II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 29 April 1994

relating to a proceeding under Article 85 of the EC Treaty

(IV/34.456 — Stichting Baksteen)

(Only the Dutch text is authentic)

(94/296/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty [1], as last amended by the Act of Accession of Spain and Portugal, and in particular Articles 6 and 8 thereof,

Having regard to notification made by Stichting Baksteen on 19 August 1991, pursuant to Article 4 of Regulation No 17, concerning a series of agreements between Dutch brick manufacturers,

Having regard to the Commission Decision of 28 January 1992 to initiate proceedings in this case,

Having regard to a further notification made on 10 September 1992, pursuant to Article 4 of Regulation No 17, concerning an agreement concluded on 25 August 1992 between Stichting Baksteen and the major Dutch brick producers,

Having regard to the summary of the notification published [2] pursuant to Article 19 (3) of Regulation No 17,

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas :

[1] OJ No 13, 21. 2. 1962, p. 204/62.
[2] OJ No C 34, 6. 2. 1993, p. 11.

I. THE FACTS

A. The parties to the notified agreement

(1) The agreement on the restructuring and reorganization of the Dutch brick industry was concluded on 25 August 1992 between Stichting Baksteen and the following Dutch brick producers :

— Boral Nedusa Baksteen BV,
— De Jong van Lekkerkerk Holding BV (Desimpel),
— Koramic Baksteengroep BV,
— Rodruza BV,
— Steenfabriek 'De Rijswaard' BV,
— BV Steenfabriek Huissenswaard,
— Teewen BV,
— L.J. Duijs Steenfabrieken BV,
— C.R.H. Kleiwaren Beheer BV,
— Daas Baksteen BV,
— Steenfabriek Zennewijnen BV,
— Steenfabriek 'De Waalwaard' BV,
— Hagens Steenfabrieken BV,
— Baksteen Helden BV,
— Smeijers & Voortman BV,
— Steenindustrie Strating BV.

B. The contract products

(2) The products forming the subject of the agreement are clay construction bricks burnt in kilns, excluding more expensive facing bricks and engineering bricks. As a general rule, three types of brick can be

distinguished on the demand side, namely common bricks, facing bricks and engineering bricks; common bricks are generally used in general building work, facing bricks are more expensive and are specially made or selected to give an attractive appearance to walls, and engineering bricks are more resistant and durable. They can, however, to a very large degree be substituted for one another on the supply side, and the general market for bricks is therefore taken to be the relevant market.

(3) Clay bricks compete against a wide range of alternative building and finishing materials, in particular porous concretes lightweight concretes, sand-lime bricks, and sheets of aluminium, steel, plastic or wood. The chief drawbacks of bricks as a building material are that their use is more labour intensive than other larger-size materials and that they have poor thermal qualities. Their advantages are flexibility of use, low maintenance costs and good fire resistance and sound insulation capacities.

(4) There is very little intra-Community trade in bricks owning to the weight of the material, whose low intrinsic value does not really tolerate high transport costs, and as transport costs are particularly high in relation to production costs, long-distance transport is not very profitable.

Furthermore, national standards and regulations based on local building traditions create export difficulties. Consequently, the brick industry is mainly local; most brick-makers sell their products within a 70-kilometre radius of the factory, giving a regional structure to the brick market. Even so the Netherlands exports up to 25 % of its domestic output. For historical and geological reasons, and because of the size of the country, Dutch producers are relatively close to their foreign, especially German, customers, but also their Belgian and British customers. The markets are none the less essentially regional, exports rarely crossing more than one border.

Imports into the Netherlands from Belgium and Germany satisfied 7 % of domestic demand in 1992.

(5) Some 25 firms operate on the Dutch brick market, the parties to the agreement holding at the time of signing, some 90 % of installed capacity in the Netherlands and accounting for some 85 % of brick sales. Total turnover in one year by the Dutch brick industry as a whole is around ECU 200 million.

C. Origin of the Agreement and situation in the industry

(6) On 19 August 1991 the Dutch foundation Stichting Baksteen (which is composed of and represents seven Dutch brick manufacturers) notified the Commission of a series of agreements between Dutch brick manufacturers aimed at rationalizing production with a view to eliminating or preventing overcapacity.

However, after a preliminary examination of the case, the Commission formally opposed the first plan and informed the parties that it intended to take an interim decision based on Article 15 (6) of Regulation No 17 in order to remove the immunity from fines for the period after notification. The measures proposed in the first restructuring plan, which was designed to remedy structural overcapacity in the brick industry, were inappropriate and could not be justified solely on the ground of a crisis in the brick industry, since they went well beyond what was needed to attain the objective in question.

