

EDITORIAL COMMENTS

The recommendation of the Commission of the European Communities that negotiations should begin at once with all four applicants for membership is to be generally welcomed. This report, in the nature of an interim opinion under Article 237, considers the broad economic and political effects that might be caused by the membership of Britain, Ireland, Denmark and Norway. The great addition to the size of the Community, adding 40 per cent to its gross national product would undoubtedly raise many new problems, but it is satisfactory that the Commission is able to conclude that this increase in membership would not modify the fundamental objectives, the character and the methods of the European Communities.

Much of the value of this report is to be found in the realism with which it has analysed the difficulties inherent in the British economy and the balance of payments even though this may not have met with general approval in Britain. These matters are of course of vital concern to the existing members, and it is necessary that they should be brought into the dialogue between the Six and Britain. It is, however, encouraging that the Commission foresees that the British economy could derive definite advantages from membership as the result of an economic integration within an entity whose rate of growth over a long period has been more rapid than that of any other part of the world, except Japan. The Commission also acknowledges the assistance that would derive to the Community from the British achievements in technology and scientific research.

Of particular interest is the opinion of the Commission on the participation in the institutions by new members. It suggests that the European parliament could be increased from the present 142 to 206 members, thus permitting Britain 36 seats, Denmark and Norway 10 seats each, and Ireland 8. Britain would thus have the same representation as the three larger members, while the smaller new members would be in balance with the existing 14 seats each for Belgium and the Netherlands, and 6 for Luxembourg. The Court of Justice could expand from seven to eleven judges, with the addition of a new Advocate-General bringing their total up to three. The Commission should remain at its present level of 14 and should consist of two members each from Germany, France, Italy and Britain with one member from each of the six other smaller members.

The most significant institutional problem lies in the voting powers of the Council representatives, and the Commission in its report has made no detailed proposals of what they should be. It has, however, expressed the view that if the same voting rights were extended to the new members as the existing members enjoy at present it would disproportionately increase the voting power of the smaller countries. It is worth recalling that in 1962 a careful study of future voting rights was made by an influential committee under the auspices of the Europa Instituut, Leyden, which came to the

conclusion that the larger countries France, Germany, Italy and Britain should each have eight votes, Belgium and the Netherlands four votes each, Denmark, Ireland and Norway three votes each and Luxembourg two votes. The total votes would be 51 and the qualified majority 34, thus retaining the present two-thirds majority of votes.

With the start of the judicial year, changes have occurred in the composition and Presidency of the Court of Justice of the European Communities in Luxembourg. Two judges who have served upon the Court since its beginning in 1953, when it was still the Coal and Steel Community Court, have earned a well deserved retirement. With the farewell of Judges Delvaux and Hammes (who has been President for the last three years) the last of the first generation of European judges have departed. They made a substantial contribution to the case law of the Court, which in quantity alone consists already of more than 8,000 pages in print. But, more important, they participated in the development of the Court from a specialist's forum to one of the central integrating forces of Europe whose decisions are shaping the Communities.

We welcome the appointments of the two new judges. They both combine a vast practical experience with a deep knowledge of Community law. Professor Mertens de Wilmars of Belgium has pleaded on several occasions before the Court as an imaginative advocate. Professor Pescatore from Luxembourg has already achieved a reputation as a diplomat and a scholar. The presence of these qualities on the Court will further strengthen this body as an important factor in European integration.

Judge Lecourt, the new President, has rightly stressed in a number of instances the need for action towards the harmonisation of European legislation. In his new function he will be able to stimulate and give direction to this process from the Court's point of view. We wish him much success in the fulfilment of his burdensome task.

The value added tax, which began as the idea of an American in 1916, is sweeping the continent of Europe. Although regarded as essential for the Common Market, it is in fact in Denmark (outside France which has had such a system since 1954) that the reform has first been made. The Danish tax came into effect on July 1, 1967. It will be followed in Germany on January 1, 1968 and the Netherlands one year later. At the same time the French have made amendments to their own system which also come into force on January 1, 1968. If this tax has been unusually well received for a tax in some countries, it is because the existing turnover taxes are exceedingly cumbersome and arbitrary in their operation.

It is one of the fundamental tenets of the Community that the internal frontiers should be abolished. Hitherto the existence of the Common Outer Tariff has been regarded as the symbol of the Community. This, however, would only be appropriate if the Community is to remain closed to the outside

world. It is a far more genuine test of the Common Market that all customs officers should be removed from the interior of the Community territory, and all Europeans should be satisfied with nothing less.

These barriers consist not only of customs barriers which will all be completely removed by July 1968. There are also legal barriers imposed by the regulations for foodstuffs, pharmaceuticals, patents, trade marks and the like, some of which have already been eliminated. There still remain, however, the formidable tax barriers, which also require a check at the frontier. In the main, goods crossing the frontier are entitled to drawback in respect of the indirect taxes imposed in the country of manufacture, under the provisions of Article III of the GATT. They are, however, re-assessed by the importing country which has the right to impose a compensatory tax on imports to balance the internal taxation upon local production. There is also a substantial difference in many of the excise duties imposed in the countries of the Community which also requires the maintaining of a tax frontier.

