COMMISSION DECISION

of 3 June 1975

relating to proceedings under Article 85 of the EEC Treaty

(IV/712 — Stoves and Heaters)

(Only the Dutch text is authentic)

(75/358/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 85 thereof;

Having regard to Council Regulation No 17 (1) of 6 February 1962, and in particular Article 3 thereof;

Having regard to the notification of the 'Herziene Overeenkomst Haarden- en Kachelhandel' submitted on 26 October 1962 by Mr J. M. O'Breen, manager of the Haarden- en Kachelbureau, in accordance with Article 5 of Regulation No 17;

Having regard to the applications submitted under Article 3 of Regulation No 17 by Mr H. D. Kriek, dealer, of Krommenie, and by B. V. Stokvis en Zonen of Rotterdam on respectively 4 May 1973 and 31 October 1974;

Having regard to the decision of the Arrondissementsrechtbank in Haarlem on 15 January 1974 to adjourn the action brought before it until the Commission had given its Decision in the case;

Having heard the parties concerned, in accordance with Article 19 (1) of Regulation No 17 and with the provisions of Regulation No 99/63/EEC (2);

Having regard to the Opinion obtained on 25 February 1975 of the Advisory Committee on Restrictive Practices and Dominant Positions in accordance with Article 10 of Regulation No 17,

WHEREAS:

I. The facts

The facts may be summarized as follows:

The 'Revised Agreement on Trade in Stoves and Heaters' (hereinafter referred to as 'the Agreement'), made on 1 January 1952, amended on 1 January 1962 and then notified to the Commission on 26 October 1962, contained various provisions for an association of different categories of approved members involved in the manufacture and distribution of coal and oil heating appliances on the Dutch market, that is to say manufacturers, importers, wholesalers, provincial wholesalers, agents and retailers.

The Agreement was administered by the 'Haarden- en Kachelhandel bureau' (hereinafter referred to as 'the Bureau') of which Mr J. M. O'Breen (hereinafter referred to as 'Mr O'Breen') was the manager. The Agreement has been further amended on a number of occasions and on 1 October 1967 was extended to include gas heaters. The operation of the Agreement was subsequently terminated at the end of 1972. The Bureau is now being wound up and Mr O'Breen has been given the responsibility of dealing with outstanding cases and of disposing of the assets of the Bureau.

The Dutch market in coal, oil and gas heating appliances was controlled by the Agreement, and about 25 Dutch manufacturers, three importers, about 75 wholesalers and several thousand retailers were affiliated to it. The products, the subject of the Agreement, accounted for more than 90 % of the trade in these heating appliances in the Netherlands.

R. S. Stokvis & Zonen NV, Rotterdam — later R. S. Stokvis & Zonen BV — (hereinafter referred to as 'Stokvis') joined the Association on 1 January 1957 as a wholesaler and was thereafter a member of the approved group of wholesalers dealing in gas heating appliances.

Mr H. D. Kriek, a dealer of Krommenie (hereinafter referred to as 'Mr H. D. Kriek') had been a member of the association since 1957/58 as a retailer and in 1967 became a member of the approved group of retailers selling gas heating appliances.

Article 32 (3) of the Agreement as notified to the Commission in 1962, which applied to wholesalers belonging to the Association, provided as follows:

'3. Wholesalers:

(a) shall refrain from offering, selling or delivering to retail associations; sales and supplies to approved purchasing associations shall only be made to a central warehouse;

(1) OJ No 13, 21. 2. 1962, p. 204/62.
(2) OJ No 127, 20. 8. 1963, p. 2268/63.

