II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 2 December 1977

relating to a proceeding under Article 85 of the EEC Treaty (IV/147 — Centraal Bureau voor de Rijwielhandel)

(Only the Dutch text is authentic)

(78/59/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 of 6 February 1962 [1], and in particular Article 3 thereof,

Having regard to the notification of its Algemeen Reglement (general regulations) by the Centraal Bureau voor de Rijwielhandel, Amsterdam, made on 25 October 1962 in accordance with Article 5 of Regulation No 17,

Having regard to the application made on 30 October 1974 by P. Donck, a partnership at Rotterdam, in accordance with Article 3 of Regulation No 17,

Having regard to the decision taken by the Kantonrechter at Rotterdam on 29 January 1976 to stay the action before him pending a Commission Decision in this case,

Having heard the association of undertakings concerned in accordance with Article 19 (1) of Regulation No 17 and with Regulation No 99/63/EEC [2],

Having regard to the opinion delivered on 25 May 1977 by the Advisory Committee on Restrictive Practices and Dominant Positions in accordance with Article 10 of Regulation No 17,

Whereas :

The facts are as follows :

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1. The Centraal Bureau voor de Rijwielhandel (Central Bicycle Trade Association, hereinafter referred to as 'the CBR') is an association representing manufacturers, wholesalers and intermediaries in bicycles, parts and accessories, and bicycle retailers and repairers and dealers in related goods.

The objects of the CBR are :

(a) to promote trade in bicycles, parts and accessories and in related goods ;

(b) to further the common interests of its members (Clause 3 of the Statutes).

Membership of the association is restricted to bodies corporate in the bicycle trade (Clause 4 of the Statutes). The current members are :

— RAI : Nederlandse Vereniging van de Rijwwiel- en Automobielindustrie, Amsterdam,

— COT : Centrale Organisatie in de Tweewielerbranche, Amsterdam,

— NCBRM : Nederlandse Christelijke Bond van Rijwiel- en Motorhanderlaren, Rijswijk.

In addition to its rules (huishoudelijk reglement) and an appeals regulation (reglement voor Hoger Beroep), the CBR adopted a general regulation (Algemeen

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

Reglement) on 14 May 1920 (with frequent minor amendments up to 16 July 1976) pursuant to Clauses 3 and 8 of the Statutes and Clause 6 of the Rules.

2. The Algemeen Reglement can be described as a general and comprehensive system organizing the market for the distribution and servicing of bicycles and related articles in the Netherlands, set up as a private initiative but claiming and receiving general recognition.

The Algemeen Reglement distinguishes six categories of recognized dealer :

I — retailers,

II — wholesalers,

III — suppliers to the wholesale trade,

IV — manufacturers' agents,

A — assemblers (manufacturers or assemblers who supply the general public direct),

B — buyers' associations for wholesalers.

3. Recognition is given exclusively to persons who, or companies which, meet all the requirements established for each category (Clause 4) and actually apply for recognition (Clause 7). Membership of one of the abovementioned member associations of the CBR is not a condition precedent to recognition.

The CBR may withhold recognition from any applicant who engages in unfair trading or actions contrary to the terms set out in the Algemeen Reglement (Clause 5 (1)). Recognition within more than one category may be given only if the applicant meets the requirements for each of the categories and does business in separate premises under separate management (Clause 5 (2)). Recognition is conditional upon a written undertaking being given by the applicant to the CBR that, on pain of fines or other penalties, he will comply with all his obligations (Clause 6 (1)). Foreign manufacturers are not required to give this written undertaking if a recognized manufacturer's agent (fabrieksagent) guarantees in writing the performance of their obligations (Clause 6 (2)). Recognized dealers, whether or not members of one of the associations belonging to the CBR, must take cognizance of all official statements by the CBR after the time of their application and after recognition itself and must comply with all changes in respect of the obligations flowing from the Algemeen Reglement which are notified to them (Clause 13).

4. Recognized firms must at the time of recognition expressly undertake to keep their business activities within the scope of the law. In addition there are a number of minimum requirements as to stock levels, equipment, premises and product display (Clause 63). To be recognized as a retailer, wholesaler or assembler, the firm must do business at an establishment in the Netherlands (Clause 63 (I), (II) and (A)). Buying associations may be recognized only in Category B (buying associations), even if they meet the requirements for recognition in other categories (Clause 58).

5. Firms which accept the Algemeen Reglement and are recognized by the CBR are required to comply with a number of prohibitions ;

'1. No goods other than those in respect of which recognition is given may be sold or stocked. Bicycle repairers and dealers in related goods may not sell bicycles nor stock them for sale.