In addition to an incentive for the permanent closure of production capacity, the measures included the following:

— an agreement fixing production quotas, backed by a system of fines and resulting in a quantitative share-out of virtually the entire output of bricks in the Netherlands,

— introduction of a system for acquiring, on behalf of the participating firms, third-party producers or production units of third-party producers and for eliminating irreversibly all the production capacity acquired,

— establishment of a direct link between the agreement on bricks and certain undertakings given by the same brick manufacturers concerning the production of paving stones.

After the Commission had adopted this position and sent its statement of objections to the parties at the beginning of 1992, the latter decided to withdrawn their original plan. However, the participants

in Stichting Baksteen proceeded with a first series of closures involving a total of 150 million bricks.

(7) Having taken another thorough look at the situation and trend on the market, the same producers arrived at the conclusion that it was nevertheless essential to implement a coordinated plan to reduce capacity in order to overcome the difficulties which have affected the Dutch brick industry for several years, and which may be summarized as follows :

— at the end of 1991 brick stocks in the Netherlands totalled 448 million bricks, equivalent to some 32 % of total brick sales by Dutch firms. Although the industry considers that a stockpile representing around 20 % of sales is sustainable, existing stocks of 32 % easily exceed this critical threshold and the costs of maintaining such unused capacity are very high. The surplus is attributable chiefly to technological developments (introduction of new processes and construction of larger plants to achieve economies of scale) and to falling demand. It should be noted that the drop in demand is structural in nature and the direct result of the steady decline in the consumption of bricks relative to other building materials (in terms of sales of bricks for every Fl 1 000 spent on construction). Relative consumption has fallen by 20 % in the last five years. The trend is still downward, chiefly because alternative materials are cheaper and give better technical results ; this explains the growing tendency to replace bearing walls made with bricks by concrete and steel and to use sheet materials instead of other forms of brickwork.

In those circumstances, and given the pessimistic forecasts for medium-term sales trends, it must be assumed that the stockpile will increase steadily, leading in the short-term to a stockpile/sales ratio that will be difficult to put up with :

— the utilization rate of installed capacity by the seven firms forming Stichting Baksteen, which stood at 93 % as recently as 1989, dropped by 10 % to 83,4 % in 1991. As the production of bricks is a highly capital-intensive activity, involving very high fixed and semi-fixed costs, the total unit cost of production is very sensitive to the capacity utilization rate ; in this particular sector, in which the proportion of fixed and semi-fixed costs in the ex-works price is high, capacity utilization must necessarily be maximized in order to achieve a normal rate of return. Form this standpoint, the present poor capacity utilization rate is not economically sustainable over a long period.

In view, however, of the imbalance between supply and demand caused, on the one hand, by unfavourable market trends and falling demand and, on the other, by the existence of steadily mounting stockpiles and production overcapacity, it is unlikely that there will be an improvement in the medium term ;

— furthermore, the average return on 1 000 bricks has also fallen considerably : since 1980, the price has fallen by around 30 % in real terms ;

— through a combination of the abovementioned factors, the operating profits of the firms concerned have fallen sharply in the last few years, and the information available does not point to any lasting improvement in the medium term.

(8) In the circumstances, the parties consider that action is essential in order gradually to restore a lasting balance between supply and demand, thereby resolving the crisis in the Dutch brick industry.

On 25 August 1992 another agreement on the restructuring and reorganization of the Dutch brick industry was concluded, this time between 16 firms ; it is aimed at a coordinate reduction in brick production capacity of the order of 217 million units, and forms the subject of this Decision.

D. Present content of the agreement

(9) The size of the capacity reductions was calculated on the basis of :

— the situation in the Dutch brick industry in 1991, when capacity, output, sales and stockpiles totalled 1 783 million, 1 471 million, 1 390 million and 448 million bricks respectively,

— forecasts by the EIB *(Ekonomisch Instituut voor de Bouwnijverheid)*, according to which no significant growth in demand could be expected in the medium term; thus in 1993, some 1 300 million bricks would be sold,

— the principle that a permanent stockpile should not exceed 20 to 22 % of demand,

— the fact that in the industry in question, which has one of the highest capital intensities in manufacturing, capacity is profitable only if used at very high rates.

On the basis of these principles, the parties to the agreement concluded that a capacity cut of 200 million to 220 million bricks was necessary in order to restore the balance between supply and demand in the medium term, whilst at the same time gradually reducing the stockpile.