(b) shall refrain from offering, selling or delivering to unauthorized retailers or to retailers who have been suspended or disqualified under the provisions of these regulations ;

(c) shall refrain from offering, selling or delivering to state, provincial or other public bodies and institutions — including the Nederlandse Spoorwegen — unless the goods ordered and supplied are intended for internal use within the institution, and shall refrain from offering, selling or delivering to the Rijksinkoopbureau, (Government procurement office) unless the goods ordered and supplied are intended for internal use by Government institutions. Offers, sales and deliveries shall take account of the regulations which shall be drawn up for that purpose by the "Haarden- en Kachelbureau" ;

(d) shall not supply stoves and heaters on terms of sale or return, nor enter with purchasers into arrangements of equivalent effect ;

(e) shall not accept the return of heating appliances after delivery except for clearly established defects in the delivered goods, unless in special circumstances the Manager of the Haarden- en Kachelbureau at his discretion so permits ;

(f) shall not open showrooms for the sale of heating appliances to the public unless they are operated as a retail shop within the meaning of the first paragraph of this Article ;

(g) shall not appoint retailers as agents nor give commissions or other forms of benefit to retailers for their orders ;

(h) shall refrain from buying or taking delivery of stoves and heaters from manufacturers or importers of oil heaters who are not approved under these regulations, or who have been suspended or disqualified in pursuance of these regulations . . .'.

On 1 December 1969 sub-clause (b) above was amended by the addition of the following sentence :

'deliveries shall not be made to sales points other than those registered with the Haarden- en Kachelbureau under these regulations'.

This amendment was notified on 23 April 1971.

On 2 December 1971 the following additional provision was notified under (i) :

'(i) shall refrain from directly or indirectly assisting in any way in the contravention of the provisions of Article 10 (2). Such assistance will be deemed to have been given where a wholesaler knew, should have known or could reasonably have formed the conclusion that stoves and heaters supplied by him were not intended exclusively for direct sale by a retailer to the consumer'.

Article 75 (1) of the Agreement, added by way of amendment on 1 October 1967 and notified on 26 September 1968, states :

'1. The obligations set out in Articles 32, 33, 34 and 36 (5) of this Agreement also apply to manufacturers, importers and wholesalers of gas heating appliances, it being understood that in Article 32 (3) (a) "purchasing associations within the meaning of Article 12" be amended to read "purchasing associations within the meaning of Article 74", and that subparagraph (b) be amended to read : "shall refrain from offering, selling or supplying gas heating appliances to and buying gas heating appliances from persons not registered with the Gasverwarmingsapparaten department or persons registered with this department who have been suspended or disqualified under the provisions of these regulations".'

This provision was amended in the following terms on 11 November 1970 and the amendment was notified on 23 April 1971 :

'. . . and that (b) be amended to read "shall refrain from offering selling, supplying or delivering gas heating appliances to and buying gas heating appliances from persons not registered with the Gasverwarmingsapparaten department or persons registered with this department who have been suspended or disqualified under the provisions of these regulations ; deliveries may not be made to sales points other than those registered with the Gasverwarmingsapparaten department under these regulations".'

In the text of the Agreement notified in 1962, the provisions of Article 10 applying to retailers affiliated to the Agreement read as follows :

'*Article 10*

The stipulations governing retailers, set out in Article 9, are now as follows :

1. Heating appliances shall be purchased only from suppliers appearing in the list of suppliers drawn up by the Haarden- en Kachelbureau or about to be placed on this list by the Bureau. Such articles shall not be purchased from suppliers whom the Haarden- en Kachelbureau in Utrecht has declared to be temporarily suspended or who have been struck off the list of suppliers by the Bureau. Heating appliances shall not be purchased jointly by groups of retailers.

2. Heating appliances shall not be sold by retailers to other retailers, unless the approval of the Haarden- en Kachelbureau has been obtained.

3. Heating appliances shall be sold only at the gross price, as fixed by the supplier, applying at the time when the appliance is sold. In displaying the goods or in any other way offering them for sale, no price may be quoted other than this gross price. No advertisements may be made which offer part-exchange or which may create a misleading impression on the public. The cost of any installation shall be charged separately. Any further regulations on this matter issued by the Haarden- en Kachelbureau must be observed.

4. Heating appliances shall not be supplied or accepted on terms of sale or return, displayed, exhibited, demonstrated, offered for sale or sold on other premises, or deposited or stored with other parties. They shall not, without the approval of the Haarden- en Kachelbureau, be displayed, exhibited, demonstrated, offered for sale or sold in any place other than those registered as sales premises with the Haarden- en Kachelbureau.