2. No goods other than those in respect of which recognition is given may be sold to recognized firms or persons ; it is thus forbidden, for instance, to supply bicycles to recognized bicycle repairers or to dealers in related goods. It is also forbidden to obtain from a recognized firm goods other than those in respect of which recognition was given.

3. Bicycle dealers and dealers in related goods may not carry out repairs to bicycles or related goods.' (Clause 9).

6. The extensive network for the regulation of purchases and supplies as set out in the Algemeen Reglement by the CBR can be described in general terms as follows.

Recognized firms may not obtain bicycles, parts or related goods from non-recognized firms (Clause 20) nor from certain categories of recognized firms. They may not supply non-recognized firms (Clause 20), even when the goods are intended for export, nor may certain categories of recognized firms supply certain other categories of recognized firms.

These provisions are set out in detail below :

(a) Recognized retailers must generally obtain goods exclusively from recognized wholesalers, although there are exceptions, as where retailers help each other out of difficulties (Clause 25 (1), (2) and (3)). They must supply only the general public, which excludes recognized or non-recognized firms in the bicycle trade as well as firms which, though not actually in the bicycle trade, directly or indirectly offer these goods for sale in whatever manner (Clause 25 (4)).

(b) With a few exceptions, recognized wholesalers must supply goods only to firms recognized by the CBR (Clause 40 (1)). They must obtain supplies exclusively from other recognized wholesalers or from recognized suppliers to the wholesale trade (Clause 49). An exception is made in respect of supplies obtained from buyers' associations to which they belong (Clause 59 ; see paragraph 6 (f)).

(c) Recognized suppliers to the wholesale trade may only supply recognized wholesalers, other recognized suppliers to the wholesale trade, assemblers and buying associations (Clause 50 (1)).

(d) Recognized manufacturers' agents (fabrieksagenten), who are chiefly importers and general representatives for foreign manufacturers, must confine their activities to those of intermediary in the placing of orders between recognized suppliers to the wholesale trade and other recognized suppliers, wholesalers, assemblers and buying associations (Clause 56 (1)).

(e) Recognized assemblers may supply only the general public, which thus excludes recognized and non-recognized firms in the bicycle trade and other firms which, although not actually in the bicycle trade, directly or indirectly offer the relevant goods for sale in whatever manner ; they may, however, supply their own shops if they are also recognized as retailers. They may obtain supplies only from recognized wholesalers or suppliers to the wholesale trade (Clause 57 (1) and (2)).

(f) Recognized buying associations may supply only recognized wholesalers, and then only such recognized wholesalers as are members of the relevant buying association (Clause 59 ; see paragraph 6 (b)).

(g) Where recognized suppliers to the wholesale trade sell through agents, they may work only through recognized agents and must have these agents entered on the CBR lists (Clause 54).

(h) Although children's bicycles and perambulators are generally not covered by the Algemeen Reglement, it is forbidden to supply firms in business in the Dutch bicycle industry but not recognized by the CBR. Nor may recognized firms purchase these goods from non-recognized firms which are in business in the bicycle trade (Clause 24).

7. Certain clauses of the Algemeen Reglement contain provisions to ensure the operation of exclusive dealing arrangements in certain categories. These include the obligation to obtain and maintain lists of recognized dealers (Clauses 38, 43, 52, 56 (3), 57 (4) and 61) and the obligation to mark goods with serial numbers and keep a register of these numbers (Clauses 39, 41, 55 and 60).

8. Wholesalers and suppliers to the wholesale trade are also obliged to make provision for the recall of goods already supplied to firms which applied for recognition when setting up in business but were subsequently refused recognition (Clauses 48 and 53).

9. All recognized firms are expressly bound to honour their existing exclusive dealing agreements (Clause 21) :

> 'Where one or more recognized members of Category II (wholesalers), Category III (suppliers to the wholesale trade) or Category IV (manufacturers' agents) have the exclusive right to deal in specified goods, then, without prejudice to the other provisions of this Regulation, supplies of those specified goods shall be obtained only from those members or their representatives.'

10. Recognized members are obliged to participate in collective resale price maintenance affecting both prices and terms of sale in the bicycle trade.

Clause 26 reads : 'Where retail prices are set by a recognized supplier, recognized retailers shall not sell the goods nor offer them for sale below those prices.

Where the wholesaler imposes terms and conditions of sale, recognized retailers shall not sell the goods nor offer them for sale on terms which are inconsistent with those imposed.'