These frontiers must all be removed, whatever their nature, even though it is at times tempting for individual member States to argue that their particular system is the best, and that they would prefer to maintain it. It is, however, irrelevant in the building of a Common Market that a particular barrier has good or bad effects. The only necessity is to suppress it; and the only practical policy is one which aims at the systematic abolition of all internal barriers.

It is therefore not surprising that the Commission took early steps to examine the system of indirect taxation, which requires adjustments at the frontiers, and the expert Neumark committee which it appointed came as early as 1962 to the conclusion that there should be a common tax based on the value added system.

It has long been common ground that some form of indirect taxation is essential in every member State. Many of the member States already have a high level of indirect tax. For France it is 57 per cent, and for Italy 60 per cent of their total tax receipts. The lowest (except for Luxembourg which is a special case) is the Netherlands, with a contribution to the treasury from indirect taxation which amounts only to 32 per cent of the whole.

On the basis that some form of indirect taxation is inevitable, the only question remaining was what kind of tax it was going to be. The value added tax was chosen by the Neumark committee and subsequently approved by the Commission as a tax which cast its net as widely as possible over consumption in general, and if it operated without discrimination on all production and services it could be said to be a tax which was "neutral" in its operation and therefore did not distort the existing pattern of industrial competition. It could also be readily deducted from exports at the frontier, and imposed on imports from other States, so that it did not distort the competitive position between the member States.

The ultimate burden is passed on to the consumer, and it has been argued,

especially by the Dutch, and similar views were expressed by Professor K.V. Antal in the early days of this Review,¹ that the value added tax was a clumsy one in operation, and that the same result could be achieved by a general sales tax, either at the wholesale or retail stage, which omitted the earlier stages. The same criticism is made in the Richardson report in the United Kingdom. This may well be true in an ideal society, but in the world as it is there must be a system which provides for effective collection, and it is this feature of the proposed new tax that is attractive. Starting the collection of the tax at the early stages of production makes it very much more difficult for the tax to be evaded.

The advice of the Neumark committee was endorsed by the Commission, who put forward a draft directive as early as 1962 proposing that the member States should adopt some form of sales tax, to be converted at a later stage to a common form of value added tax. The European parliament, however, recommended that the first step should be to move directly to the common value added tax, thus expediting the transition to a common tax system. This suggestion was adopted by the Commission. The Council, however, failed to agree to the directives, largely on account of the reluctance of the Dutch to submit to a tax which they felt (quite rightly) was not as good as it might have been, and was not necessary for the tax morality existing in the Netherlands. The decision was, however, forced upon them by the Germans, who decided after much consideration to introduce independently a tax based on the common value added system, which they proposed should start on January 1, 1968. The basic rate was to be ten per cent, rising to eleven per cent on July 1, six months later. The result was that the Dutch, who are the major trading partners within the Community with Germany, were to be faced with a rise in the price of their goods exported to Germany. Although there was a compensatory tax levied at the frontier to compensate for the internal turnover taxes existing in Germany, this varies somewhere between two and eight per cent, so that the new legislation will result in a substantial rise in the price of many goods from abroad, thus constituting what has been known as the "devaluation" effect of the introduction of the new tax system. Against this the Netherlands could not stand idle, and they accordingly agreed in the Council to the new directives and intend to bring their own tax system into line to offset the damage to Dutch exports in Germany. The Dutch have now published a draft bill whereby it is proposed to introduce the common value added tax system at a basic rate of fourteen per cent to start on January 1, 1969.

Under the terms of Article 99 the Community was obliged to harmonise the legislation of the various member States concerning turnover taxes. The Council has, however, gone further in its two directives of February 9, 1967, than the requirements of Article 99, and has taken steps under Article 100 as well to establish the common system of value added tax. This is regarded

1. "Harmonisation of Turnover-Taxes in the Common Market", 1 C.M.L. Rev. (1963-4), p. 41.

as a step on the road to the elimination of the "tax frontiers", not directly prescribed by the Treaty, yet essential to the fulfilment of the Common Market.

The present directives set up a common system by defining the persons who are to be subject to the tax, the transactions to which it must be applied, and the transactions which may be exempted. They also prescribe the way in which the tax is imposed and the requirement for invoicing and the rendering of a monthly return. The member States are still free, subject to agreement with the Commission, to fix their own rate of general tax, to authorise reduced rates for certain transactions, and to grant exemptions over part of the field. They are furthermore not bound to extend the tax beyond the wholesale stage. The Commission contemplates a final assault on the tax frontiers by a future directive which will fix the rates and the exemptions and extend it to the retail stage. This will have a far-reaching effect on the fiscal sovereignty of the member States and thus is not expected to be reached under present circumstances for a number of years.