   Heating appliances shall not be supplied on loan or otherwise made available for use, nor shall any such offer be made in advertisements or other publications.

5. The conditions under which hire-purchase sales are made shall be notified immediately to the Haarden- en Kachelbureau in Utrecht.

6. No discount shall be given on the sale of heating appliances nor may gifts, commissions or dividends be given on sales. Sales commissions may, however, be allowed for permanently employed staff. Advertising sales at reduced prices or selling at reduced prices or with free gifts and offering commissions on the sale of heating appliances are also prohibited.

7. Prompt assistance must be given in any inquiry concerning heating appliances initiated by or on behalf of the Haarden- en Kachelbureau in Utrecht ; this assistance includes permitting the inspection of books and records.

8. It is also prohibited, in any way whatsoever, to assist directly or indirectly in, or be a party to any act which runs counter to the above provisions'.

These provisions were supplemented by circular distributed by the appropriate Consultative Committee on 8 April 1969 and notified on 23 April 1971 as follows :

(a) *Article 10 (2)*

'Heating appliances shall not be sold by retailers to other retailers, unless the approval of the Haarden- en Kachelbureau has been obtained. By virtue of the provisions of Article 78 of the Exclusive Trade Agreement on gas heating appliances, this stipulation also applies to approved retailers of gas heating appliances' ;

(b) *Article 10 (7)*

'Full and clear accounts must be kept showing all purchases and sales of gas heating appliances together with the names of suppliers and purchasers'.

The provisions were again amended by circular of 1 December 1969, which was notified on 23 April 1971, as follows :

(a) *Article 10 (3)*

'No advertisements shall be made which create a misleading impression on the public' ;

(b) *Article 10 (6)*

'No commissions shall be given or offered on the sale of heating appliances. Sales commissions may, however, be given to permanently employed staff'.

The supervision of the application of the provisions of the Agreement is, by virtue of Articles 38 *et seq.*, the responsibility of the 'Beoordelingscommissie' or Committee of Arbitration, which has the power to impose fines and to disqualify members from exclusive distribution. Appeal can be made against the decisions of the 'Beoordelingscommissie' to an Appeal Committee set up under Articles 54 *et seq.* of the Agreement. The Committee of Arbitration and the Appeal Committee operated in accordance with a highly formalized procedure which both in its form and its effects was designed to follow closely the manner in which judicial proceedings are conducted in the Netherlands.

The Committee of Arbitration consisted of five representatives of the different categories which were party to the Agreement ; there was no independent representation. The Appeal Committee consisted of either three or five members drawn from persons in categories which were not concerned with the sector in question. Appointment to the committees was made by a consultative committee which again consisted exclusively of members of the different categories belonging to the Agreement. The independence of the Appeal Committee was diminished not only by the way in which it was constituted but also by the rules of procedure drawn up for it by the consultative committee.

The principle under which this procedure operated followed the Dutch legal principle of 'binden advies' or mandatory settlement. The Bureau is still seeking to carry out the provisions of this part of the agreement in two cases, by enforcing penalties imposed by the Appeal Committee.

Certain other provisions of the Agreement related to the conditions of entry and to the obligations imposed on the various categories of parties to the Agreement including the obligation to observe resale price maintenance. These provisions also covered the requirement for mutual and collective exclusivity between the different categories of member which effectively closed the Dutch market.

In July 1968, Mr H. L. Smit, a wholesaler/retailer of Amsterdam (hereinafter referred to as 'Mr Smit'), a known independent who was not registered under the Agreement, had made an arrangement with Mr Kriek under which he bought the gas heaters he required from wholesalers approved under the Agreement in the name of Mr Kriek, who was an approved retailer.

These gas heaters were then resold by Mr Smit at lower prices than those fixed by the manufacturers, importers and wholesalers affiliated to the Agreement. Furthermore, both the range of goods sold by Mr Smit and his turnover were considerable.

By a letter dated 3 November 1969, the Committee of Arbitration summoned Mr Kriek on the grounds that this market conduct was in breach of the obligations imposed on retailers by Article 10 of the Agreement.