(10) Under the agreement, four Dutch brick producers have undertaken to close down seven production units definitively and irreversibly: this will represent the effective dismantling of surplus production capacity amounting to 217 million bricks. The firms in question have also undertaken:

— to halt production of ceramic building materials at the seven production sites to be dismantled, for a period of 30 years (this undertaking being automatically transferred to any future purchasers of the units),

— to refrain from selling any of the dismantled plant to producers who would use it to increase their production capacity within a 500-kilometre radius of the Dutch frontier for a period of 30 years, and to impose this obligation on any future purchasers, even if they are outside the geographical area referred to.

Provision is made for a system of fines in order to prevent any failure to comply with these obligations, and the parties accept the principle of verification of total closure of their units by independent qualified experts.

(11) The restructuring operation will be financed by the 16 firms that have signed the agreement. From 1 October 1992 they will contribute over a five-year (or possibly shorter) period to a compensation fund managed by Stichting Baksteen. Each firm will contribute either Fl 20, Fl 15 or Fl 6 per 1 000 bricks produced and undertakes to supply all details concerning its annual output to Stichting Baksteen, which is required not to divulge this information to the other parties.

The financial resources thus accruing to Stichting Baksteen will be allocated to those parties that have definitively dismantled capacity, as a contribution to the costs of closure, including the associated social costs. The definitive closure of the capacity will be certified by independent qualified experts.

(12) A social plan for the sector has been negotiated with the trade unions, the implementation of which is to be monitored by Stichting Baksteen. The parties will endeavour to ensure that, in carrying out the restructuring operation, employees are redeployed wherever possible and in accordance with the legal and/or contractual obligations in force in the Netherlands.

(13) The parties to the agreement are strictly prohibited from bringing on stream new capacity during the financing period and a list has been drawn up to that end by Stichting Baksteen indicating the current production capacity of each party.

Replacement investments are authorized provided they do not entail any increase in production (in the case of participants in Stichting Baksteen) or provided that the increase is limited to 5 % over the entire financing period (in the case of the other participating firms).

The parties retain complete freedom of action as regards mergers or acquisitions.

II. COMMENTS OF OTHER INTERESTED PARTIES

(14) On 6 February 1993 a notice was published in the *Official Journal of the European Communities* pursuant to Article 19 (3) of Regulation No 17 summarizing the notification in order to give other interested parties the opportunity to submit their comments.

No unfavourable views had been received by the Commission from competitors and/or other economic operators by the end of the stipulated period.

III. LEGAL ASSESSMENT

A. Article 85 (1)

(15) The notified agreement is an agreement between undertakings which has the object and effect of restricting competition within the common market.

(16) The principal object of the agreement is to achieve a larger cut in capacity and stockpiles than could be obtained by a unilateral restructuring operation. The notified plan constitutes concerned action between competitors aimed at closing plants and limiting capacity, backed by a system of fines in the event of failure to comply with obligations, and financially supported by a compensation fund. It therefore has a direct effect on competition inasmuch as it restricts the means of production, and therefore the investments and competitive strategies of the parties.

(17) Although, structurally, the market for bricks is regarded as a regional market, the notified agreement is liable to affect trade between Member States as the relevant products are traded between them : Dutch brick exports to Germany, Belgium and the United Kingdom absorb up to 25 % of total Dutch output, whilst imports into the Netherlands satisfy up to 7 % of domestic demand in the Netherlands.

B. Article 85 (3)

(18) As regards the applicability of Article 85 (3), it is clear that the brick industry in the Netherlands is suffering from considerable overcapacity and steadily mounting stockpiles, and from difficulties in matching capacity to demand that are chiefly due to technological developments (introduction of new processes and construction of larger plants to achieve economies of scale), to falling demand caused by a constant decline in the relative consumption of bricks, and to a very low price elasticity of demand.

(19) The agreement aims at reducing capacity in order to improve the rate of utilization of the capacity retained and gradually restore a lasting balance between supply and demand in the medium term.

(20) In a market economy, it is primarily the task of individual firms to identify the moment at which their surplus capacities become financially untenable and to take the necessary steps to reduce them.

(21) In the case in question, the forces present on the market were and still are unable individually to make the necessary capacity cuts to restore and eventually maintain an efficient competitive structure. That is why the firms concerned organized, together and for a limited period, the necessary structural adjustment.