Clause 47 reads : 'Where dealer prices or terms of resale are set by the supplier, recognized wholesalers shall not sell the goods nor offer them for sale at prices or on terms which are inconsistent with them.

However, aggregated rebates on goods supplied over a period of not less than three months shall be permissible, even in respect of goods to which the foregoing paragraph applies, unless an earlier supplier of the relevant goods expressly forbids this.'

The Algemeen Reglement further provides :

> 'Where retailers determine the retail price for goods whose retail price is not already set by the appropriate recognized supplier, profit margins of no less than the following shall be applied :

(a) for bicycles : 25 % of the purchase price ;

(b) for all other goods : 30·33 % of the purchase price.

The purchase price is taken to mean the net invoiced price before deduction of any cash discount.

The CBR may authorize derogations from the foregoing paragraph in respect of retailers who prove to the satisfaction of the CBR that they can still make a profit even if they apply a lower profit margin.' (Clause 27).

11. Recognized firms are prohibited from supplying or offering for sale bicycles whose retail price includes equipment other than that expressly provided for in the Algemeen Reglement (Clause 22). Maximum terms for guarantees are also set for recognized firms (Clause 23).

12. Recognized retailers are forbidden to offer or sell goods subject to rebates or the like, with four exceptions : sales to public enterprises or authorities, cash sales (2 %), sales between 15 November and 15 January (5 %) and bulk discounts on annual sales of more than Fl 2 500 (5 %) (Clause 28). They may only take part in promotions, raffles and the like or clearance sales when the rebates amount to no more than 3 % (Clause 29). In the event of a sales promotion campaign relating to goods which do not directly belong to the bicycle industry, the retailer must clearly state that the goods covered by the Algemeen Reglement are not affected (Clause 30). Advertising relating to price reductions must clearly specify the goods concerned (Clause 31), and old or damaged bicycles may be sold at reduced prices only if approval is first given by the CBR (Clause 32). Second-hand bicycles may be taken in part-exchange only at their real value (Clause 33). Auction sales and street-trading are prohibited (Clause 34).

13. Failure to comply with the association's rules or decisions may be penalized by measures such as a warning, fine, expulsion or publication of a notice specifying the firm's name (Clause 11). Compliance with the Algemeen Reglement is verified by the CBR through inspectors drawn from outside the bicycle industry (Clause 12). Recognized firms are vicariously liable for the acts of their employees (Clause 14).

Recognition may in certain cases be withdrawn, particularly when the requirements for recognition are no longer met (Clause 15). In respect of all dealings and agreements between recognized firms it is tacitly assumed that the Algemeen Reglement applies to them so that, unless the CBR gives special dispensation, any obligation to supply or take delivery automatically lapses when recognition is withdrawn (Clause 16). The CBR is authorized to take various measures which may be necessary to protect the interests or reputation of the bicycle trade (Clause 17 (2)). Amendments and additional rules enter into force with publication in the official organ or with any other appropriate notification (Clause 17 (1) and (3)). Recognized firms must refrain from any action which is declared by the CBR to be incompatible with the interests and reputation of the trade (Clause 18).

14. An appeal against any decision taken by the CBR in relation to the Algemeen Reglement may be made to a special Appeals Board ('Commissie van Hoger Beroep') ; there is no right to take action in the ordinary courts. The rules for the appeals procedure are laid down in the Appeals Regulation (Clause 19 (1)).

15. The Commission has warned the CBR on many occasions that there was no prospect of an exemption for the Algemeen Reglement in its notified form. In 1971 the Commission requested the CBR to adapt the Algemeen Reglement to the requirements of Article 85 of the EEC Treaty and in particular to abandon the obligations of exclusivity. Following a complaint made on 20 January 1971 by Henk Kokke Sport, Sint-Willebrord, the Commission asked the CBR not to apply the Algemeen Reglement to goods imported from other Member States (letter from the Commission to the CBR dated 3 March 1971, discussion of 1 April 1971, and letter from the Commission dated 27 April 1971). In reply, the CBR indicated that it would not collect fines imposed in respect of goods imported from other Member States.

As a result of an application made on 23 April 1974 by an undertaking recognized by the CBR, the Commission obtained more evidence that imports into the Netherlands from other Member States were being impeded by the Algemeen Reglement (letter from the Commission to the CBR dated 24 July 1974).

Again in 1974, the CBR fined Donck of Rotterdam under Clause 28 of the Algemeen Reglement and then summoned Donck before the Rotterdam Cantonal Court (Kantongerecht) for failure to pay. By order given on 29 January 1976 the court stayed the proceedings on CBR's claim for payment of the fine pending a Commission Decision on the Algemeen Reglement as notified.

