does allow suppliers, in certain cases, to rationalize their operations through the use of "specialization agreements" in which the contracting parties reciprocally undertake to abandon the production or supply of an article or service, so long as the Tribunal concludes that the agreement will result in gains of efficiency that will compensate for any anticompetitive effects.

The Director and the Competition Tribunal represent a much more pervasive governmental influence than has ever been experienced under Canada's prior competition legislation. Nevertheless, the existence of a forum in which business arrangements that are subject to government notification and review can be the subject of negotiation rather than criminal prosecution may have significant advantages for business.

Federal Republic of Germany*

The regulation of the insurance industry is presently a hot issue in the European Economic Community. The question is now before the European Court of Justice; the outcome will be crucial for the further development of the law governing the state supervision over the industry.

I. The Background

In Continental Europe it is a strong tradition that the control of the insurance industry should not be left entirely to the forces of the market. Insurance is regarded as a kind of bet on the future, as an invisible, intangible good. The insurance contract is viewed as basically out of balance with regard to the know-how of the contracting parties: the situation is often much worse than in horse trading; the policyholder frequently is not able to know what he pays for.

Therefore the German law requires an initial authorization by a federal agency for every insurance company. This requirement guarantees a preventive monitoring to ensure that the planned activity is in the interest of policyholders and the general public. It provides for the financial soundness of insurance companies, but it goes beyond that, including in particular the content of policy conditions. In addition, the insurers' conditions have to be harmonized with each other.

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II. The Attack

The attack on this traditional view draws its legal strength from certain provisions of the EEC Treaty concerning the free supply of services. The freedom to provide cross-frontier services is one of the fundamental principles of the Common Market to be effected between the Member States. In point is article 59, which says that "restrictions on freedom to provide services within the Community shall be progressively abolished." Article 60 defines as "services" "activities of a commercial character." This definition includes insurance services.

These articles are designed to eliminate all restrictions on freedom to provide services. They have direct legal effects and confer private rights that the national courts must protect. In the earlier years of the Community's existence little attention was paid to services in general, and insurance in particular. In recent years, however, considerable efforts have been made to conquer lost grounds.[1]

The longstanding, rather academic discussion about this freedom took a more practical turn with the *Schleicher* case.[2] Schleicher was an insurance broker in Bavaria. He sold indemnity insurance for stocks of fur to a German client placed with a number of insurers in London. These insurers did not hold an authorization by the German Federal Insurance Supervising Agency to do business in Germany, nor did they have an establishment in Germany. Schleicher was fined (§ 144a VAG) and lost in court. He appealed to the court of last resort, the Berlin Court of Appeals (Kammergericht).

The Court of Appeals upheld the fine and declared the German law to be compatible with the European rules on free supply of services. The court, therefore, refused to refer the case to the European Court of Justice in order to receive a preliminary ruling on the interpretation of the Treaty. Article 177 of the EEC Treaty makes this action obligatory for courts of last resort if the matter is controversial. The Court of Appeals, however, had no doubts, nor did it see any controversy.

As a result, the Commission of the European Community (the executive body) became involved. It launched an attack and took the Federal Republic of Germany before the European Court of Justice, arguing that Germany was breaking its Treaty obligations to implement the free supply of services. Such a procedure is provided for in article 169 of the EEC Treaty "if the Commission considers that a Member State has failed to fulfill an obligation under this Treaty."

1. Pool, *Moves Towards a Common Market in Insurance*, 21 COMMON MKT. L. REV. 123 (1984).

2. KAMMERGERICHT, RECHT DER INTERNATIONALEN WIRTSCHAFT 856 (1983).

The Commission received support from England and The Netherlands; the Federal Republic of Germany was joined by Belgium, Denmark, France, Ireland, and Italy. Ironically, the adviser for the Commission is a German law professor from Munich.[3]

III. The Day in Court

What are the arguments for and against? They lead us right into the problem of what insurance is.