(22) Whilst in principle it is for firms to adopt flexible pricing policies in order to influence demand levels, demand for bricks is a derived demand as they represent only 2 — 3 % of the cost of a building. Consequently, there is very little or no elasticity of demand with respect to price levels in the short or medium term. Brick price levels are not likely to affect the rate of construction or, therefore, total demand for building materials.

(23) Furthermore, there is very little flexibility in the brick production process, not only as regards changes in capacity utilization — given the very high fixed and semi-fixed costs — but also when it comes to reducing capacity. As half of the parties already have only one kiln, they are technically incapable of making any capacity cuts whatsoever.

(24) The other parties, as leading manufacturers, would not have decided individually and independently to reduce capacity had they not been certain that competitors would follow their example or provide financial support, and that no new capacity would be introduced during the period of the agreement.

(25) The fact that only four participants have made the reductions for their own financial, technical or social reasons does not detract from the effectiveness of the collective commitment to reduce capacity.

(26) By reducing capacity, firms throw off the financial burden of maintaining unused surplus capacities and, by increasing utilization of the capacity utilization of the capacity retained, dot not have to reduce output.

As the capacity closures concern production units that are the least suitable at least efficient because of obsolescence, limited size or outdated technology, production will in future be concentrated in the more modern plants which will then be able to operate at higher capacity and productivity levels ; this will lead to a corresponding reduction in the incidence of fixed costs, which form a large proportion of net costs.

As a result, it is possible to predict a future increase in the profitability of the Dutch brick industry and, therefore, a return to normal competitiveness.

(27) In addition, because the closures are coordinated, restructuring can be carried out in acceptable social conditions, incluiding the redeployment of employees.

(28) It can, therefore, be concluded that the agreement helps to improve production and to promote technical and economic progress.

(29) Article 85 (3) provides that an agreement must allow consumers a fair share of the resulting benefit. Consumers in the present case should benefit from the improvement in production because in the long term they will be dealing with a healthy industry offering competitive supplies and, in the short term, they will go on enjoying the advantages of continuing competition between the parties. Thanks to the agreement they can also be sure that structural adjustment keeps competitive firms or capacities on the market whilst eliminating outmoded or obsolescent capacity which might otherwise have affected healthy capacity through loss compensation within a group.

(30) There are a sufficient number of producers remaining, whether or not parties to the agreement, to give consumers a choice of supplier and security of supply, while ruling out the risk of over-concentrated supply.

(31) A capacity-reduction agreement accompanied by a financing system is, however, liable to lead in the short term to higher prices for consumers. In the present case, however, such risks are largely offset by the fact that the high costs of financing stockpiles will diminish. The special nature of the market for bricks, where unit costs are very sensitive to capacity utilization rates, makes it possible to expect a favourable effect on prices. Consumers also have the option, if the prices charged by the parties to the agreement are unfair, of obtaining supplies from other available sources.

(32) Another crucial factor as regards the application of Article 85 (3) is whether the measures aimed at reducing capacity are indispensable to the attainment of that objective.

(33) The agreement relates only to the reduction of surplus capacities : to that end, it is necessary for the agreement to contain a detailed and binding closure plan which guarantees, firstly, that surplus capacity will be effectively and permanently dismantled and, secondly, that throughout the period of its application no fresh capacity will be installed apart from the replacement capacity provided for in the restructuring plan. For the rest, the freedom of the parties in matters of production, pricing, conditions of sale, imports and exports, deliveries, mergers and acquisitions is not affected by the agreement. The provisions of the first agreement which could have jeopardized those freedoms have been deleted. Nor does the agreement contain any provision aimed at coordinating the commercial conduct of the parties.

(34) The system of compensatory payments must be regarded as indispensable to the attainment of the objective. Half the firms concerned were unable to reduce their capacity as they had only one kiln ; the financing scheme must thus be regarded as an incentive to the others to reduce their structural overcapacity. It provides compensation for firms carrying out closures, and helps them to cover the costs of the operation, especially the social costs incurred. The five-year period (which could be shorter, depending on actual financing) serves to amortize, share out and stagger the financial charges.

(35) It was deemed essential to introduce binding guarantees in respect of the definitive closure of the seven production units concerned and the actual dismantling of plant in order to ensure that the capacity cuts were irreversible. As the effectiveness of the agreement depends on compliance with these commitments, provision is made for contractual fines and the transfer of the obligation to any future purchaser not party to the agreement of the sites or plant to ensure that capacity earmarked for closure is actually dismantled.

(36) The agreement is strictly limited in time : all the reductions provided for in the agreement (namely the dismantling of capacity equal to 217 million bricks) were carried out before the end of 1992 ; this part of the restructuring plan is therefore completed. The provisions relating to the financing scheme and the other obligations on the parties will expire no later than 30 September 1997.