At a meeting held on 13 November 1975 the Commission again attempted to move the CBR to amend the Algemeen Reglement, referring to Commission Decisions in similar cases [1] (letters from the Commission to the CBR dated 7 July, 27 October and 9 December 1975). Several alternative amendments were discussed but the opposing views could not be reconciled.

16. Following notification of the statement of objections by the Commission on 17 June 1976, CBR made amendments to the Algemeen Reglement to take effect on 16 July 1976. The amended text was communicated to the Commission on 13 July 1976. The most important amendments were the provision of only two categories of recognized dealer — retailers and suppliers — and the application of the regulation exclusively to goods in respect of which a trademark has been lodged with the CBR by the supplier. In other respects the Algemeen Reglement was largely unchanged. Recognition in either category remained subject to certain minimum requirements, and business was to be carried out at an establishment in the Netherlands (Clause 44). The prohibitions in Clause 9 and the provisions concerning exclusive dealing arrangements between the two categories (Clauses 20, 22, 23 and 37) correspond to the earlier provisions, with the general exception that only registered branded goods are concerned. Lists of recognized persons were to be maintained (Clauses 35 and 39). The goods no longer require inscribed serial numbers, and inspection was to be abandoned. The clause requiring compliance with existing exclusive dealing agreements was deleted. However, the obligation to take back goods supplied to unsuccessful applicants for recognition remained (Clause 43).

All the clauses concerning the operation of collective resale price maintenance and the calculation of minimum profit margins for retailers remained in force for registered branded goods (Clauses 24 and 25), but the clause relating to dealer prices was deleted. General rules have been established to fix maximum terms of guarantees for bicycles and related goods (Clause 21). The more extensive clauses which had earlier governed this matter were deleted.

Apart from a few insignificant amendments, all the clauses concerning discounts, clearance sales, price reductions, old and damaged bicycles, part exchange, auction sales and street-trading remained in force in respect of registered branded goods (Clauses 26 to 31). There was added a clause (Clause 36) to the effect that when a bicycle not covered by the Algemeen Reglement is offered for sale no mention of its origin may be made. The provisions governing the operation of the CBR were unchanged (Clauses 11 to 18). The provision giving the right to appeal to the Appeals Board still excluded the jurisdiction of the courts (Clause 19 (1)).

At the hearing of 27 July 1976 the CBR expressly requested exemption under Article 85 (3) for the new, amended, Algemeen Reglement.

17. The Dutch bicycle market from 1971 to 1976 was as follows :

Bicycle sales

	Total bicycles	Dutch bicycles	%	Imports
1971	926 000	608 000	65·6	318 200
1972	1 070 300	661 300	62·1	409 000
1973	1 069 400	685 300	64	384 100
1974	1 272 800	834 200	65·4	439 600
1975	1 066 200	711 700	66·8	354 500
1976	1 241 600	810 400	65·4	431 200

This means that some 35 % of all bicycles sold in the Netherlands are imported. Most of these imports come from EEC Member States. Furthermore the remaining 65 % are manufactured from parts the bulk of which — an average 50 to 70 % by value — are also imported from other Member States. The position is similar on the spare parts market. The number of registered bicycle retailers has fallen considerably over the years. In 1976 about 5 200 retailers recognized by the CBR remained. It may be assumed that some 80 % of goods covered by the old Algemeen Reglement were sold through the distribution network set up by the CBR. Virtually the whole market for high-quality bicycles was covered by the CBR system.

All the most important manufacturers and importers were included in the market organization set up under the Algemeen Reglement. Most of the goods sold outside the CBR network in the Netherlands were sold through supermarkets, department stores and the like, consisting almost exclusively of bicycles which do not bear a well-known brand name.

[1] Commission Decisions of :
- 3 July 1973, OJ No L 217, 6. 8. 1973 (Gas water-heaters and bath-heaters),
- 15 May 1974, OJ No L 160, 17. 6. 1974 (Agreements between manufacturers of glass containers),
- 3 June 1975, OJ No L 159, 21. 6. 1975 (Stoves and heaters).

II

The Algemeen Reglement in the version applying until 1976 is incompatible with the common market and caught by the prohibition in Article 85 (1) of the EEC Treaty.

18. The CBR and its member organizations are associations of undertakings, and the recognized persons and companies who have agreed to be bound by the Algemeen Reglement are undertakings for the purpose of Article 85.