The judgment of the Restrictive Practices Court given on July 25, 1967 indicates further progress in the establishment of an antitrust policy for England. The occasion was the reference concerning chocolate and sugar confectionery, when five of the leading sweet and chocolate manufacturers applied to the Court for the approval of resale price maintenance in respect of their products under the Resale Prices Act 1964. After a long hearing lasting 43 days at a cost to the manufacturers which is said to amount to £ 60,000, the Court refused to grant them any exemption from the general prohibition imposed by the Act.

If the gateways imposed against restrictive agreements under the Restrictive Trade Practices Act 1956 have been regarded as narrow, the openings granted under Mr. Heath's Resale Prices Act seem like the eye of a needle. The criteria under which the Court was empowered to decide that a system of minimum price maintenance could be retained are set out under section 5(2) of the Act as follows: that

- “(a) the quality of the goods available for sale, or the variety so available, would be substantially reduced to the detriment of the public as consumers or users of those goods; or
- (b) the numbers of establishments in which the goods are sold by retail would be substantially reduced to the detriment of the public as such consumers or users; or
- (c) the prices at which the goods are sold by retail would in general and in the long run be increased to the detriment of the public as such consumers or users; or
- (d) the goods would be sold by retail under conditions likely to cause danger to health in consequence of their misuse by the public as such consumers or users; or

- (e) any necessary services actually provided in connection with or after the sale of goods by retail would cease to be so provided or would be substantially reduced to the detriment of the public as such consumers or users."

This Act adopted the pattern laid down in the Restrictive Trade Practices Act which required that any suppliers claiming exemption from the general prohibition on resale price maintenance should register their goods with the Registrar of Restrictive Trading Agreements, and these agreements would then be brought before the Restrictive Practices Court to determine whether the conditions set out in section 5(2) above were satisfied.

As soon as the Act was passed a number of manufacturers abandoned resale price maintenance in the light of the stringent requirements of the Act. Others registered their products with the Registrar in the hope that some ray of hope might be given by the first decisions of the Court, and that in any event they would be able to continue price maintenance until their case was set down for hearing by the Court. It was, however, generally recognised that the only suppliers who had any real chance of succeeding were those in respect of sweets, chocolates, cigarettes and tobacco. It was always said that the effect of the abolition of price maintenance would be to drive the small shopkeeper and kiosk owner out of business, and that if any goods justified price maintenance it would be sweets and tobacco.

In the present case the confectionery manufacturers relied on clauses (a), (b), (c), and (e). They contended that if price maintenance was not preserved there would be a shift in custom from the small shops to the larger shops and supermarkets. The supermarkets particularly would make large cuts in prices so as to attract customers and could well afford to do so for a few weeks, whereas the small shopkeeper could not. They contended that there would be a loss of variety, as the large shops were only interested in stocking a few profitable lines. The consequence would be that in order to stay in business the small shops would have to increase their trade margins on smaller turnovers, and that in consequence prices would increase. The Registrar, on the other hand, denied that these would be the consequences, and that though there might be price cutting for a short period this would not last, but that the result would be a general lowering of prices.

The Court examined the figures, which showed that confectionery was sold in nearly 60,000 sweet shops, which accounted for 48 per cent of sales. It did not believe that during the time when supermarkets were making dramatic cuts there would be any substantial closure of shops. Though there might be a general reduction of 10 per cent in sweet shops in the High Street, such a reduction would not inconvenience the public and the Court held that the general fears of the smaller traders were unfounded. The Court accordingly held that the suppliers had not established their case and their maintenance agreements would therefore be made unlawful.

This is the first case under the new Act, and it may well be the last, for there seems little chance that such goods as gramophone records, photo-

graphic equipment, cosmetics or baby goods would be in any better position to prove a case in their favour. The most critical must be the position of the tobacco and cigarette manufacturers, but it is unlikely that their case will be markedly different from the sweet suppliers. This case may therefore result in the end of resale price maintenance in Britain.

While the result of the confectionery case was generally expected, the decision of the British Monopolies Commission that the merger between United Drapery Stores and Montague Burton would be against the public interest was received with surprise and criticism. This recommendation, which has been acted upon by the President of the Board of Trade, was made in relation to the resale selling of men's suits. The joint forces of the two companies would have a total of 1,177 shops out of a total of 4,107 shops dealing in men's suits, while the next largest competitor had only 411 tailoring shops. The fear of the Commission was that the merged companies would use their market power to cause an unjustifiable rise in the price of the cheapest suits, on which the profit margins were low. This forecast was not shared by one of the members of the Commission, who dissented from the general conclusions.

The need for the merger was that Montague Burton themselves recognised that new leadership was necessary if its assets were to be properly used, a view to which the government does not seem to have given as much weight as it should if it is to permit private enterprise to find a cure for its own maladies.