The Committee wrote to Mr Kriek on 9 January 1970 informing it that it was being fined :

(a) Fl 5 000 for acting in contravention of Article 10 (4) and (8) ;

(b) Fl 500 for not keeping his books in a proper manner in accordance with the requirements of Article 10 (7).

In its investigation into Mr Kriek's affairs, initiated on 30 October 1969, the Committee of Arbitration had found that :

(a) a large number of gas heating appliances (about 3 600) had been bought from individual wholesalers while only a small number (about 200) had been sold to the public ;

(b) Mr Kriek had not maintained accounts of his trade in gas heating appliances in the manner laid down by the Agreement.

When Mr Kriek refused to pay the fine imposed, the Committee of Arbitration informed him by letter dated 16 February 1970 that he was suspended as a member of the Agreement and that accordingly he could no longer make purchases from recognized wholesalers. The arrangement between Mr Kriek and Mr Smit was then discontinued since practically the whole trade in gas heating appliances was carried out through firms affiliated to the Agreement. Mr Kriek was unable to obtain gas stoves elsewhere.

On 8 February 1972 Mr O'Breen summoned Mr Kriek before the Arrondissementsrechtbank in Haarlem to enforce the payment of the Fl 5 500 fine. In its judgment on 15 January 1974, the Court adjourned the case until the Commission of the European Communities had given its Decision in the matter. This judgment was sent to the Commission by the Court.

During 1969 and 1970, Stokvis had delivered gas heating appliances to retailers not registered under the Agreement and to one retailer who was suspended. Stokvis had also delivered 3 900 items to the firm Schweitzer in Westzaan (hereinafter referred to as 'Schweitzer'), which had then sold them to Mr Smit.

The Committee of Arbitration wrote to Stokvis on 3 November 1971 informing Stokvis that it was being fined :

(a) Fl 3 700 for supplying to retailers who were not registered or who were suspended ;

(b) Fl 100 000, of which Fl 50 000 was suspended, for supplying Mr Smit via Schweitzer.

Stokvis appealed to the Appeal Committee against this decision of the Committee of Arbitration. In its ruling of 6 December 1971, the Appeal Committee upheld the fine of Fl 3 700, but set aside the remainder of the decision of the Committee of Arbitration, and, in a new ruling, fined Stokvis Fl 50 000 for infringement of Article 75 (1). The grounds for this were the same, that is to say for supplying Mr Smit via Schweitzer.

In its appeal, Stokvis had claimed that the amended provisions of Article 75 (1) of the Agreement, circulated to members in stencilled form on 11 November 1970, were not binding as long as they were not notified to the Commission of the European Communities. This notification did not take place until 21 April 1971.

On 6 December 1971 the Appeal Committee ruled on this point as follows :

> 'A formal eleventh objection has been lodged to the effect that the addition of Article 75 (1) of the Revised Agreement — circulated in stencilled form on 11 November 1970 — was not binding for as long as this amendment was not notified to the European Commission, which notification, as it has emerged during this hearing, took place only on 21 April 1971.

Even if the Appeal Committee concedes that it is correct that amendments to the Revised Agreement shall not take effect until after such notification, this can, nevertheless, have no effect on the view of the Appeal Committee in the present case'.

On 5 January 1973 Mr O'Breen summoned Stokvis before the Arrondissementsrechtbank in Rotterdam to enforce payment of the fine of Fl 53 700; these proceedings are still pending.

By letter dated 12 January 1973, the bureau informed the Commission that the Agreement had been terminated at the end of 1972 and that it would cease to have effect from 1 January 1973. The system operating under the Agreement had been brought to an end. The affairs of the Bureau were being wound up under the direction of Mr O'Breen.

II. Appraisal

Under Article 85 (1) of the EEC Treaty, all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market are prohibited as incompatible with the common market.