The Algemeen Reglement, which contains the relevant provisions concerning competition between recognized firms, constitutes a decision by an association of undertakings for the purpose of Article 85. The same applies to subsequent decisions taken under the Algemeen Reglement by the CBR, since all the recognized firms agreed in advance to be bound by them (see paragraph 3). The fact that firms not belonging to any of the CBR's member associations become subject to the Algemeen Reglement upon application for and the receipt of recognition (Clause 7) means that there is an agreement between these firms and the CBR on the one side and the firms which do belong to member associations on the other. Recognition accordingly gives rise to agreements that are within Article 85 (1) of the Treaty.

19. The object and effect of Clause 63 of the Algemeen Reglement, which requires retailers, wholesalers and assemblers (see paragraph 4) to do business in premises in the Netherlands if they are to be recognized, is to restrict and distort competition in the common market. The need for premises in the Netherlands entails extra costs for firms which are not established in the Netherlands but wish to sell bicycles and related goods on the Dutch market and wish for that purpose to use the CBR distribution network, which extends to some 80 % of the market. The result is a considerable competitive disadvantage for all firms which are not establsihed in the Netherlands.

20. The other requirements for recognition imposed by the Algemeen Reglement (see paragraph 4) not only reiterate legal requirements as to the establishment and activities of bicycle firms, but add further requirements as to stocks, premises and presentation. The result is that certain firms which do not meet or do not wish to meet these extra requirements are faced with substantially reduced sources and outlets so that their ability to compete is also reduced. Since a sizeable percentage of the Netherlands market is accounted for by recognized firms, even firms that wish to use non-recognized firms as sales intermediaries are indirectly affected.

21. The collective reciprocal exclusive arrangements (see paragraphs 5 and 6) have as their object and effect the following restrictions and distortions of competition.

Recognized firms are prevented from trading in bicycles and related goods with non-recognized firms. All non-recognized firms (including all firms established in other Member States) are prevented from selling products covered by the Algemeen Reglement to recognized firms, so that they are denied access to the majority of traders in the Netherlands market. Non-recognized Dutch firms are prevented from purchasing bicycles or related goods from recognized firms for export to other member countries (see paragraph 6). Market outlets and sources for non-recognized manufacturers, importers, exporters and wholesalers are substantially restricted in the Netherlands and elsewhere in the EEC.

The various categories of firms defined in the Algemeen Reglement are required as a rule to confine their business to that level of distribution for which they are recognized. Trading between persons at the same level of distribution is possible only in exceptional circumstances. What are known as direct sales, in many cases the more rational form of distribution, where one of the levels of distribution specified in the Algemeen Reglement is bypassed, are forbidden. Wholesalers and suppliers to the wholesale trade , for instance, cannot sell to the public, and suppliers to the wholesale trade and manufacturers' agents cannot supply retailers. The same applies to direct purchases. The arrangements are carried so far, in fact, that certain retail dealers (bicycle sellers and sellers of related goods) are forbidden to carry out repairs (see paragraph 5 (3)).

This rigid division of distribution applies similarly to goods imported from other Member States. Recognized foreign manufacturers are required to comply with the obligations imposed by the Algemeen Reglement, either themselves or by means of a written guarantee entered into by their importers as recognized manufacturers' agents or 'fabrieksagenten' (see paragraph 3).

22. A number of clauses in the Algemeen Reglement, which are designed to supplement or reinforce the collective reciprocal exclusive arrangements, also have the object and effect of restricting or distorting competition within the common market.

These include clauses requiring recognized firms to keep lists of those recognized in other categories, the obligation to inscribe serial numbers on bicycles and the inspection of these numbers (see paragraph 7). The result is that compliance with the prohibition on sales to non-recognized firms can be verified so comprehensively as to make such sales extremely difficult.

23. The obligation for wholesalers and suppliers to the wholesale trade to take back goods supplied to firms setting up in business and applying unsuccessfully for recognition (see paragraph 8) also serves to supplement and reinforce the exclusive arrangements, so that it too has the object and effect of restricting competition.

24. The collective protection for exclusive dealing agreements, under which recognized firms acquire the exclusive right to sell or represent certain goods (see paragraph 9), is a restriction of competition within the meaning of Article 85 (1). The exclusive buying and selling rights acquired by contracting parties to such exclusive dealing agreements become so widespread as a result of the Algemeen Reglement that firms recognized by the CBR can no longer acquire the relevant goods from other dealers within the common market who have been supplied by the manufacturer. The exclusive dealing agreements taken with the Algemeen Reglement accordingly impose greater restrictions than are permissible for an individual exemption under Article 85 (3) or under Regulation No 67/67/EEC, and in particular Article 3 (1) (b) thereof. The present case has no special features which would justify the granting of an individual exemption, exceeding the scope of Regulation No 67/67/EEC, to the Algemeen Reglement.

