of antitrust cases "in their remedial phase, more often than not, is crucial". The ultimate measure must eliminate the effects of the violation found without being punitive in its nature or limited by economic hardship. At the same time, the competition afforded by Rome should be preserved both because of its importance in the communities in which it operates and the effect it exerts in the business world.

[ *Dissipation of Anticompetitive Effects* ]

The Government's first objection to the plan, to wit—that the proposed sale would not adequately dissipate the anti-competitive effects of Alcoa's acquisition of Rome, is rather difficult to follow. As this court understands the decision of the United States Supreme Court, it found contrary to this court's decision that aluminum conductor was a line of commerce in which the legality of Alcoa's acquisition of Rome could be measured. A finding of illegality followed since both Rome and Alcoa possessed market shares therein which were held to be substantial enough so as to tend to reduce competition in violation of the statute. Since Okonite does not manufacture aluminum products of any kind, it would seem to necessarily follow that the anti-competitive effects fatal to the Rome-Alcoa merger will be entirely eliminated under the proposed plan.

[ *The New Combination* ]

The second objection is to the effect that the combination of Rome and Okonite would raise additional significant competitive problems. This contention seems to be based upon two arguments. The first is to the effect that there is an overlap in the copper products manufactured by Rome and with those manufactured by Okonite. The second is to the effect that both Rome and Okonite are potential competitors in the market for their manufactured products in that they are capable of internal expansion so as to manufacture and market products which are now solely manufactured by either of the two companies.

[ *Overlap of Products*]

The first of these arguments, as to the overlap products, impresses this court as involving conceded facts which are of de minimis proportion. Without doubt, it is true that both companies are engaged generally in the wire and cable business. As previously stated, Okonite's operations are solely confined to high voltage copper cable and conductor products with special emphasis upon the paper and rubber insulated conductor items. Its products seem to be most generally adapted to special uses and may be referred to as of the underground type. Rome, in contrast to the purchaser, is essentially a low voltage product manufacturer using primarily thermo-plastic and thermo-setting insulations. It specializes in the building wire type of product which is not manufactured by Okonite.

The overlap of products appears to be found in the Power Wire and Cable census category which is divided by voltage capacities into two classes—to wit—those under 601 volts and those over the above voltage. In 1964, the last year in which the census tables for the above products are available, it appears that there is an overlap of products in four of the ten five-digit product classifications. In three of four such classifications, the combined shares of Rome and Okonite therein are listed as less than 5% of the total shipments in those categories. Overall Okonite's three largest products account for about eighty-three percent of its total power cable shipments, none of which is manufactured by Rome.

In the matter of the sub-classification known as Portable Wire and Cable, Rome's percentage of the total shipments was 2.5% while Okonite's was 12.6%, resulting in a total of 15.1%. Passing over the other three overlapping categories as insignificant in amount, it must be admitted that the last mentioned sub-classification cannot, on its face, be so termed. The explanation thereof however indicates that the overlap is more theoretical than real. The above statement is supported in the evidence, explained in Government exhibit 800, where it appears that both molded and non-molded portable cable are included in the above sub-classification. Okonite manufactures principally molded portable power cable with its sales in 1965 representing 96% of its total sales of portable cable. On the other hand, Rome's product is principally non-molded portable cable and represents 64% of its sales of portable power cable products. The process of manufacturing the two products is different and their end usages differ with respect to a large part of the products referred to manufactured by each company, molded portable cable being used in heavy industry while non-portable cable is used in light industry and may be sold through retail outlets. All of the above leads to the conclusion that the overlap products manufactured by Rome and Okonite are insignificant competitive factors as between the two organizations. In other words, they are not considered in the trade or among themselves as significant direct competitors.

[ *Potential Competition*]

There remains to be considered the contention advanced by the Government that Okonite and Rome, if not actual, are potential competitors. Without doubt, this argument involves a measure of speculation. Common experience is full of examples of business failures due to overexpansion in competitive business especially involving managerial ability and technical skill. It is easy to say that both Rome and Okonite possess the potential to expand internally so as to become an actual competitor with the other. It is a fact, however, that Rome has been in existence since 1936 and Okonite since 1878 and neither has, over the above periods of time, developed the full product line which the Government contends is potentially readily available to both.