Since the Agreement has ceased to operate since 1 January 1973, this appraisal will be limited to those provisions of the Agreement for which legal enforcement is still being sought in the two cases, that is to say, Articles 10, 32 (3), 75 (1) and the arbitration provisions under Articles 38 to 54 *et seq.* The appraisal must take account of the legal and economic situation on the relevant market at the time, in particular the collective and mutual obligations with regard to exclusivity and resale price maintenance which applied to the greater part of the Dutch market.

The legal or natural persons engaged in the trade in heating appliances who were parties to the Agreement are undertakings within the meaning of Article 85 (1), while the Bureau is an integral part of an association of undertakings empowered to take binding decisions.

The Agreement, as notified in 1962 and thereafter amended on several occasions by those empowered to do so, was an agreement between undertakings and can therefore fall within the scope of Article 85 (1), while the decisions taken by the competent authorities set up under the Agreement are decisions of an association of undertakings within the meaning of this Article.

The provisions of Article 10 of the Agreement under which the fine was imposed on Mr Kriek and which state that retailers affiliated to the Agreement must sell their products only in premises belonging to them, together with the obligation to sell these products only to private persons and not to other retailers, have as their object and effect the prevention, restriction and distortion of competition within the common market.

Similarly, the provisions that retailers should keep detailed accounts including the names of their customers had as their object and effect the prevention, restriction and distortion of competition within the common market, since their object was to supervize the prohibition on sale to other undertakings of the relevant products on the Dutch market with the result that such sales were made the more difficult to carry out.

The provisions of Articles 32 (3) and 75 (1) of the Agreement under which the fine was imposed on Stokvis and which stated that wholesalers affiliated to the Agreement must not sell the products in question to non-approved or disqualified retailers, or directly or indirectly collaborate in sales between retailers, have as their object and effect the prevention, restriction and distortion of competition.

These provisions have as their object and effect both the extension and completion of the exclusive regulation of trade and resale price maintenance which was agreed by the recognized groups of manufacturers, importers, wholesalers and retailers for the products in question on the Dutch market.

The existing distribution structure and the respective market positions of the undertakings concerned were thus fixed in such a way that new entrants to the market and undertakings not affiliated to the Agreement found it more difficult to capture a share of the market. The possible change in market relationships which competition could have produced was considerably hindered by these provisions.

The so-called arbitration provisions (Articles 38 to 54 *et seq.*) also have as their object and effect the prevention, restriction and distortion of competition within the common market. They are in fact a means of dissuading firms from establishing their position on the market through competitive effort. They thus contribute to the circumvention of the EEC rules on competition.

Examination of this case shows that the restrictions of competition constituted a coherent and precisely elaborated system which clearly had as its object and effect the exclusion of competition between the groups concerned and the channelling of trade in the products in question through these groups to the greatest extent possible. The share of total Dutch sales involved is estimated at over 90 %, and a substantial proportion of the products are imported into the Netherlands from other Member States.

These provisions furthermore are capable of having an appreciable effect on trade between Member States. A system such as that described above, which covers the whole territory of a Member State, has as its effect the strengthening of barriers between national markets, which stands in the way of the economic interpenetra-

tion aimed at by the EEC Treaty and results in the protection of national markets (see Judgment of the Court of Justice given on 17 October 1972 in Case 8/72 — VCH). Undertakings from other Member States wishing to sell the relevant products in the Netherlands without being affiliated to the Agreement are considerably impeded by the existence of these provisions in the Agreement. Opportunities for manufacturers and wholesalers from the other Member States to export to the Netherlands and for Dutch buyers to import these products from the other Member States are thereby considerably restricted. The flow of trade between the Member States is accordingly affected in a manner detrimental to the creation of a single market between these Member States.

Article 85 (3) provides that Article 85 (1) may be declared inapplicable in the case of agreements between undertakings and decisions by associations of undertaking which contribute to the improvement of production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which do not :

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives ;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

The Bureau claimed that since the agreements only applied to the Dutch market, it was notified only as a precautionary measure, since it was exempted from notification under Article 4 (2) of Regulation No 17, the only parties to the Agreement being undertakings from one Member State while the Agreement did not relate either to imports or to exports between Member States.