25. The clauses governing resale price maintenance and the uniform calculation of profit margins on goods not subject to resale price maintenance sold by retailers (see paragraph 10) are similarly restrictions of competition within Article 85 (1). They stifle any attempts at price competition and thereby restrict the possibility for dealers to raise their market shares through independent competitive pressures and from passing on to the consumer any cost savings resulting from rationalization. Furthermore, imports and reimports are subject to the same arrangements for resale price maintenance.

26. The prohibition on improved equipment of bicycles and the restriction of guarantee terms (see paragraph 11) hamper the business freedom of recognized firms and exclude individual initiatives aimed at acquiring new customers and strengthening competition. These provisions are also restrictions of competition within the meaning of Article 85.

27. The obligations imposed on retailers only to give discounts in certain cases up to a level fixed by the CBR (cash, seasonal and quantity discounts) and to obtain the consent of the CBR before reducing prices for obsolete and damaged bicycles (see paragraph 12) also have the object of restricting competition within the meaning of Article 85 (1) of the EEC Treaty. In terms of the competitive situation, the protection which they afford is neither necessary nor justified. They neither represent existing legislation nor are based on the established case law relating to unfair competition. Above all they do not define the circumstances which would make such activities unfair, but are rather concerned with prices and the elements thereof. The CBR regulates the granting of discounts even in respect of goods originating in other Member States to the detriment of the consumer. The same may be said of the provisions on discounts given in promotions, and clearance sales, on sales of goods not recognized by the Algemeen Reglement and the prohibition on auctions and street-trading (see paragraph 12).

28. The appeals regulation admittedly gives recognized firms the opportunity to appeal against CBR decisions but, with the exception of possible judicial intervention at the stage of enforcement, deprives them of their access to the ordinary courts (see paragraph 14). It cannot be excluded that the CBR Appeals Board might interpret the restrictive provisions of the Algemeen Reglement in a manner giving them effect in excess of their true meaning and thereby hinder, delay or otherwise impede the legal remedies sought by the parties. In particular the imposition of fines and withdrawal of recognition might put the person concerned at a considerable competitive disadvantage (see paragraphs 13 and 15). The provision in the Algemeen Reglement obliging members

to observe the requirements of the law, including those on unfair competition (see paragraphs 3, 4 and 12), entails the risk that the rulings of the CBR Appeals Board may, in the interests of members hinder desirable competitive practices, maintain restrictive practices in the common market and circumvent the application of the rules of competition of the EEC Treaty (see paragraph 27). This ouster of jurisdiction of the ordinary courts relates to matters involving the application and scope of the competition rules of the Treaty and therefore falls within Article 85 (1) and prevents any competitive action which is permissible under these rules. The restrictive effects arising and likely to arise from the Algemeen Reglement are aggravated by the agreement to create an arbitral tribunal.

29. The provisions of the Algemeen Reglement, taken as a whole, including the provisions on the operation of the CBR (see paragraphs 3 to 14), together form a closed and coherent system which restricts competition appreciably. Sales of bicycles and related products are strictly confined to established channels, leaving only limited scope for competition between different brands at the various levels of distribution. The CBR is recognized in the trade as the trade association for the bicycle sector in the Netherlands. The trade interests involved, both sellers and buyers, are thereby given the impression that the CBR and its regulations are lawful in every respect and that its rules and standards are compulsory. It has furthermore obtained an exemption from the Netherlands Secretary of State for Economic Affairs from the general prohibition on collective resale price maintenance.

Retailers of the goods in question may only withstand the effects of competition by stocking a wide selection of goods. Regular supplies of such stocks, however, may only be obtained if such retailers are recognized by the CBR. It follows that the CBR and its rules impose an economic pressure on persons to join one of the recognized categories. Economic disadvantages are hard to avoid without such recognition, especially as the CBR covers a large proportion of the Dutch bicycle and spare part market. For this reason undertakings subject to the Algemeen Reglement are obliged to accept all the restrictions of competition arising therefrom. This economic pressure ensures a collective market behaviour which aggravates appreciably the restrictions of competition arising from the Algemeen Reglement and makes competitive conditions impossible or at least very difficult for outsiders to withstand. Failing recognition by the CBR all equality of opportunity in competition is lost.