The Supreme Court in *United States v. Penn-Olin Co.* [ [1964 TRADE CASES ¶ 71,147](#) ], 378 U. S. 158 at 174 states that potential competition cannot be put to a subjective test. Its definition is not susceptible of a ready and precise answer. A potential competitor apparently contemplates “an aggressive, well-equipped and well-financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market ...”. No argument can be made that Rome is or was such a competitor for several years last past. Okonite, in its present position, meets some of the requirements of the definition. However the argument that it is “waiting anxiously” to enter the above market is directly contrary to the evidence produced. Its prior unsuccessful effort in the aluminum field may well have dampened its ardor. Certainly its interest in that field has not been “long sustained” and its experience therein is some proof that it lacked “the know-how and the capacity to enter that market” ... “at a reasonable profit”. The “array of probability” found in Penn-Olin is entirely missing here.

The business policy of a corporation rests primarily upon its officers and directors who are held accountable in the matter of their business judgments. It is true that the governing body of aggressive corporations is constantly reviewing its product lines, the quality thereof and the avenues of expansion. It is likewise correct that Okonite contemplates a business expansion but it should be emphasized that same is limited to a product or the products which are already being manufactured by that company. Here there is no evidence that in the foreseeable future either Rome or Okonite plans to or is capable of entering a product field other than it now occupies. It seems that "corporate growth by internal expansion is socially preferable to growth by acquisition". *United States v. Philadelphia Nat. Bank* [ [1963 TRADE CASES ¶ 70,812](#) ], 374 U. S. 321 at 370. This court however has no basis to assume that the present policy of the governing body of either involved corporation will in the foreseeable future reverse its present policy of management so as to increase its product lines and thereby become actual competitors in the market place. The judgment of experienced businessmen is more reliable than speculation, hedged as it must be by a tight money market which seems to restrict venture capital investment. This is indicated by the lack of individual or syndicate interest in the purchase of Rome assets.

Although not a specific objection to the present petition, the Government urges that same should be rejected and further effort to dispose of Rome to a more acceptable purchaser be directed. There is no specific fault found with the means taken by Alcoa to accomplish the sale of Rome's assets. If, in fact, Okonite be an eligible purchaser, further effort would seem not only to be unnecessary but detrimental to Rome's viability. The offer made constitutes a clear, clean and complete divestiture by Alcoa of Rome's assets. It obviates many, if not most, of the objections which are generally advanced in similar proceedings. It eliminates the unrest among Rome's personnel and assures them of a strong aggressive employer who has given assurance as to the continuance of Rome's presently located three manufacturing plants. It should tend to stop Rome's loss of technical help to other employers and restore a sense of security which, understanding, has been missing since the order of divestiture. The benefit to be obtained by the closing of this litigation at this time would seem to far outweigh any speculative advantage which would result from further delay.

It should be noted that the plaintiff appears to avoid advancing any contention that the proposed plan is in violation of the antitrust laws. The plan has been under consideration by the plaintiff since about August 15, 1966. It would therefore seem that no claim of such violation will be made since plaintiff, by reason of past litigation involving both Rome and Okonite, must be well acquainted not only with the wire and cable industry as a whole but with the output of the facilities and the market status of the two corporations.

In the main litigation here, the plaintiff appeared to urge that the acquisition of Rome by Alcoa resulted in an undue concentration of power in one of the giants of the aluminum industry. As this court sees it, the proposed plan would result in a company with a full product line actually and potentially supplying the competition to the integrated copper and aluminum producers and larger independents while not significantly reducing competition among the two hundred so-called small non-integrated fabricators. The relative position of Rome-Okonite in size among the so-called independents would not thereby be changed, but the much larger producers would be afforded a more active competition in the market.

The above discussion and the findings expressed therein lead to the conclusion that the proposed plan is simply "a merger between two small companies to enable the combination to compete more effectively with larger corporations dominating the relevant market". *Brown Shoe Co. v. United States* [ [1962 TRADE CASES ¶ 70,366](#) ], 370 U. S. 294 at 319. As such a merger, same is not impeded either by the statute or judicial interpretation. Economies in operation and an increase in competition, rather than a diminution thereof all in the public interest, invoke both the judgment and discretion vested in this court to approve the submitted plan in accordance with the prayer of the petition.

The above will constitute this court's findings and conclusions and if either litigant desires additional specific findings or conclusions, same may be submitted within ten days.

An order, providing for the approval of the proposed sale of Rome's assets to Okonite in accordance with the above decision, will be prepared by Alcoa accordingly and, if not agreed upon, may be settled before this court upon three days' notice, and it is

Ordered accordingly.