(37) It can therefore be concluded that the restrictions on means of production imposed on the parties are indispensable to the attainment of the objectives in question.

(38) For the purposes of Article 85 (3), the agreement does not afford the firms the possibility of eliminating competition in respect of a substantial part of the products in question.

(39) It should first be noted that the firms continue to compete on both prices and, more generally, all those aspects not covered by the agreement. As the coordinated capacity reduction forms only one element of the firms' competitive strategies — albeit an important one — they are not surrendering all freedom to act on the market, which ensures that a certain degree of internal competition is maintained.

(40) External competition is generally assured through the presence of other producers and importers not parties to the agreement.

(41) The contract products compete against a wide range of alternative building and finishing materials that are sufficiently substitutable to make them competitors.

(42) Lastly, because the agreement has from the start been strictly limited in time, the certainty that full competition will soon be restored encourages the firms concerned to bear in mind when taking action under the agreement that, when it expires, they will again be competing fully against each other.

C. Articles 6 and 8 of Regulation No 17

(43) The agreement signed on 25 August 1992 was notified on 10 September 1992. In accordance with Article 6 of Regulation No 17, the decision pursuant to Article 85 (3) of the EC Treaty should apply from 10 September 1992.

(44) As the agreement expires on 30 September 1997, it is appropriate, pursuant to Article 8 (1) of Regulation No 17, to fix the date of expiry of this Decision at 30 September 1997.

(45) However, application of the agreement should not give rise to exchanges of information which could lead to concerted practices prohibited by Article 85 of the Treaty; it is therefore necessary to require the undertakings being parties to the agreement to refrain from divulging to the other parties individual data on each party's output and deliveries of bricks, either direct between themselves or between some of them, or through a fiduciary body or third party,

HAS ADOPTED THIS DECISION:

Article 1

The provisions of Article 85 (1) of the EC Treaty are, pursuant to Article 85 (3), hereby declared inapplicable for the period from 10 September 1992 to 30 September 1997 to the agreement between Stichting Baksteen and the major Dutch brick producers listed in Article 3 below, notified on 10 September 1992.

Article 2

The undertakings being parties to the agreement shall refrain from divulging any data on individual outputs and deliveries of bricks, either direct between themselves or between some of them, or through a fiduciary body or third party.

Article 3

This Decision is addressed to the following undertakings:

1. Rodruza BV,
   St. Canisiussingel 20,
   NL-6511 TJ Nijmegen;

2. Teewen BV,
   Kaldenkerkerweg 33,
   NL-5932 CT Tegelen;

3. Boral Nedusa Baksteen BV,
   Spijksedijk 11,
   NL-6917 AB Spijk;

4. Koramic Baksteengroep BV,
   Kerkstraat 23,
   NL-5527 EE Hapert;

5. De Jong van Lekkerkerk Holding BV (Desimpel),
   Van Ginnekenweg 12,
   NL-5071 NJ Udenhout;

6. Steenfabriek Huissenswaard BV,
   Scherpekamp 1-7,
   NL-6687 ML Angeren;

7. Steenfabriek De Rijswaard BV,
   Rijswaard 2,
   NL-5308 LV Aalst (Gld);

8. L. J. Duijs Steenfabrieken BV,
Beekveld 26,
NL-5258 SJ Berlicum;

9. Daas Baksteen BV,
Terborgseweg 30,
NL-7045 AL Azewyn;

10. C. R. H. Kleiwaren Beheer BV,
Olivier van Noortlaan 110,
NL-3133 AT Vlaardingen;

11. Steenfabriek Zennewijnen BV,
Utrechtseweg 151,
NL-6862 AH Oosterbeek;

12. Steenfabriek De Waalwaard BV,
Waalbandijk 69,
NL-6669 MC Dodewaard;

13. Hagens Steenfabrieken BV,
Windvleugel 3,
NL-6581 DT Malden;

14. Baksteen Helden BV,
Steenstraat 8B,
NL-5981 AE Panningen;

15. Smeijers & Voortman BV,
Rijssenseweg 66,
NL-7475 VC Markelo;

16. Steenindustrie Strating BV,
Gelmswijk 4,
NL-9665 RR Oude Pekela;

17. Stichting Baksteen,
Coolsingel 139,
NL-3012 AG Rotterdam.

Done at Brussels, 29 April 1994.

For the Commission

Karel VAN MIERT

Member of the Commission