30. All thse restrictions of competition within the common market are likely to have an appreciable effect on trade between Member States. In the Netherlands, some 80 % of the bicycle trade during the period to which this Decision relates was handled through the distribution channels set up by the CBR, and a number of important importers of bicycles and related goods were involved in the CBR system. Imports accounted for roughly 35 % of aggregate bicycle sales, these goods being mainly from other Member States of the Community. The bulk of the Dutch market for bicycle components and spare parts was also accounted for by imports from other Member States. This alone warrants a finding that trade between Member States is affected. In any event, the CBR system covered almost the entire Dutch market for high-quality bicycles. By the parties' own admission, there was no doubt that the importance of the CBR to the trade in bicycles and related products in the Netherlands was such that it could hardly be denied that the restrictive effects of the Algemeen Reglement extended to the purchase and sale of goods from other Member States. Foreign firms wishing to build up a given market share by an agressive competitive strategy first had to overcome the barriers raised by the agreement. Importers wishing to sell their goods on a market free of anti-competitive practices had access to no more than 20 % of all distribution channels in the Netherlands. A large number of dealers and all specialist retailers were unable to engage directly in the import trade without observing the Algemeen Reglement. Such undertakings lost all freedom of action in the market and could neither develop more rational distribution systems nor increase the sale of imports. Any opportunity for dealers in the Netherlands to import goods from other Member States and for foreign firms to export to the Netherlands was thus sharply reduced. The Algemeen Reglement established a system extending to the whole territory of a Member State and tended to perpetuate the isolation of a national market.

Finally it should not be overlooked that the Algemeen Reglement also impeded the export by its members of bicycles and related equipment to other Member States. Stockholding wholesalers may well have been interested in such exports, and may have wished to work through specialist exporting firms. The prohibition on supplies to unrecognized Netherlands exporters thus seriously hampered exports to other Member States (see paragraphs 6 and 21).

III

The application made by CBR in its notification for a declaration that Article 85 (1) of the EEC Treaty is inapplicable to the Algemeen Reglement must be rejected, since the requirements of Article 85 (3) are not satisfied.

31. The requirements for recognition, the collective exclusive arrangements, the compulsory resale price maintenance and the other restrictions on competition affecting recognized firms do not contribute to improving the distribution of bicycles and related goods. There is no evidence that they help to rationalize distribution. Furthermore, they prevent consumers from deriving a fair share of the benefit obtained by individual recognized firms.

32. Apart from certain legal requirements as to establishment and the exercise of business in the trade in bicycles and related goods (1), the Algemeen Reglement lays down specific minimum requirements for recognition of firms by the CBR and confines recognized firms to the exercise of a specific distribution function (see paragraphs 3, 4 and 18 to 21). Non-recognized firms which cannot or will not meet these requirements suffer from substantial restrictions on their business activities by reason of the high degree of organization of the CBR. The most rational marketing techniques cannot therefore flourish on the Netherlands market. Collective arrangements of this kind which raise barriers to entry cannot be exempted from the prohibition of restrictive practices under Article 85 (3).

33. The Algemeen Reglement also establishes strict segregation of functions between clearly defined types of business. The result is a form of market protection where non-recognized firms cannot do business through recognized firms and recognized firms cannot do business through non-recognized firms. Parallel imports through recognized firms are excluded and imports through non-recognized firms are hampered (see paragraphs 5 to 8 and 21 to 23). This arrangement likewise cannot be regarded as rationalizing distribution or creating a situation that is more beneficial to the consumer than competition at and between the various levels of distribution.

34. The effect of the clauses relating to compliance with exclusive dealing rights, resale price maintenance, the calculation of minimum profit margins and the prohibition on overt or covert discounts (see paragraphs 9 to 12 and 24 to 27) is severely to restrict price competition. Any benefits resulting from rationalization achieved by recognized firms cannot be passed on in the form of reduced prices, either to dealers at subsequent distribution stages or to consumers. Furthermore, there are no objective reasons for granting exemption to a collective resale price maintenance system even when confined to the territory of one Member State.

The adverse effects on the common market of price maintenance and price fixing and of the prohibition of rebates are clear when it is considered that it is impossible to offer reduced prices not only for bicycles and related goods manufactured in the Netherlands but also for those imported from other Member States. A further aggravating circumstance is that penalties may be imposed to enforce compliance with a prohibition on sales below specified prices by wholesalers and retailers.

35. The arrangements instituted by the Algemeen Reglement are not, as the CBR claims, indispensable for ensuring specialist sales and service. An individual exclusive dealing agreement between importer or manufacturer and dealer, agreed independently of the CBR, can contribute to ensuring this service. The Algemeen Reglement restricts competition to too great an extent, without there being any evidence that it promotes sales and service by specialists.