The Commission, however, considers that in view of the involvement of three Dutch importers the Agreement did relate to imports and exports between Member States. The Agreement was, therefore, not exempted from notification under Article 5 (2) in conjunction with Article 4 (2) (1).

The Agreement does not qualify for exemption under Article 85 (3) since it does not satisfy the requirements contained therein.

With regard to the application of these provisions, the Bureau claimed that one of the aims of the Agreement was to ensure that the relevant products were sold through specialized retailers under regulated trading conditions, that the market was always supplied through the equitable cooperation between manufacturer, wholesaler and retailer, and that the consumer could always be sure of having appliances available on the market which could be installed in his own home by experts.

It must be observed firstly that the restrictions on competition, that is to say the obligation to observe the requirements as to exclusive sales and purchases and the obligations concerning prices, do not appear to be necessary for improving distribution of the products in question. On the contrary, these obligations were part of a market protection system which blocked access to the distribution network and made parallel imports impossible, in so far as both of these were controlled by the undertakings affiliated to the Agreement, which in fact constituted the major part of the distribution network in the Netherlands for these products.

It is difficult to see how the system of exclusive distribution through the wholesalers and retailers affiliated to the Agreement, and the resulting prohibition on selling to other non-affiliated or disqualified undertakings, could improve distribution, or why retailers affiliated to the Agreement should be required to sell only to private persons, since trade between retailers can clearly contribute to better and faster supplies to the consumer.

It must also be observed that the restriction of competition did not in any way allow consumers to benefit from any advantages resulting from the Agreement. On the contrary, the effect of the restrictions was to maintain the prices laid down under the agreement and to obstruct supplies to undertakings selling at a lower price.

It is not necessary to consider the other conditions for the applicability of Article 85 (3), but it may nevertheless be stated that the restrictions in the agreement are not to be considered indispensable merely because they require the appliances to be sold by retailers. Having regard to the fact that the Dutch market was almost completely dominated by the Agreement, it is not possible to accept the argument that competition was not eliminated in respect of a substantial part of the products.

Article 3 (1) of Regulation No 17 states that where the Commission, upon application or upon its own initiative, finds that there is an infringement of Article 85 of the EEC Treaty, it may require the undertakings or associations of undertakings concerned to bring such an infringement to an end.

On the foregoing considerations the Commission proposes to reach a finding that the association of undertakings against which proceedings have been initiated has infringed Article 85 of the EEC Treaty.

The Commission therefore proposes to require the association of undertakings concerned to bring this infringement to an immediate end by requiring it to stop applying the disputed provisions of the Agreement and to refrain henceforth from attempts, whether by legal action or by other means, to collect fines imposed for alleged infringements of the Agreement committed when it was still applied.

Since the decision of the Arrondissementsrechtbank in Haarlem on 15 January 1974, adjourning the proceedings pending before it, has been communi-

cated to the Commission of the European Communities, a true copy of the present Decision should be sent to that Court,

HAS ADOPTED THIS DECISION :

Article 1

The provisions of Articles 10, 32 (3) and 75 (1) and the arbitration provisions (Articles 38 to 54 *et seq.*) of the Revised Agreement on Trade in Stoves and Heaters constitute an infringement of Article 85 (1) of the Treaty establishing the European Economic Community.

Article 2

The application for a declaration under Article 85 (3) that Article 85 (1) is inapplicable is refused in respect of those Articles of the Agreement referred to in Article 1 hereof.

Article 3

The association of undertakings to which this Decision is addressed shall forthwith bring the aforesaid infringement to an end. It must, in particular, refrain from attempting, through the process of law or by any other means, to recover the fines imposed for alleged breaches of the Agreement while it was in force.

Article 4

This Decision is addressed to the Haarden- en Kachelbureau, for the attention of Mr O'Breen, van Hoeylaan 32, The Hague.

Article 5

A true copy of this Decision shall be sent to the Arrondissementsrechtbank in Haarlem, for the attention of Mr van Eijk, Clerk of the Court, Jansstraat 81, Haarlem.

Done at Brussels, 3 June 1975.

For the Commission

The President

François-Xavier ORTOLI