The Commission draws its spirit largely from the famous *Cassis de Dijon* case,[4] dealing with the free exchange of goods. The facts of this case are as follows: Cassis de Dijon is a well-known French fruit liquor. German law, however, did not allow it to be sold in Germany because Cassis de Dijon contains less than twenty-five percent of alcohol—the minimum percentage for fruit liquor under German law. The Germans argued that this minimum requirement was necessary for reasons of public health and for the protection of the consumer against unfair competition (with low grades of alcohol).

The European Court of Justice did not accept either of these arguments. The Court saw no convincing reason for this restriction. It denied a common interest that could have priority over the principle of free exchange of goods.

The decision of the European Court of Justice stands for the proposition that as a general rule goods that have been produced and brought onto the market in one Member State according to its law must be marketable throughout the whole Community. That reasoning sounds good for the Commission's position. The trouble is, however, that this decision, as indicated, deals with the free movement of goods, not with the free supply of services. The question is, therefore, whether there is a difference between goods and services—not only in fact but also in law.

The defenders of the traditional state supervision over the insurance industry stress the differences. They emphasize the particular character of insurance services as dealing with pure construction of the law. No material substance is exchanged, there is nothing more than the exchange of words to which a particular law lends a binding force with further-reaching consequences. Whereas goods are material objects determined by their physical characteristics, insurance services are entirely determined by rules of law, are mere speech acts.[5] The law—and only the law—

3. See his former positions in Steindorff, *Insurance and the Freedom to Provide Services*, 14 COMMON MKT. L. REV. 133 (1977).

4. EuGH (ECJ) 20. Feb. 1979 -Rewe Zentral AG- 120/78, Slg.1979/699.

5. Grossfeld, *Language and the Law*, 50 J. AIR L. & COM. 793 (1985).

creates the product. This law is the law of the individual Member State. Power of words—of national words—so far!

IV. Technicalities

1. Technically the discussion runs under the headline of "intrinsic limitations" that stand for a rule of reason and a balancing of interests. The idea is that the EEC Treaty forbids only those restrictions that seem unjustifiable in an economic community. What is required is an evaluation of the rule giving rise to the limitation. At stake is the necessity or reasonableness of national rules for social protection. Only "unreasonable" rules should be eliminated.

Under this concept, for instance, the European Court of Justice[6] upheld the national prohibition of advertisements by cable television.[7] In more general terms, a regulation of a Member State is an intrinsic limitation if it is necessary for the protection of the public, and if it cannot be replaced by a less restrictive regulation.[8]

2. The Commission is of the opinion that the German legislation does not meet these standards. In the Commission's eyes Germany provides an excessive supervision, a "maximum of supervision," even in fields where the protection of the policyholder is not essential, e.g., insurance of goods indicative of a high standard of living, and therefore lacking social relevance.

3. Finally, there may be some limits to the power of the European Court of Justice to integrate the Community. The Court's assumption of a power to override national laws is not unchallenged. Whereas the highest German court in administrative matters supports the superiority of the European Court of Justice,[9] the highest German court in tax matters favors a more limited view.[10] This latter court held that the Member States' sovereignty is restricted only by the *language* of the EEC Treaty itself, not by an interpretation by the European Court of Justice going beyond the wording of a Treaty provision.

6. EuGH (ECJ) 18. Marz 1980 -Delbauve- 52/79, Slg.1980/833; *see also* EuGH (ECJ) 17. Dez. 1981 -Webb- 279/80, Slg.1981/3305.

7. *See* Grossfeld & Ebke, *Strukturprinzipien des Rundfunks und privatrechtl. Organisationsformen im EG-Bereich*, in SATELLITENFERNSEHEN UND DEUTSCHES RUNDFUNKSYSTEM S.29 (H. Hubner u.a. (Hrsg.) 1983).

8. See EuGH (ECJ) 10. Feb. 1982 -SA Transporoute et travaux- 76/81, Slg.1982/417; EuGH (ECJ) 20. Feb. 1979 -Rewe Zentral AG- 120/78, Slg.1979/649.

9. BUNDESVERWALTUNGSGERICHT, RECHT DER INTERNATIONALEN WIRTSCHAFT 143 (1985).

10. BUNDESFINANZHOF, ENTSCHEIDUNGEN 143, 383; *see* B. GROSSFELD, ZEISS IN FRANKREICH, PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS S. 303 (1985).