The fact that the provisions of the Algemeen Reglement proscribe certain forms of conduct which can be described as unfair competition (see paragraphs 27 to 28) does not justify such far-reaching regulation of the market.

36. The collective arrangements set up by the CBR system eliminate competition in respect of a substantial part of the goods supplied on the Dutch market, since by far the majority of all the dealers, manufacturers, importers and agents in the bicycle industry are members of the CBR.

Accordingly, the application for a declaration of exemption for the Algemeen Reglement under Article 85 (3) of the EEC Treaty must be rejected.

(1) For the trade in bicycles and related goods, see Nederlandse Vestigingswet Detailhandel 1971 (Staatsblad No 569, pp. 1349 *et seq.*, 1971 and Stb. No 374, p. 4, 1972) and Uitvoeringsbesluit Vestigingswet detailhandel (Stb. No 152, p. 1, 1972).
For bicycle repairers, see Nederlandse Vestigingswet Bedrijven 1954 (Stb. No 66, pp. 197 *et seq.*, 1964) and Vestigingsbesluit Motorvoertuigen- en Fietsbedrijven 1967) Stb. No 522, pp. 1475 *et seq.*, 1967).

37. Any exemption of the amended Algemeen Reglement (as notified on 13 July and taking effect on 16 July 1976) must await a new decision. It is not yet known to what extent the amended Algemeen Reglement is being applied by manufacturers, importers, wholesalers and retailers and to what products it relates. The practical implementation of the rules and their effect of competition and trade between Member States require further examination.

38. The Commission sees no cause to apply Article 7 (1) of Council Regulation No 17 for the period from 13 March 1962, the date of the entry into force of Regulation No 17/62, to 16 July 1976, the date on which the amended Algemeen Reglement took effect. This provision is for the benefit only of those undertakings prepared, either on their own initiative or at the request of the Commission, to amend an agreement so that it is no longer caught by Article 85 (1) or satisfies the tests of Article 85 (3). The CBR amended the Algemeen Reglement only after communication of the statement of objections, and the amended Algemeen Reglement was only notified to the Commission shortly before the hearing on 27 July 1976 (see paragraph 16), although the Commission had warned the CBR on many occasions since 1971 that there was no prospect of any exemption for the Algemeen Reglement in its original form (see paragraph 15).

Even if the Commission were to come to the conclusion, on the basis of investigations still to be completed, that the amended Algemeen Reglement was not caught by Article 85 (1), or that it satisfied the tests of Article 85 (3), there can be no question of applying Article 7 (1) for the period prior to 13 July 1976, particularly in view of the special circumstances of this case and the lateness of the amendment. Even if the Commission had found cause to grant the benefit of Article 7 this would not have extended to the imposition of fines by the CBR for breaches of the Algemeen Reglement during the period in question. Finally, a decision under Article 7 (1) cannot be relied upon as against undertakings which have not expressly consented to the notification (Article 7 (1) of Regulation No 17/62). Donck did not expressly consent to the notification,

HAS ADOPTED THIS DECISION :

Article 1

The following provisions of the Algemeen Reglement of the Centraal Bureau voor de Rijwielhandel in the version operative from 13 March 1962 (the date of entry into force of Council Regulation No 17/62) until 16 July 1976 constitute infringements of Article 85 (1) of the Treaty establishing the European Economic Community :

— requirements for recognition (Clauses 63 and 58),

— exclusive dealing and the allocation of functions between the various categories and the obligation to respect such allocation (Clauses 9, 20, 24, 25, 40, 49, 50, 54, 56, 57 and 59 ; Clauses 38, 39, 41, 43, 48, 52, 53, 55, 60 and 61),

— compliance with existing exclusive dealing agreements (Clause 21),

— resale price maintenance (Clauses 26, 27 and 47),

— the regulation of discounts and sales techniques (Clauses 22, 23 and 28 to 34),

— the ouster of jurisdiction of the ordinary courts Clause 1 (1) in so far as the application and scope of the abovementioned provisions of the Algemeen Reglement are concerned,

— all measures taken by the CBR to investigate and enforce compliance with the abovementioned provisions (Clauses 5, 6, 11, 12, 13, 16, 17 and 18)

Article 2

The application for exemption under Article 85 (3) of the EEC Treaty made by the Centraal Bureau voor de Rijwielhandel for the version of the Algemeen Reglement applying until 16 July 1976 is rejected.

Article 3

This Decision is addressed to the Centraal Bureau voor de Rijwielhandel, Johannes Vermeerplein 3 Amsterdam, Netherlands.

Done at Brussels, 2 December 1977.

For the Commission

Raymond VOUEL

Member of the Commission